Donald ANDERSON *v.* STATE of Arkansas

CA CR 97-1017 967 S.W.2d 569

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1998

David Lewis Clark, for appellant.

Winston Bryant, Att'y Gen., by: *O. Milton Fine II*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Donald Anderson appeals his conviction for defrauding a secured creditor for which he was fined $5,000 and ordered to pay court costs and

restitution in the amount of $2,800. He asserts two points on appeal. We find merit in appellant's argument and reverse his conviction.

Appellant was convicted of violating Ark. Code Ann. § 5-37-203 (Repl. 1997), which provides:

> (a) A person commits the offense of defrauding secured creditors if he destroys, removes, cancels, encumbers, transfers, or otherwise disposes of property subject to a security interest with the purpose to hinder enforcement of that interest.
>
> (b) Defrauding secured creditors is a Class D felony.

The facts upon which appellant was charged are as follows. On November 15, 1993, appellant and his wife purchased a 1986 Chevrolet truck from J&P Auto Sales in Flippin, Arkansas. The sales price was $5,850, and the retail installment agreement provided for monthly installment payments of $219.35. Their agreement further provided that appellant was granting a security interest to the seller in the truck being purchased. The buyers listed an address at the time in Flippin, Arkansas. J&P financed the transaction by simultaneously assigning its rights to Peoples Bank & Trust of Mountain Home, Arkansas, and guaranteeing payment of the debt.

Appellant and his wife missed monthly installments or made partial payments on the truck off and on after its purchase. Only the first payment due in December 1994 was timely and paid in full. The payment history that followed is outlined: January — $0; February — $0; March — $200; April — $200; May — $100; June — $380; July — $100; and August — $100. The records indicated that one money order for partial payment came from appellant on July 19, 1994, after he had moved, and on it was handwritten in the address portion "Don Anderson, Amity, Ark." In September 1994, the bank called on J&P, as guarantor, to repay the outstanding loan in full and reassigned all of its right and title under the retail installment contract back to J&P. The arrangement with the bank was that J&P could be required to repurchase, or pay off, the loan if any payment became past due for more than ninety days.

Appellant explained that he and his wife separated around June 1994. His wife moved back to Florida, and he moved from Flippin to Amity, Arkansas, where his sons lived. Before they separated, he thought she was paying the truck payments. When they divided their belongings, his wife did not want to take the truck so he took it. Short of money, he only paid partial payments in July and August 1994. Then, after learning and expecting that the truck was to be repossessed, he simply stopped making any payments.

The bank had begun sending J&P notices of late payment beginning in January 1994. It was important for J&P to be informed of this information since the bank had recourse against the automobile dealership. Before and after September 14, 1994, when it had to pay off the loan, J&P attempted to find appellant and determine the whereabouts of the truck. Appellant's sister, who was listed on his credit application as living in Flippin, had apparently moved when J&P tried to locate her for a more current address.

The owner of J&P filed an affidavit seeking a criminal prosecution regarding the truck in December 1994. The formal information filed by the prosecutor alleged that on or before September 14, 1994, appellant and his wife purchased the truck, left the area, and failed to pay for the vehicle or to contact J&P regarding their whereabouts. J&P continued thereafter to try to locate appellant and the truck through letters, telephone calls, and requests for a more current address from the post office. It also attempted to obtain information from appellant's probation officer in Arkadelphia, but the probation officer would not disclose any information. Apparently, J&P did not check with the Office of Motor Vehicles in the Arkansas Department of Finance and Administration prior to seeking criminal prosecution. If it had, it would have learned that, in November 1994, appellant had renewed the truck's annual registration and listed his Amity address.

The truck was finally located in Amity, Arkansas, and it was repossessed from that location in September 1995. The truck's condition was found to be substantially deteriorated from the time

it had been sold. The motor would not "turn over," one side was dented, the seat was torn, the ceiling lining was torn and hanging down, the radio/tape player was broken, and the engine oil had the consistency of "pudding." The truck was not operable and had apparently been sitting in front of appellant's Amity residence for months. J&P sold the truck in this condition for about half the price for which it had been sold to appellant.

Appellant admitted that his son had told him that some man had been looking for him, and his son had told the man where appellant was working at the time. Appellant testified that he knew that he was behind and in fact had stopped making payments — "I knew that they was [sic] going to come and get it; I just didn't know when. Like I said, I left keys in it for them. They could have come down any time, day or night, [to repossess the truck.]" He knew the bank had an existing lien. He maintained that he never intended to defraud a secured creditor; he just fell behind and expected the secured party to recover the truck. He moved only because he and his wife had separated and he needed somewhere to live.

■ Appellant argues that the trial court erred when it denied his motion to dismiss on the grounds (1) that the complaining party was not a secured creditor and therefore no cause of action could be sustained, and (2) that there was no evidence of intent. The first motion to dismiss was made prior to the case going to trial, and the trial judge properly denied that motion. A motion to dismiss cannot be granted prior to the State having an opportunity to present its case. *Watson v. State*, 313 Ark. 304, 854 S.W.2d 332 (1993); *Hardcastle v. State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988).

■ ■ After the State presented its case, appellant moved for directed verdict, which is a challenge to the sufficiency of the evidence. *Tucker v. State*, 50 Ark. App. 203, 901 S.W.2d 865 (1994). When reviewing the sufficiency of the evidence, we view all the evidence and the reasonable inferences capable of being drawn therefrom in the light most favorable to the State. *Brunson v. State*, 45 Ark. App. 161, 873 S.W.2d 562 (1994). The evidence, direct or circumstantial, must be of sufficient force that it

compels a conclusion one way or the other without resort to speculation and conjecture. *Edwards v. State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992).

Though appellant makes two arguments on appeal, we first consider, as we must, the sufficiency of the evidence argument. *Johnson v. State*, 328 Ark. 526, 944 S.W.2d 115 (1997). Appellant argues that there is insufficient evidence upon which to find the requisite intent to defraud a secured creditor. As recited above, the appellant must have had the "purpose to hinder enforcement of [the secured creditor's] interest." One acts purposefully when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 1997). One's intent is seldom capable of being proven by direct evidence. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). The jury is allowed to draw upon its own common knowledge and experience to infer intent from the circumstances. *Tiller v. State*, 42 Ark. App. 64, 854 S.W.2d 730 (1993). Thus, there is a presumption that a person intends the natural and probable consequences of his acts. *Moore v. State*, 58 Ark. App. 120, 947 S.W.2d 395 (1997). If circumstantial evidence is the only evidence supporting a finding of a culpable mental state, it must do so excluding every other reasonable hypothesis consistent with innocence. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

From the evidence presented at trial, there was insufficient evidence from which the jury could have determined that appellant purposefully acted to hinder enforcement of a secured interest. At worst, the State proved that appellant was not following through with his payment obligations under the retail sales agreement, perhaps proving a negligent disregard for the rights of his secured creditor. However, irresponsibility in the handling of his payments and contacts with his creditor does not constitute substantial evidence to support the jury's determination that appellant's conduct was criminal. The evidence simply falls short of compelling a conclusion, without resort to speculation and conjecture, that appellant acted with the conscious object to hinder a secured creditor's enforcement of its interest.

Eggleston v. State, 16 Ark. App. 72, 697 S.W.2d 121 (1985), cited by appellant, is somewhat analogous and gives some guidance. Mr. Eggleston was prosecuted for violation of the same statute. His employer, South Central Career College, purchased a car for him since he could not obtain a loan due to a poor credit history. South Central held title to the car, and it was financed through Twin City Bank. South Central deducted payments from his paycheck. Mr. Eggleston was also responsible for other expenses such as taxes, license fees, and insurance. When Mr. Eggleston left the employ of South Central, he discussed the car situation with the owner of South Central and stated that Eggleston's accountant would contact him about refinancing the automobile or paying it off in full. The accountant did call South Central's owner, but nothing was resolved within the two days that it was anticipated to take. The staff at South Central was thereafter unable to locate Mr. Eggleston, and the owner soon took his grievance to the law enforcement authorities. The bank, the secured creditor, was not involved in the proceeding, and no representative of the bank testified at trial. While South Central was not a secured creditor, it did have a contractual relationship with Mr. Eggleston. There we saw no evidence of purposeful intent to hinder the enforcement of a security interest.

The holding in that case lends support to our holding today. As we stated in *Eggleston*: "Although there was testimony that appellant could not be located and that he allowed the insurance to lapse on his car, these circumstances alone do not establish appellant's intent to hinder the enforcement of a security interest." *Id.* at 76. Here, appellant did not dispose of the truck, and although the truck had deteriorated, it was not destroyed, so the only conceivable basis for the State to pursue appellant was the "removal" of the truck with the purpose to hinder enforcement of the lien. The very nature and purpose of a truck is to be moved about. The fact that appellant's circumstances caused him to move to another town and take the truck with him does not constitute substantial evidence of the requisite purposeful intent, the highest level of culpable mental state that can be required under Arkansas law. Therefore, we reverse on this point.

Appellant alternatively argues that there was no secured party complaining when the criminal charge was filed. Although we question whether this was preserved for appeal, we need not address this argument because we are reversing on the first point.

Accordingly, we reverse appellant's conviction.

BIRD and ROAF, JJ., agree.

John Robert NASH et al. *v.*
Gerald A. SCOTT et al.

CA 97-1068 966 S.W.2d 936

Court of Appeals of Arkansas
Division IV
Opinion delivered April 29, 1998
[Petition for rehearing denied May 27, 1998.]

J.R. Nash, for appellants/cross-appellees.

Eichenbaum, Liles, Heister & Bauman, P.A., by: *Paul B. Heister*, for appellees/cross-appellants.

JOHN MAUZY PITTMAN, Judge. The parties in this chancery case are tenants in common of a warehouse. Appellants filed a partition suit; appellees, as defendants, filed a response alleging that appellants waived their right to partition by including in their deed and sales agreement a repurchase option giving appellees a right of first refusal. At the hearing, appellants contended that the repurchase option violated the rule against perpetuities. The chancellor ruled that the rule-against-perpetuities argument was inapplicable and untimely, and that appellants had impliedly waived the right to partition by inclusion of the right of first refusal. From that decision, comes this appeal.

Appellants raise several arguments for reversal, but we need address only those that we find dispositive: that the chancellor

erred in ruling that their argument concerning the rule against perpetuities was not timely, and in ruling that the right of first refusal in the deed and sales agreement did not violate the rule against perpetuities.

We first address the timeliness question. Appellants, as plaintiffs below, filed this partition suit. Appellees, as defendants, filed answers alleging that appellants waived their right to partition by granting the right of first refusal. Appellants subsequently asserted that appellees' waiver argument was without merit because the right of first refusal upon which it was based violated the rule against perpetuities. The chancellor ruled that appellants' rule-against-perpetuities argument was untimely because it was not raised until trial. The chancellor erred in so ruling. Rule 12(b) of the Arkansas Rules of Civil Procedure, which governs the manner in which defenses must be presented, provides that defenses "shall be asserted in the responsive pleading thereto *if one is required*," and, if no responsive pleading is required, a party "may assert at the trial any defense in law or fact." In the case at bar, appellants were not required to file a responsive pleading to the waiver defense alleged by appellees in their answers. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983) (holding that a plaintiff is not required to respond to defenses). Although appellees referenced the sales agreement in their counterclaim, this reference was limited to the issue of attorney's fees and did not touch upon the waiver issue; consequently, appellants were not required by Ark. R. Civ. P. 8(c) to assert the rule against perpetuities as a defense to the counterclaim. Appellants did assert their rule-against-perpetuities argument at trial, which satisfies Rule 12(b), and we hold that the chancellor erred in ruling that the rule-against-perpetuities argument was untimely.

Appellants next contend that the chancellor erred in ruling that the repurchase option containing the right of first refusal did not violate the rule against perpetuities. We agree. Arkansas does not have a statute stating the rule against perpetuities but follows the common-law rule, which prohibits the creation of future interests or estates that by possibility may not become vested within the life or lives in being at the time of the effective date of the instrument and twenty-one years thereafter.

Broach v. City of Hampton, 283 Ark. 496, 677 S.W.2d 851 (1984). A repurchase option contained in a deed is subject to the rule against perpetuities. *Id.* In the case at bar, the deed granted to the parties, and their heirs and assigns forever, a right of first refusal to purchase the other's interest in the property. The agreement provides that the parties, or their heirs and assigns, can exercise the option over an unlimited number of years, and on the date the instrument was signed there existed the distinct possibility that the option would not be exercised until after expiration of the life or lives in being plus twenty-one years. The repurchase option therefore violated the rule against perpetuities, and the option is void. *Otter Creek Development Company v. Friesenhahn*, 295 Ark. 318, 748 S.W.2d 344 (1988); *see Broach v. City of Hampton, supra.*

Because the repurchase option is void, the chancellor erred in ruling that the repurchase option effected a waiver of appellants' right to partition. Because the chancellor's decree was premised on this error, and because we must reverse and remand for further consistent proceedings relative to appellants' partition suit, the remaining issues on appeal and cross-appeal are either moot or subject to revisitation on remand in the larger context of an accounting and need not be addressed in the present appeal.

Reversed and remanded.

ROGERS and NEAL, JJ., agree.

Jim and Jeannie PENTZ *v.* Al and Chris ROMINE, Lloyd Stone, Individually, Ron and Sharon Marable, and Marable-Stone, Inc.

CA 97-1145 966 S.W.2d 934

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1998

Harry McDermott, for appellants.

Everett & Mars, by: *David D. Stills* and *John C. Everett*, for appellees.

SAM BIRD, Judge. Jim and Jeannie Pentz appeal a decision of the chancery court that dismissed their complaint for specific performance against Ron and Sharon Marable and Marable-Stone, Inc. Since the property involved in the suit has been sold in a foreclosure sale, we dismiss the appeal because it is moot.

In 1990 appellants Jim and Jeannie Pentz entered into a real estate sales contract with Al and Chris Romine in which the Pentzes purchased a convenience store in Springdale from the

Romines, and the Romines financed the transaction. In March 1996, the Pentzes entered negotiations with Marable-Stone, Inc., as represented by its officers Lloyd Stone and Ron Marable, to sell the convenience store. A document entitled "Agreement to Lease/Purchase" was prepared by Ron Marable and faxed to appellants, who made some handwritten changes, and faxed it back to Marable. Although appellants and Ron Marable testified they had a deal, the last sentence in the last typed paragraph of the faxed document stated, "A formal contract between the parties shall be executed within ten (10) business days of this date."

Ron Marable then contacted his attorney to prepare a formal document incorporating the parties' agreement. It just so happened that Marable's attorney was also Al Romine's attorney, and had prepared the real estate sales contract for Romine and the Pentzes. Consequently, he was aware that their contract contained a clause that required the Pentzes to obtain the written consent of Al Romine before they could encumber or hypothecate the convenience store in any way. Therefore, the document he prepared for Marable had a specific clause for Romine's approval of the lease/sale. However, Romine refused to consent to the sale, and threatened to sue Marable-Stone if the other parties attempted to go through with the transaction. He testified that he told everyone involved from the time he knew about the Pentzes' plan to sell the property to Marable-Stone that he would not finance a sale for anyone else. Marable-Stone then refused to go through with the purchase.

Appellants filed suit in Washington County Chancery Court against Ron and Sharon Marable, husband and wife, Lloyd Stone, individually, and Marable-Stone seeking specific performance, and against the Romines for damages for tortious interference with the appellants' contractual relations. The Romines filed a counterclaim against appellants seeking foreclosure, alleging that appellants were in default of the real estate sales contract. Subsequently, appellants voluntarily nonsuited their complaints against Lloyd Stone, individually, and the Romines. The case went to trial on April 3, 1997, on the remaining claims of appellants against the Marables and Marable-Stone and the Romines' counterclaim against appellants for foreclosure. The appellants admitted they

had breached the real estate sales contract with the Romines. On April 16, 1997, judgment for foreclosure was entered for the Romines on their counterclaim against appellants, and the appellants' claims against the Marables and Marable-Stone were dismissed.

Appellants' first two arguments on appeal allege error in the chancellor's dismissal of their claim for specific performance against Marable-Stone. We do not address these arguments because we must dismiss this appeal for mootness.[1] On May 12, 1997, the property was sold at public sale by the Commissioner, pursuant to an order of the court, to Littlefield Oil Company.

A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Stair v. Phillips*, 315 Ark. 429, 435, 867 S.W.2d 453 (1993); *Coleman's Serv. Ctr. v. FDIC*, 55 Ark. App. 275, 935 S.W.2d 289 (1996); *see also Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 210, 895 S.W.2d 535 (1995). With few exceptions, the appellate court will not address moot issues. *Coleman's*, *supra*; *Leonards v. E.A. Martin Mach. Co.*, 321 Ark. 239, 246, 900 S.W.2d 546 (1995); *Wright v. Keffer*, 319 Ark. 201, 203, 890 S.W.2d 271 (1995); *Kinkead v. Union Nat'l Bank*, 51 Ark. App. 4, 19, 907 S.W.2d 154 (1995). Even if we agreed with appellants' arguments and reversed, because of the foreclosure action it would be impossible for the contract between Marable-Stone and appellants to be specifically performed because appellants cannot deliver title to the property. *See McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 713 S.W.2d 469 (1986); *see also DeHaven v. T & D Dev., Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995).

Appeal dismissed.

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

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[1] Appellants' third argument is that we must remand for the chancellor to determine if the real estate contract was tortiously interfered with by appellee Romine. Because their complaint against the Romines for tortious interference was nonsuited before the trial, this issue is not before us.

VERA LEE WEAVER LIVING TRUST, Jerold Lee Weaver, Trustee *v.* CITY OF EUREKA SPRINGS

CA 97-246 969 S.W.2d 681

Court of Appeals of Arkansas
Division IV
Opinion delivered April 29, 1998
[Substituted opinion delivered June 3, 1998]

Kelley Law Firm, by: *Glenn E. Kelley*, for appellant.

Jay C. Miner, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order denying appellant's motion for attorney's fees and costs that was made when appellee abandoned condemnation proceedings against appellant's property. Because we agree that the evidence demonstrates a lack of good faith on the part of the condemning authority, we reverse and remand.

On December 2, 1992, appellee, the City of Eureka Springs, filed a complaint, pursuant to Ark. Code Ann. § 18-15-201 (1987), to condemn property owned by appellant, the Vera Lee Weaver Living Trust, that is administrated by Jerold Lee Weaver, the grantor's son. The city obtained an order of immediate possession based on the representation that the work of renovating the structure should be commenced at once, and it placed on deposit the sum of $29,500 as just compensation. It is undisputed, however, that the city did not begin renovation of the property nor did it take actual possession during the pendency of the action. At the trial held on September 27, 1995, the jury returned a verdict of $80,000 as the fair market value of the property at the time of the taking, which exceeded the highest estimate of value adduced at trial by $10,000. On October 20, 1995, appellant filed a motion for the court to release the funds that had been placed on deposit in the court's registry. Three days later, the city moved to exercise its right to abandon the condemnation action. Appellant responded with a request for attorney's fees and costs, alleging that the city had acted in bad faith. A hearing was held on the issue of fees and costs in November of 1996, after which the trial court denied appellant's prayer for relief. This appeal followed.

It has long been held that a condemnor has an absolute right to discontinue a condemnation action until actual payment of the compensation. *Selle v. City of Fayetteville*, 207 Ark. 966, 184 S.W.2d 58 (1944). However, under Arkansas law, a landowner is permitted to recover a reasonable attorney's fee, as well as other expenses, when a condemning agency fails to act in good faith in instituting and, later, abandoning condemnation proceedings. *Des*

Arc Watershed Improvement District v. Finch, 271 Ark. 603, 609 S.W.2d 70 (1980); *Housing Authority of the City of North Little Rock v. Amsler, Judge*, 239 Ark. 592, 393 S.W.2d 268 (1965). This is considered an exception to the general rule that attorney's fees are not recoverable unless specifically authorized by statute. *Des Arc Watershed Improvement District v. Finch*, 275 Ark. 229, 630 S.W.2d 17 (1982). As was said by the court in *Amsler, supra*, a trial court has an inherent right to require such reimbursement to the landowner when a condemning agent chooses to renege merely because the jury verdict is not to its liking, in order to protect its own processes, property owners, and the constitutional provision of just compensation.

From the testimony of city council members, it was disclosed that the city had no pressing need for the property and that it had no set plans for what it intended to do with the property when the action for eminent domain was filed. It was said that there was an agreement to wait until the condemnation proceedings were over to decide how the property might be used. James Walden, the City Administrator Assistant, testified that the amount placed on deposit with the court was based on an appraisal the city had obtained. He also said that the parties had engaged in negotiations prior to trial and that the city had rejected an offer made by the landowner of $60,000. He acknowledged that this offer was accompanied by an appraisal of a reputable and knowledgeable real estate broker in the area, and he agreed that the offer was made in good faith and that the amount offered was actually $9,000 less than the broker's appraisal because the landowner was willing to accept a reduced price in order to settle the dispute. It was Walden's testimony that the city would have kept the property if it "had gotten it cheap," and the jury would have returned a verdict of $29,900 or less. He said that the city was unwilling to pay the price set by the jury.

In *Des Arc Watershed Improvement District v. Finch*, 275 Ark. 229, 630 S.W.2d 17 (1982), the supreme court held that bad faith was shown when the condemnor claimed that it had abandoned the action because it had no funds to pay the jury's award, yet it later instituted another condemnation proceeding in the wake of the first. We can infer from that decision that mere dissatisfaction with the jury's verdict can be cause for a finding of bad faith.

In this case, the city makes no claim that it does not have the ability to pay the jury's award. Instead, it abandoned the condemnation action because it did not want to pay any more than a bottom-dollar price for the property. If a specious claim of inability to pay an award is said to be an affirmative indication of bad faith, then we believe that a lack of good faith is shown here.

From the objective facts in the record, the evidence shows that the city had a notion to take the property without any defined purpose for its use. The record also reveals that the city had no intention of completing the action unless the property could be obtained "cheap," despite having good reason to believe that it was worth substantially more than its own low-end estimate. Even so, the city continued its pursuit of the property, keeping it in limbo for several years, thereby preventing the landowner from having full use and enjoyment of the property. We can hardly conceive of any greater demonstration of bad faith as is evidenced here, and we are at a loss to understand the trial court's ruling in light of its recognition that the city's actions represented an "arbitrary use of the — almost capricious use of the condemning authority."

Although the trial court noted that the jury's verdict did exceed the highest estimate offered at trial, we are not convinced that this fact alone compels a different conclusion. The city did not urge this as a reason for discontinuing the action, and it could have, but did not seek a remittitur for reduction of the award to an amount sustained by the evidence. *See Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995). On this record, it is quite clear that the city's motivation for abandoning the action was its unwillingness to pay no more than a paltry sum for the property and that any excessiveness of the jury's verdict had little bearing on that decision. We, therefore, reverse and remand for the trial court to determine an amount of reasonable fees and costs and to enter judgment accordingly.

Reversed and remanded.

PITTMAN and NEAL, JJ., agree.

Jefferson D. GUESS, Jr. et al. *v.* Alice GOING

CA 97-1233 966 S.W.2d 930

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1998

Robert A. Newcomb, for appellants.

Friday, Eldredge & Clark, by: *Scott J. Lancaster* and *Jeffrey H. Moore*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Jefferson D. Guess, Jr., and other heirs to the estate of Anna Elizabeth Guess appeal an order of the Lonoke County Probate Court denying their request to remove appellee, Alice Going, as executrix of the estate, and appoint a substitute. On appeal they assert that the probate court erred in denying their request. We reverse.

Anna Elizabeth Guess lived a long and mostly independent life on a farm in Cabot. She raised seven children. By all accounts, she dealt with her descendants generously, loaning money and selling property on very favorable terms. For example, she allowed one son, Wayne, to trade a three-year-old Chevrolet pickup truck for ten acres of land in 1989, and grandson Doyle Guess, Jr., purchased a house and a half-acre of land in 1974, for $1,000 in cash and $100 per month for ten years.

In 1991, apparently at the behest of her daughter, Alice Going, Anna granted Going a durable power of attorney that remained in effect until her death. The event that motivated the giving of the power of attorney, according to Going, was a kitchen fire that resulted from Anna forgetting her meal on the stove. According to Anna's other daughter, Martha Blackwell, however, the reason for the power of attorney was Going's intention to prevent her from further disposing of her real estate after the trade of the pickup truck for ten acres of land. This view was shared by Doyle Guess, Jr., Wayne Guess, and Jeffrey Guess, Jr. According to these heirs, Going blocked several proposed land sales.

On March 31, 1994, however, Anna, then age 82, entered into a land-sale contract with Douglas Wayne Wilson and Cindy Going Wilson, Going's daughter. Pursuant to the agreement, which was prepared by Going, she conveyed her greatest asset, 85 acres of farmland, for $170,000. The agreement provided that the Wilsons were not required to make a payment of any kind until January 15, 1995. At that time, they would be required to begin making thirty-six monthly payments of $500. Only after they had made this interest-free "down payment," would they then be required to begin paying seven-percent interest on the $152,000 balance. The $152,000 was then to be amortized by monthly payments of $1,027.19, to be made over the next 28 and a half years.

On July 14, 1995, Anna signed a new will that Going had also prepared for her. According to Going, she patterned the new will after the previous will that had been prepared by a lawyer. The will only changed in two significant respects. It changed the distribution of certain property that was previously bequeathed to Paul Guess, Sr., who was deceased, to Paul Guess, Jr. It also shortened the distribution time from five years to one year.

Anna died on September 15, 1995. On September 26, 1995, Going petitioned the Lonoke County Probate Court to appoint her executrix and admit her mother's July 14, 1995, will to probate. An order admitting the will to probate and appointing Going executrix was signed that same day. On October 5, 1995, Jefferson D. Guess, Jr., Wayne Guess, Lewis Guess, Martha Guess Blackwell, Doyle Guess, Jr., and Sherry Guess Kwaitkowski (hereinafter Guess *et al.*) filed pleadings opposing the probate of the will and alleging lack of testamentary capacity, undue influence, and procedural defects in the execution. They also opposed the appointment of Going as executrix, asserting that Going refused to bring an action to set aside the land-sale agreement involving her daughter, which they contended was invalid due to lack of mental capacity, undue influence, and inadequacy of consideration, and was obtained by fraud. Guess *et al.* prayed that Lewis Guess, Wayne Guess, and Martha Guess Blackwell be appointed co-administrators of the estate. After a two-day trial, the probate court upheld the validity of the will and denied Guess *et al.*'s petition to replace Going as executrix.

As a preliminary matter, we first take up the question of whether there is a final appealable order from which this appeal is taken. Relying on *In re Estate of McLaughlin*, 306 Ark. 515, 815 S.W.2d 937 (1991), and on Ark. Code Ann. § 28-48-103(f) (1987), Going asserts that a petition for the appointment of an alternative executor or special administrator is not appealable. Central to Going's argument is an assertion that "No where in Appellants' Petition do they request the removal of Alice Going as Executrix." We find no merit to this argument.

It is obvious from reading the Guess *et al.*'s petition that they were not seeking the appointment of a special administrator. A special administrator is vested with much more limited authority than a general administrator. *See* Ark. Code Ann. § 28-48-103; *see also Newton County v. West*, 288 Ark. 432, 705 S.W.2d 887 (1986). While perhaps the pleading could have been better drafted, it made clear to the opposing party and to the trial court that Guess et al wanted the appointment of a different administrator.

Moreover, the probate court treated the pleading as a petition to remove Going as executrix, and it ruled on it as such. The denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994) (construing Ark. Code Ann. § 28-1-116 (1987)). Accordingly, we hold that the decision of the probate court was a final appealable order and proceed to the merits of this case.

Guess *et al.* argue that the probate court erred in not finding that Going's conflict of interest made her "unsuitable" to serve as executrix. They contend that this conflict arises from the fact that she drafted the land-sale agreement, and her "mother's love" precludes her from challenging an agreement that was extremely favorable to her daughter because she "naturally would not want to deprive her daughter of such a benefit." Moreover, Guess *et al.* argue that the probate court erroneously looked only to the purchase price for the property, and not the terms of the agreement or when the proceeds would become available to the heirs, in determining that Going had not wronged the estate in refusing

to challenge the agreement. In support of this argument, Guess *et al.* urge this court to resort to decisions from foreign jurisdictions to find that a conflict of interest is grounds for removal of an administrator. This is clearly not necessary.

An executor of an estate occupies a fiduciary position and must exercise the utmost good faith in all transactions affecting the estate and may not advance his own personal interest at the expense of the heirs. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936); *Warren v. Tuminello*, 49 Ark. App. 126, 898 S.W.2d 60 (1995). Personal representatives are directed by Arkansas's probate code to marshal all assets of the estate. Ark. Code Ann. § 28-49-101 (1987). It is clear that by not challenging the land-sale agreement, Going did not completely discharge her duty to marshal all assets of the estate.

In *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975), the supreme court required a probate court to remove an administratrix who persistently acted in her own interests in order to deprive her stepchildren of their entitlement. We find the instant case analogous. Under the land-sale agreement, the heirs, almost all of whom are middle-aged or older, will likely not see the benefit of what would have been the estate's greatest asset.

Under Ark. Code Ann. § 16-48-105(a)(1) (1987), an administrator of an estate may be removed "When the personal representative becomes . . . unsuitable . . . [or] has failed to perform any duty imposed by law." In *In re Guardianship of Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995), the supreme court noted that the Arkansas probate code contains no definition of the term "unsuitable," but quoted with approval, as it had previously in *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959), the definition of this term given by the Massachusetts Supreme Court in *Quincy Trust Co. v. Taylor*, 57 N.E.2d 573 (1944):

> The statutory word "unsuitable" gives wide discretion to a probate judge . . . . Such a finding may also be based upon the existence of an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently,

> promptly, fairly, and dispassionately in his trust. It may also be based upon any other ground for believing that his continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted. Actual dereliction in duty need not be shown.

319 Ark. at 581, 892 S.W.2d at 495.

Going admitted on direct examination that she was aware that all the other heirs wanted her to challenge the land-sale contract, but she refused to do it, in part, because it would affect her daughter. There can be no more explicit proof of a conflict of interest than this testimony.

Although this court reviews probate cases *de novo*, *Warren v. Tuminello*, *supra*, an order of a probate court will not be reversed unless clearly erroneous. *Newton County v. West*, *supra*. Clearly erroneous means that although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). We find that the probate court's refusal to replace Going as executrix was clearly erroneous.

We note that the probate court's decision to retain Going as administrator rested upon its determination that the land-sale agreement between Anna and the Wilsons was valid. However, when it did so, the probate court acted outside its jurisdiction. The probate court is a court of special and limited jurisdiction, and even though it is a court of superior and general jurisdiction within those limits, it has only such jurisdiction and powers as are expressly conferred by statute or the constitution, or necessarily incident thereto. *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976).

A probate court's jurisdiction extends only to heirs, distributees or devisees, beneficiaries, and claimants against an estate. *Id.* A probate court lacks jurisdiction to determine contests over property rights and titles between the personal representative and third parties or strangers to the estate. *Id.*, *McDermott v. McAdams*, 268 Ark. 1031, 598 S.W.2d 427 (Ark. App. 1980). Because the Wilsons were not heirs, distributees, devisees, or

beneficiaries of or claimants against Anna's estate, the probate court was without jurisdiction to determine the validity of the land-sale contract.

Furthermore, it is well settled that while a probate court may apply equitable principles, it lacks jurisdiction to grant equitable relief. *Brown v. Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989); *Hilburn v. First State Bank, supra, McDermott v. McAdams, supra.* The action to set aside the land-sale agreement between Anna Guess and strangers to her estate properly belonged in chancery court. *See Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995); *Merrell v. Smith, Special Admr.*, 226 Ark. 1016, 295 S.W.2d 624 (1956); *Sykes v. Campbell*, 221 Ark. 858, 256 S.W.2d 320 (1953); *Petree v. Petree*, 211 Ark. 654, 201 S.W.2d 1009 (1947); *Beller v. Jones*, 22 Ark. 92 (1860); *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1854). Any attempt to extend probate court jurisdiction without specific authority is void. *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984).

Accordingly, we reverse and instruct the probate court to appoint a suitable administrator for the estate of Anna Elizabeth Guess.

Reversed and remanded.

ROBBINS, C.J., and BIRD, J., agree.

Charlotte COBLE *v.* MODERN BUSINESS SYSTEMS

CA 97-1339 966 S.W.2d 938

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1998

Mashburn & Taylor, by: *Timothy J. Myers*, for appellant.

Ledbetter, Hornberger, Cogbill, Arnold & Harrison, by: *James A. Arnold* and *Rebecca D. Hattabaugh*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Charlotte Coble sustained extensive injuries after she was involved in an automobile accident on July 11, 1994. At the time she was employed by

appellee Modern Business Systems, and she later filed for workers' compensation benefits, contending that the accident was work-related. The administrative law judge denied benefits, finding that Ms. Coble failed to prove by a preponderance of the evidence that she suffered a compensable injury while employed by the appellee. The Workers' Compensation Commission affirmed and adopted the decision of the ALJ, and Ms. Coble now appeals.

For reversal, Ms. Coble raises two arguments. First, she contends that the Commission erred in concluding that the "traveling salesman" exception to the "going-and-coming" rule no longer applies under Act 796 of 1993. In addition, Ms. Coble submits that the Commission erred in finding that her injuries did not arise out of and in the scope and course of her employment. We find no error and affirm.

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

At the hearing before the Commission, Ms. Coble testified on her own behalf. She stated that she began working for Modern Business Systems in March 1992 when she was hired as branch administrator for the office in Springdale, Arkansas. In January 1994, she was promoted to corporate trainer, and this job required her to travel to other branch locations throughout the company. She was also assigned to manage three other offices. One of these was in Fort Smith, Arkansas, and the others were located in southwest Missouri. Ms. Coble testified that, when she was required to

travel, the company paid for her airfare, hotel accommodations, rental car, and meals.

On July 11, 1994, Ms. Coble was in Peoria, Illinois, for the purpose of training a new administrator. She arrived at the branch office at about 8:00 a.m. and met the trainee, who was to meet with the head of the benefits department, Dwalla Tuinstra, before meeting with Ms. Coble. According to Ms. Coble, the trainee was upset when she came out of her meeting with Ms. Tuinstra, and said she needed a break. Ms. Coble stated that, although "we had a lot to cover," the trainee was permitted to take an hour for lunch. At that time, Ms. Coble decided that, rather than going to lunch, she would try to find a mall so that she could buy a new pair of panty hose. She stated that, "I had about a two-and-a-half or three-inch-wide run in them that went from the top of my leg all the way down to the end of my foot," and that, "[i]t was pretty noticeable." After getting directions to a mall, Ms. Coble set out to replace the hose. However, when she arrived at the mall she realized that she would not have enough time to go in and make the purchase, so she attempted to drive back to the office. While she was trying to turn around on a highway, her vehicle was struck by a motor home, and she suffered multiple injuries, including a head injury. She eventually resumed working for the appellee, but resigned in May 1996 because she became frustrated and could not perform her job as the result of her head injury.

Ms. Coble testified that she needed to replace her hose on the day at issue because "professional appearance is very, very important." She indicated that the run in her hose made her feel uncomfortable in a professional setting, and stated that sometimes she encountered customers coming in and out of the office while she was conducting a training session. Ms. Coble acknowledged that Modern Business Systems did not have a written dress policy, but asserted that her supervisors insisted that proper dress and appearance were important. She further testified that her supervisors always expected her to wear high heels and hose while at work, and that "going without hose would not be tolerated."

Ms. Coble's immediate supervisor, Sharon Lear, testified that, while the company does not have a written dress code, the

employees are expected to dress professionally. Ms. Lear indicated that dressing professionally includes wearing panty hose and that Ms. Coble always dressed appropriately. However, as to the hose-runner that Ms. Coble detected on July 11, 1994, Ms. Lear offered the following testimony:

> The company does not have any policy, written or otherwise, about women employees developing runners in their panty hose. The problem with developing panty runners in panty hose is a fact of life for women who wear them. That sort of thing seems to happen always at the most inconvenient time. It does happen quite a bit. Modern Business Systems does not have a written or unwritten policy or expectation that their employees are to drop everything and go replace hose that develop runners as soon as it happens. It's an individual preference. It would probably depend on what the circumstances were. If you're not expecting people in and just your employees, I don't think anyone would consider changing their hose. Some people wouldn't anyway, but it's never been an issue that we've asked anyone to go home and change that I'm aware of.
>
> . . . .
>
> I would not require or have requested that she go out on her lunch break and replace those if I had been aware of the situation. The decision to do that was, in my opinion, entirely a personal decision by Charlotte Coble.

On appeal, Ms. Coble argues that the Commission erred in finding that the "traveling salesman" exception to the "going-and-coming" rule no longer applies under the new Act, and in finding that her injury did not arise out of and in the scope and course of her employment. However, the Commission never specifically made either of these findings. Instead, it denied benefits pursuant to Ark. Code Ann. § 11-9-102(5)(B)(iii) (Repl. 1996), which provides:

> (B) "Compensable Injury" does not include:
>
> (ii) Injury which was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated[.]

The Commission found that, at the time that the accident occurred, Ms. Coble was not performing "employment services," and denied benefits. Therefore, our review of this case will be directed toward a determination of whether this finding by the Commission is supported by substantial evidence.

In her brief, Ms. Coble cites *Arkansas Dep't of Health v. Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984). In that case, the claimant was told by her employer to travel from Little Rock to Harrison for the purpose of inspecting ambulances. On the following day, she was to drive to Yellville. She arrived at Harrison and, after completing her work by about 5:00 p.m., checked into a hotel. Following a nap, she went to the hotel bar to have a drink. On the way back to her hotel room, she was attacked by an unidentified assailant and suffered injuries. We affirmed the Commission's finding of compensability, and in doing so cited the "traveling salesman" exception. We noted that the nature of the claimant's employment required her to be in Harrison and to check into a hotel, and that returning to her room from the hotel bar was reasonably expectable so as to be an incident of the employment. However, this opinion was delivered prior to the enactment of Act 796 of 1993.

Ms. Coble has also cited *Olsten Kimberly Quality Care v. Petty*, 328 Ark. 381, 944 S.W.2d 524 (1997), which was decided under the provisions of the new Act. In that case, the claimant's job was to drive her own vehicle to the homes of patients and provide nursing services. While driving to the home of one such patient, she was involved in an automobile accident and suffered injuries. The Commission awarded benefits. We affirmed and review was sought to the supreme court. In affirming, the supreme court found that the claimant was engaged in "employment services," relying on the fact that her travel was an inherent and necessary incident of her required employment activity, and that her travel was an essential component of the services she provided.

In the case at bar, we find substantial evidence to support the Commission's finding that Ms. Coble was not performing "employment services" at the time of her accident, and we therefore affirm its decision that she failed to establish a compensable

injury. In *Olsten Kimberly Quality Care v. Petty, supra,* the claimant was required to drive to various homes in order to perform her job. In the instant case, there was evidence that Ms. Coble was not required to replace hosiery during the workday in the event of a run, nor was she even expected to do so. In addition, she admitted that she would not have made the trip if her trainee had not requested a lunch break; she was prepared to continue the training despite the condition of her panty hose. On her break from work, she was free to do whatever she wanted to do, and it was solely her decision to proceed to the mall. Under these circumstances, we agree that her decision to drive to the mall was personal in nature, was not a requirement or essential component of the services she provided, and did not constitute "employment services" for purposes of the new Act.

At the conclusion of her brief, Ms. Coble also suggests that public policy mandates reversal of the Commission's decision. She asserts that the representatives of the appellee started paying her medical expenses and led her to believe that future medical benefits would be provided, and that as a result the statute of limitations almost ran on her workers' compensation claim. We find no merit to this argument because, even if the appellee misled Ms. Coble in the manner that she alleges, she in fact was able to file for workers' compensation before the statute of limitations barred her claim.

Affirmed.

BIRD and ROAF, JJ., agree.

Gina Paige CROUCH *v.* STATE of Arkansas

CA CR 97-1399 968 S.W.2d 643

Court of Appeals of Arkansas
Division II
Opinion delivered May 6, 1998

Ralph M. Cloar, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

D. FRANKLIN AREY, III, Judge. Appellant Gina Paige Crouch's probation was revoked by the Pope County Circuit Court; she was sentenced to forty-eight months in the Arkansas Department of Correction. The trial court subsequently denied her posttrial Motion for Arrest of Judgment and for New Trial without a hearing. On appeal, appellant argues that the trial court erred by failing to provide her a hearing on this motion, and by summarily denying the motion without a hearing, written find-

ings of fact, or written conclusions of law. We find merit in appellant's first point, and remand this case for a hearing on appellant's motion.

On February 25, 1997, appellant entered a plea of guilty of carnal abuse in the third degree. She was placed on four years' probation. Her probation was conditioned upon, among other things, her having no contact with the victim.

The State filed a Petition for Revocation on May 21, 1997, alleging that appellant had written letters to the victim in violation of her probation. At a hearing on July 7, 1997, two handwritten, undated letters were introduced; the letters were addressed to the victim, and one of them was signed with appellant's name. The letters were found by the victim's mother in the victim's belongings. The letters were admitted into evidence over appellant's objection.

The trial court held that there was no doubt that the letters were from appellant to the victim. It found that the State had proven by a preponderance of the evidence that appellant violated the conditions of her probation by contacting the victim; the court then revoked appellant's probation and sentenced her to a term of four years' imprisonment.

Appellant then filed a Motion for Arrest of Judgment and for New Trial, alleging deprivation of her constitutional rights to due process and effective assistance of counsel. Appellant specifically requested that the trial court set this motion for a hearing on a date certain. The motion was premised upon trial counsel's failure to investigate and prepare for the hearing, lack of diligence in conducting discovery, failure to have an expert review the letters, or otherwise prepare and present an adequate defense. The trial court denied appellant's motion without a hearing and without written findings of fact or conclusions of law.

On appeal, appellant asserts that, pursuant to Arkansas Rules of Criminal Procedure 33.3 and 37.3, and Arkansas Code Annotated section 16-91-105(b)(4) (1987), the trial court was required to conduct a hearing on her motion and to set forth written findings of fact and conclusions of law. The State's response is two-

fold. First, it argues that appellant failed to fully develop the facts and circumstances surrounding her ineffective assistance of counsel claim so that this appeal should be affirmed. In the alternative, it argues that the trial court committed no error because the record and files before the trial court conclusively demonstrated that the motion was without merit.

The disposition of this appeal is controlled by Rule 33.3 and *Halfacre v. State*, 265 Ark. 378, 578 S.W.2d 237 (1979). Rule 33.3 allows a convicted felon to file a motion for new trial, a motion in arrest of judgment, or any other application for relief prior to the time fixed to file a notice of appeal.

> The trial court *shall designate a date certain, if a hearing is requested* or found to be necessary, to take evidence, hear, and determine all of the matters presented within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed.

Ark. R. Crim. P. 33.3 (emphasis supplied). Thus, generally speaking, if a hearing is requested, the trial court *shall* designate a date certain for a hearing. *But see Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996) (finding no error in the trial court's refusal to hold a hearing because the hearing would have been superfluous).

In *Halfacre*, two defendants were tried jointly and were found guilty. After they were convicted and sentenced, they wrote to the trial judge asking for a hearing on the question of the effectiveness of their court-appointed counsel. The trial court found their petition to actually be in the form of a petition for Rule 37 relief, and dismissed it without a hearing. *Halfacre*, 265 Ark. at 383, 578 S.W.2d at 239. Our supreme court noted that the petition "was not couched in conclusory language, but specifically recited instances which could be considered as a basis for finding that [the defendants'] constitutional right to effective assistance of counsel had been denied." *Id.*

> While such a matter can be raised by way of a petition for relief under [Ark. R. Crim. P. 37], a trial court is not precluded from hearing evidence on such a motion as grounds for a new trial. . . .

> The trial court, having just finished the trial and observing the conduct of counsel, was in a unique position to hear and determine the matter; such a hearing enables us to review the matter on appeal.

Id. Our supreme court remanded the matter for the trial court to conduct such a hearing, make findings, and enter an appropriate order. *Id.*

In her motion, appellant requested a hearing; nonetheless, the trial court ruled on the motion without granting appellant a hearing. Such a hearing would have enabled us to review this matter on direct appeal. *See Halfacre*, 265 Ark. at 383, 578 S.W.2d at 239. Given the specificity of appellant's motion, the plain language of Rule 33.3, and our supreme court's decision in *Halfacre*, this matter should be remanded for a hearing on appellant's motion.

The State's argument is premised upon *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996). That case is distinguishable. In *Dodson* the defendant filed a timely posttrial motion for a new trial, alleging ineffective assistance of counsel. The trial court did not rule on the motion; nonetheless, the defendant brought an appeal, arguing that the motion was "deemed denied," and thus ripe for appeal. *Id.* at 641, 934 S.W.2d at 200. Our supreme court noted that "in the interest of judicial economy, this court will review claims of counsel's ineffectiveness on direct appeal provided that the allegation is raised before the trial court (i.e., in a motion for new trial) and that the facts and circumstances surrounding the claim have been fully developed." *Id.* at 642, 934 S.W.2d at 201. The *Dodson* court concluded that it could not address the merits of the motion for new trial.

> In the case at hand, we have not been provided with anything other than the bare allegations set out in [defendant's] motion for new trial. We have no evidence as to why trial counsel made the particular decisions which are challenged in this appeal. . . . Such information is necessary for us to conduct a meaningful review of the allegations.
>
> . . .[W]e conclude that a "deemed denied" ruling on a posttrial motion for new trial is an insufficient order from which to raise on direct appeal a claim of ineffectiveness. Such a

> deemed ruling necessarily precludes any consideration by the trial court of the relevant facts pertaining to the claim. As the trial court is in the best position to evaluate trial counsel's performance and competency, an order reciting its findings is necessary to enable us to conduct a meaningful review of the claim.

Id. at 644, 934 S.W.2d at 201-202.

In the case at bar, we have a ruling on the motion; in *Dodson*, the court's disposition turned upon the fact that the motion was "deemed denied" *without* a ruling, and was thus insufficient for the purpose of raising on direct appeal a claim of ineffective assistance of counsel. The case before us is controlled by *Halfacre*. Because there was no hearing, we do not have adequately developed facts and circumstances surrounding the claim to enable us to conduct a meaningful review, so the case should be remanded.

Our disposition on appellant's first point makes it unnecessary for us to consider her arguments concerning Ark. R. Crim. P. 37. Therefore, we express no opinion on those arguments.

Reversed and remanded.

PITTMAN and GRIFFEN, JJ., agree.

Rick DOVER *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 97-1334 968 S.W.2d 635

Court of Appeals of Arkansas
Division II
Opinion delivered May 6, 1998

Brad Messer, for appellant.

D. FRANKLIN AREY, III, Judge. The Juvenile Division of the Benton County Chancery Court removed appellant Rick Dover's three children from his custody following an emergency hearing. The juvenile court found that removal was in the children's best interest, and necessary to protect their health and welfare. On appeal, appellant argues that the State failed to meet its evidentiary burden for removal of the children; that the juvenile court based its decision on improper considerations; and that the juvenile court failed to make the required factual findings before ordering

removal. We dismiss this appeal without reaching the merits because the juvenile court's order is not a final, appealable order.

At a hearing held on July 18, 1997, the juvenile court noted that the guardian *ad litem*'s report alleged the existence of an emergency regarding the children's continued placement with appellant. Although the parties before the court argued their respective positions, no witness testified. The juvenile court concluded that the children should be removed from appellant's custody and placed them with their grandmother. An order setting forth the juvenile court's decision was entered on August 4, 1997. The order noted that appellee Department of Human Service's contact with the family "occurred during an emergency. . . ."

Appellant is appealing from the order of August 4, 1997. The juvenile court must hold an emergency hearing to determine if probable cause to issue an emergency ex parte order under § 9-27-314 continues to exist. *See* Ark. Code Ann. § 9-27-315(a)(1)(A) (Supp. 1997). At this emergency hearing, the juvenile court must set the time and date for an adjudication hearing to be held within thirty days of the emergency hearing. *See* Ark. Code Ann. § 9-27-315(d). Appellant does not bring this appeal from an adjudication order; there are no issues before us concerning an adjudication hearing and order.

■ An appeal may be taken from a final judgment or decree entered by a trial court. *See* Ark. R. App. P.—Civ. 2(a)(1). To be appealable, an order, decree, or judgment must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Chancellor v. Chancellor*, 282 Ark. 227, 667 S.W.2d 950 (1984). Because a final order is a jurisdictional requirement, an appellate court should raise the issue on its own motion. *See Lester v. Lester*, 48 Ark. App. 40, 889 S.W.2d 42 (1994).

■ In the case before us, appellant is appealing from an order entered after an emergency hearing; that is not a final order for purposes of appeal. The statute allowing for emergency hearings mandates an adjudication hearing within thirty days of the emergency hearing. *See* Ark. Code Ann. § 9-27-315(d). Adjudication hearings are held to determine whether the allegations in a

petition are substantiated by the proof. *See* Ark. Code Ann. § 9-27-327(a). Implicit in this statutory scheme is the notion that proof will be presented at the adjudication hearing; the presentation of proof is not concluded at the emergency hearing. Thus, an order based upon an emergency hearing does not discharge the parties from the action or conclude their rights to the subject matter in controversy. It is not a final order. *Cf. Chancellor*, 282 Ark. at 229-30, 667 S.W.2d at 951-52 (a temporary custody order is not a final order for purposes of appeal where the appellant had not yet completed her proof on the issue of custody and where it was obvious that this was not the court's final action).

Our disposition of this appeal is consistent with our prior commentary on the finality of orders arising out of emergency hearings.

> Since probable cause hearing orders are not final and appealable, the statutory scheme of the juvenile code adds the safeguard of requiring that an adjudication hearing be held within thirty days of the probable cause hearing. In that way, any errors made in the probable cause hearing, which would not be subject to immediate appeal, are minimized by requiring the full adjudication hearing to follow soon thereafter.

Johnston v. Arkansas Dep't of Human Servs., 55 Ark. App. 392, 394, 935 S.W.2d 589, 590 (1996). While the court in *Johnston* noted that this discussion was not necessary to the disposition of the issues on appeal, it is certainly applicable to the case at bar.

Given the juvenile code's statutory scheme, orders based upon emergency hearings held pursuant to § 9-27-315 are not final. We do not have jurisdiction to address this appeal, so we dismiss it without prejudice to appellant to obtain review after a final order has been entered and filed.

Appeal dismissed.

PITTMAN, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I fully support our decision to dismiss this appeal for the reasons stated in Judge

Arey's opinion. My separate opinion is written to express my concern and disappointment about the failure of the Arkansas Department of Human Services to file a brief. As the principal opinion indicates, this case involved an appeal from a decision to remove three children from the custody of their father after the chancellor found that removal was in their best interest and necessary to protect their health and welfare. The chancellor's decision was made at the urging of the Department of Human Services and a guardian *ad litem*. However, the Department has not favored us with a brief to support the action taken at its urging.

The Department is the governmental entity with explicit responsibility to act as advocate for the interest of children in proceedings of this nature. One would think that a decision to seek the removal of children from the custody of a parent because of governmental concern for their safety and welfare would carry with it a responsibility to maintain that concern after a favorable ruling has been appealed. Aside from the need to have the public interest represented, the children affected by the decision deserve something more than what the Department provided them in this appeal, which was nothing.

The Department's failure to file briefs in similar instances has been a subject of concern in other cases. *See Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). *See also Brown v. Arkansas Dep't of Human Servs.*, 330 Ark. 497, 954 S.W.2d 270 (1997). One wonders how many more situations will occur before the people responsible for advocating the public interest in child safety and welfare cases decide to do the job for which they are being paid.

OAK GROVE LUMBER COMPANY *v.* Harry HIGHFILL

CA 97-1075 968 S.W.2d 637

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 6, 1998

[redacted]

Reid, Burge, Prevallet & Coleman, by: *Richard A. Reid*, for appellant.

Bartels Law Firm, by: *Anthony W. Bartels*, for appellee.

D. FRANKLIN AREY, III, Judge. The Workers' Compensation Commission found that appellee Harry Highfill's second foot injury was a compensable consequence of his initial work-related injury. Appellee sustained his second injury when he stepped on, or tripped over, a tree root while walking through a park; he was in the park attending a church activity. The appellant, Oak Grove Lumber Company, argues that the Commission's decision is not supported by substantial evidence and is erroneous as a matter of law. We affirm.

On June 16, 1995, appellee dropped a sledgehammer on his right foot while working for appellant. Appellee saw a nurse practitioner, who determined that appellee sustained a nondisplaced fracture. She treated appellee and instructed him to wear protective boots when he returned to work. Appellee returned to work for a few days.

On June 22, 1995, appellee attended a church function in a city park. While walking through the park, appellee either stepped on or tripped over a tree root. In his words, "something happened" to his foot; the incident "bent my toes back and it just went ahead and broke."

Appellee saw Dr. R. Cagle, who diagnosed an angular fracture of the second metatarsal with some dorsal displacement. Dr. Cagle referred appellee to Dr. Marion Hazzard, who performed an operation on appellee's foot on June 28, 1995. On January 26, 1996, the plates were removed from his foot and he was released on February 12, 1996, to resume normal activities.

In a January 16, 1996 medical report, Dr. Hazzard stated that he believed that appellee's displaced fracture was a direct result of his initial injury with the sledgehammer, as a fracture was reported after that incident. He stated that weakening of the bone secondary to the first trauma was a contributing factor to the subsequent displaced fracture. However, at his deposition, Dr. Hazzard testified that he was not saying that the displaced fracture was a natural consequence of the first fracture; he agreed that the second fracture did not follow as a natural progression in the course of events. Dr. Hazzard did believe that a previous fracture would certainly increase the probability of a displaced fracture occurring.

After reviewing Dr. Hazzard's deposition, the Commission was persuaded that his acknowledgment regarding the "natural consequence" of appellee's first fracture simply meant that appellee was not destined to sustain a major fracture owing to the presence of a minor one. Relying on Dr. Hazzard's opinion of January 16, 1996, other testimony from his deposition, and the close temporal relationship between appellee's two fractures, the Commission concluded that appellee's accident would not have caused the displaced right foot fracture had it not been for the previous injury of June 16, 1995. Thus, the Commission concluded that it was unable to find that appellee's injury of June 22, 1995, occurred as a result of an independent intervening cause.

Appellant argues that the Commission's decision is erroneous as a matter of law. Relying on Arkansas Code Annotated section 11-9-102(5)(F)(iii) (Supp. 1997), appellant argues that appellee's

second injury was a nonwork-related independent intervening cause, thereby precluding the payment of benefits. That section provides:

> Under this subdivision. . ., benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of the claimant.

Ark. Code Ann. § 11-9-102(5)(F)(iii). In effect, appellant argues that the Commission should have found appellee's second injury to be a nonwork-related independent intervening cause as a matter of law.

Appellant's argument ignores the Commission's role as a fact finder. As a general matter, the determination of whether there is a causal connection between the injury and the disability is a question of fact for the Commission to determine. *See Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). Likewise, our prior decisions indicate that the determination of the existence of an independent intervening cause is a question of fact for the Commission to determine. *See Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993); *Lunsford v. Rich Mountain Elec. Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992)(reversing the Commission's finding of the existence of an independent intervening cause for lack of substantial evidence). Thus, the question of whether appellee's second injury was a nonwork-related independent intervening cause was not to be determined as a matter of law; rather, it was a question of fact for the Commission's determination. Therefore, we reject appellant's argument that the Commission erred as a matter of law.[1]

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[1] The dissent rests on Ark. Code Ann. § 11-9-102(5)(B)(ii) and (iii)(Supp. 1997). There is no indication in the Commission's opinion that these subsections were argued to the Commission. Indeed, appellant's argument was summarized in the opinion as follows:

> Respondents now appeal from [the ALJ's] opinion and order, contending that claimant's June 22, 1995, foot injury is the result of an independent intervening cause and is not a compensable consequence of his work-related injury.

Because appellant failed to raise an argument based upon § 11-9-102(5)(B)(ii) and (iii) below, we decline to address it here. *See Couch v. First State Bank of Newport*, 49 Ark. App.

Appellant also argues that the Commission's opinion is not supported by substantial evidence. Appellant focuses on Dr. Hazzard's testimony that the displaced fracture was not a natural consequence of the first fracture. Appellant complains that the Commission gave its own interpretation of the doctor's testimony, rather than giving the testimony its "plain and clear meaning."

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Broadway*, 41 Ark. App. at 113-14, 848 S.W.2d at 447. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; even where a preponderance of the evidence might indicate a contrary result we will affirm if reasonable minds could reach the Commission's conclusion. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Marrable v. Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). The Commission has a duty to use its experience and expertise in translating the testimony of medical experts into findings of fact. *Id.* It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; and when it does so, its findings have the force and effect of a jury verdict. *Id.*; *see Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

While Dr. Hazzard did confirm that he was not saying that appellee's displaced fracture was a "natural consequence" of

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102, 898 S.W.2d 57 (1995). Even if the Commission's opinion could somehow be read to indicate that an argument based upon this statute was raised, the opinion contains no ruling concerning this statute. It was the appellant's responsibility to obtain a ruling; a question not passed upon below presents no question for decision here. *See W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996).

his first fracture, other parts of his deposition testimony and his report of January 16, 1996, support the Commission's determination. The Commission was certainly empowered to draw inferences from Dr. Hazzard's testimony, and it did so. In this instance, the Commission's decision is supported by substantial evidence.

Affirmed.

NEAL, MEADS, and ROAF, JJ., agree.

GRIFFEN and BIRD, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The result in this appeal mocks Arkansas Code Annotated § 11-9-102(5)(B)(ii) and (iii) (Supp. 1997) and the plain expression of public policy that a "compensable injury" does not include:

> (ii) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities for the employee's personal pleasure;
>
> (iii) Injury which was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated.

Harry Highfill worked for Oak Grove Lumber Company near Rector. On June 16, 1995, he struck his right foot with a sledge hammer at work. A nurse practitioner treated his injury, which she diagnosed as a nondisplaced fracture of the right foot. Highfill returned to work soon after the incident. After working a few days he took off to attend a church outing at the Rector town park. While on that outing, on or about June 22, 1995, Highfill walked or tripped on a tree root. He felt something pop and immediately experienced severe pain in the right foot that was more severe than anything he suffered when he had the work injury several days earlier. He returned to the nurse practitioner, saw another doctor, and was eventually referred to Dr. Marion P. Hazzard, an orthopedic surgeon practicing in Paragould, who ordered X-rays that revealed a displaced fracture of the second metatarsal of the right foot.

Dr. Hazzard testified by deposition that in a letter dated January 16, 1996, he had opined that the initial trauma when Highfill struck his right foot with the sledge hammer at work on June 16, 1995, was

> [a] contributing factor to the subsequent displaced fracture of the second right metatarsal. . . . I'm not saying then that it was a natural consequence or the displaced fracture was a natural consequence of the first fracture. It's correct that the second fracture just doesn't follow as a natural progression in the course of events. He worked and nothing happened when he walked on level ground. . . . It is correct and fair to say that the disability and the need for the two surgeries was actually the displaced fracture which followed the event in the park. The major cause of the disability rating, the 20% of the right second toe or 1% of the foot, and the additional need for treatment was the displaced fracture for which I treated him.

Dr. Hazzard performed surgery on Highfill's right foot to repair the fracture. A second surgery was required to remove the plates that were placed in the foot during the first surgery. Highfill missed about two months from work, and filed a claim for temporary total disability benefits, the expenses associated with Dr. Hazzard's treatment, and the permanent anatomical impairment to his foot assessed by Dr. Hazzard. Despite this undisputed proof and the crystal clear wording of § 11-9-102(5)(B)(ii) and (iii), the majority now holds that the Commission properly held the employer responsible for the consequences of Highfill's church-outing mishap.

The majority has decided to affirm the Commission by holding that Highfill's June 22, 1995, tree-root incident while walking through the city park was an independent intervening cause. They reason that this was a question of fact within the Commission's exclusive province to resolve, and that its decision is supported by substantial evidence, notwithstanding Dr. Hazzard's testimony. However, the Commission should be reversed as a matter of law.

This case does not involve a question of fact because no facts are disputed. There is no dispute about the facts surrounding Highfill's injury from dropping a sledgehammer on his right foot

while working for appellant on June 16, 1995. It is undisputed that Highfill sustained a nondisplaced fracture from that incident, that he required no surgery for that fracture, and that he missed little or no work because of it. Highfill testified that his pain drastically increased following the June 22 tripping incident involving the tree root while on the church outing. Dr. Hazzard testified that the June 22 incident was the major cause of the displaced fracture, the need for surgical repair, and the resultant disability. There was no issue of fact; rather, the issue is whether Highfill sustained a "compensable injury" as a matter of law in view of the undisputed facts.

Before July 1, 1993, when the General Assembly mandated that injuries arising out of occurrences such as Highfill's church outing are not compensable, this case would have been determined by the principle of law set forth in *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The pertinent language from that opinion states:

> We conclude that in all our cases in which a second period of medical complications follows an acknowledged compensable injury we have applied the test. . .that where the second complication is found to be a *natural and probable result of the first injury, the employer remains liable for it. Only where it is found that the second episode has resulted from an independent intervening cause is that liability affected*. . . . We further conclude that in all our cases the test was and is the same: Is the second episode a natural and probable result of the first injury or was it precipitated by an independent intervening cause.
>
> The use of these different words descriptive of the rule being applied is best explained by the history of the development of our case law in this area, which has been derived largely from Larson's treatise on workmen's compensation. Larson places the "second medical complication" cases in two logical groups — those in which the second episode manifests itself in a non-industrial setting and those in which it arises in the course of employment. This is appropriate because of the different effect the claimant's own conduct may have on the employer's continued liability.

Id. at 71-72 (emphasis added) (citations omitted). Under the law before the General Assembly enacted Act 796 of 1993 and added

the previously referenced statutes to the workers' compensation law, an employer was forced to prove that the second episode resulted from what the *Bearden Lumber* opinion termed "non work-related negligent conduct on the part of the claimant which effects an independent intervening cause."

Even under the prior law, the Commission's decision is flawed. Under the *Bearden Lumber* analytical framework, the controlling inquiry is whether the June 22 tree root incident was a natural and probable result of the June 16 incident with the sledgehammer. However, the majority and Commission have adopted the manifestly absurd conclusion from Dr. Hazzard that the displaced fracture caused by the tripping incident was a direct result of the nondisplaced fracture that was caused by the sledgehammer even though Dr. Hazzard admitted that the displaced fracture did not follow as a natural progression from the nondisplaced fracture. The Commission, in wording that is nothing but fanciful, concluded that Dr. Hazzard's testimony meant that Highfill was not "destined" to sustain the displaced fracture because of the nondisplaced fracture.

Subsections (ii) and (iii) of § 11-9-102(5)(B) are clear statements of public policy against including tripping incidents while on church outings unrelated to the employment, from the definition of what is a "compensable injury." In other words, the 1993 changes to the workers' compensation law were obviously meant to do away with questions about concurrent or independent causation as well as whether a worker was negligent when a work-related condition is alleged to have precipitated a subsequent injury that occurs outside the work environment.

Thus, both the *Bearden Lumber* principle and the statutes enacted by the General Assembly in 1993 have been disregarded by the holding in this case. According to the decision rendered today, an employer's liability for a subsequent injury following a compensable injury now depends on whether the first injury "destined" the worker to suffer the subsequent injury. If so (by whatever fanciful thought process employed by the decision maker), the employer is liable *even if the injury occurred while the*

employee engaged in the very conduct that the statute expressly does not cover.

Instead of focusing on whether the church-outing tripping incident that resulted in the injury treated by Dr. Hazzard occurred while Highfill was engaged in or performed recreational or social activities for his personal pleasure (§ 11-9-102(5)(B)(ii)) or occurred at a time when employment services were not being performed (§ 11-9-102(5)(B)(iii)), the Commission disregarded the statute altogether, along with the employer's defense based on it. The Commission, Highfill, and the majority do not explain how or why this tortured analysis is consistent with a statute that practically reads, "Thou shalt not deem 'compensable' injuries that occur while people are engaging in personal leisure, recreational, or social activities, or that occur when people are not performing employment services." The majority opinion does not indicate what made the church outing anything other than an activity for Highfill's personal leisure, recreation, or social pleasure. There is no evidence that Highfill was performing employment services when he tripped or walked over a tree root in the Rector town park while on the church outing. One searches in vain for clues about how Highfill's nondisplaced fracture turned into a displaced fracture apart from the June 22, 1995, incident at the church outing.

Only last year, this court held that an employee is not entitled to compensation for slipping and falling on ice in the employer's parking lot while walking into the workplace from a car. *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). Two years ago, we held that "performing employment services" means the performance of those functions which are essential to the success of the enterprise in which the employer is engaged. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), *aff'd* 328 Ark. 381, 944 S.W.2d 524 (1997). Highfill produced no proof whatsoever showing how tripping over a tree root while walking on a church outing in a public park was essential to his employer's business. The majority cannot wish away these recent decisions and the plain wording of the statute simply by adopting the Commission's ridiculous con-

clusion that Highfill's first injury "destined" him to suffer the second.

One can now understand why the General Assembly was blunt about the intent for the 1993 amendments to the workers compensation law at Arkansas Code Annotated § 11-9-1001 (Repl. 1996), when it wrote:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. *Unfortunately, many of the changes made by this act* [Act 796 of 1993] *were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. . . . When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges the responsibility to do so. . . . In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.* (Emphasis added.)

This decision will be a leading exhibit at future legislative sessions to show what the General Assembly intended to avoid when it included § 11-9-1001 because it shows what judicial legislating in the workers' compensation context looks like and how determined the Commission and courts can be about ignoring duly enacted workers' compensation legislation. It is amazing, but hardly amusing, that this clear expression of public policy by a super-majority of the General Assembly is so brazenly disregarded, and during the first generation of cases to boot. Our job is to apply the law that the General Assembly enacts, not thumb our noses at it and dream up outrageous results bottomed on specious reasoning.

Hopefully, appellant will petition the supreme court to review this misguided decision. Meanwhile, I dissent.

BIRD, J., agrees.

Lee Wayne JETER *v.* B.R. McGINTY MECHANICAL

CA 97-700 968 S.W.2d 645

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 5, 1998

Slagle & Gist, by: *Richard L. Slagle*, for appellant.

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

JOHN E. JENNINGS, Judge. This is a workers' compensation case. Appellant, Lee Wayne Jeter, appeals from an order of the Commission, which found that he failed to prove by a preponderance of the evidence that medical problems requiring surgery in July 1994 were a compensable consequence of his June 1991 compensable injury. He argues that the Commission's finding is not supported by substantial evidence. Appellee, B.R. McGinty Mechanical, cross-appeals from the Commission's order, arguing that the award of attorney's fees is not supported by substantial evidence. We disagree, and affirm on both the appeal and the cross-appeal.

Appellant suffered a compensable injury while employed by appellee as a welder when he experienced a myocardial infarction at work on June 12, 1991. At that time Dr. Bruce Murphy, appellant's cardiologist, performed an angioplasty of a tight blockage in appellant's right coronary artery. Appellant subsequently developed another blockage in the right coronary artery which required another surgery in July 1994. He sought workers' compensation benefits for the 1994 blockage and surgery, arguing that they were causally related to the compensable 1991 injury.

On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). The

issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Where a claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of the relief sought. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

We also recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight given to their testimony. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). In addition, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Whaley, supra.*

At the hearing appellant testified that he has remained under Dr. Murphy's care since his 1991 heart attack and surgical procedure. His attempt to return to work after his heart attack was unsuccessful. He has remained on prescription medicines for his heart, has lost weight and quit smoking, and plays golf about once a week. After a check-up disclosed the subsequent blockage he underwent the second procedure in July 1994.

Medical evidence consisted of a letter from Dr. Murphy, appellant's treating cardiologist, which stated:

> Wayne Jeter is a patient of mine who I have been taking care of since 1991. He had a myocardial infarction in June 1991 and subsequently had the artery opened, June 1991, with angioplasty of a tight blockage in his right coronary artery. In July 1994, repeat coronary angiograms demonstrated that the exact blockage was back at the exact same location in his right coronary artery. This was effectively treated with a directional coronary atherectomy with removal of a large fractured plaque in the coronary at the site that the original infarct had occurred. The question arose as to whether or not this was a work related problem. His

> original infarct occurred while at work. My only certain response is that the exact same blockage is back in the exact same location and therefore, the ongoing treatment is for the same problem at a later time. I am afraid I can't be more specific than that. It is very clear from his coronary angiograms that a new blockage had not developed, but the old blockage had recurred at the exact same site. I hope that this is helpful in your work in this matter.

Also in evidence is a letter from Dr. Eugene M. Jones, which stated:

> I reviewed the records on Mr. Wayne Jeter with reference to his myocardial infarction that occurred in June, 1991 and his subsequent angioplasty. In addition to this, in July, 1994, he had repeat angiogram which showed coronary artery obstruction in approximately the same location of the right coronary artery. The patient does have other coronary artery disease as evidenced by mild obstructions in both the left anterior descending and circumflex systems.
>
> I am well aware that there are many Workman Comp claims for myocardial infarctions where the patient experienced a myocardial infarction while doing his usual routines. Commonly, this is classified as related to that work routine, however, as we also well recognize atherosclerosis of the coronaries is a process of continual change within the coronary arteries. The process involves break down of the wall of coronary arteries due to rather high sheer forces due to the amount of blood being transmitted to the myocardium. The break down in that wall is associated first on a genetic basis; that is, it is transmitted somewhat by heredity but is influenced by other factors such as cholesterol, smoking and regular exercise program.
>
> In this particular case, there appears to be a focus on the aspect that the recurrent lesion in the right coronary artery in 1994 was in the exact location that it was in 1991. This may indeed be more reflective of the sheer forces that are present in that coronary artery producing the lesion in the same site as previously had occurred. Since the patient had apparently had reasonable relief of symptoms for prolonged period, one would suggest that this may well be a progression of the disease process; that is atherosclerosis that has been documented as well in his other arteries.

> In review of this material, there appears to be some reference to the fact that the patient had reonset of his symptoms and in fact in March, 1992 on a treadmill he had some chest tightness in the recovery period and had some mild electrocardiographic changes but no echocardiographic evidence of alterations of wall motion. This then would make one consider that the patient did not have complete resolution of his right coronary artery lesion with the angioplasty done in 1991. Certainly this is all conjecture.
>
> I hope I have outlined the various possibilities and that my opinion really is that atherosclerosis of the coronary arteries is not significantly related to a patient's occupation but is more related to genetic factors and lifestyle conditions such as smoking, high cholesterol and hypertension.

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. *McDonald Equip. Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989). The basic test is whether there is a causal connection between the two episodes. *See Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The Commission's opinion quotes the letter from Dr. Murphy, and then states:

> With regard to Dr. Murphy's letter, we note that Dr. Murphy has *not* suggested that either the prior myocardial infarction itself, or the nature of the 1991 blockage treatment, increased the likelihood of the formation of a "recurrent" blockage at the site of the 1991 blockage. As we interpret Dr. Murphy's statements, Dr. Murphy's only basis for a possible causal connection between the claimant's 1994 coronary blockage and the claimant's 1991 coronary blockage is the mere coincidence that each blockage occurred at the same location. However, relying on Dr. Murphy's observation to find that the claimant's 1994 coronary blockage was related to the 1991 infarction (or the 1991 blockage treatment) would require us to engage in speculation and conjecture, and speculation and conjecture can never be substituted for credible evidence, no matter how plausible. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 151 (1980).
>
> Moreover, the greater weight of the evidence indicates that the coronary blockage identified in 1994, was causally related to

other factors and was *not* related to either the prior infarction or the prior blockage treatment. In this regard, Dr. Eugene Jones, also a cardiologist, indicated in a November 28, 1995, letter to the respondents' attorneys that he reviewed the claimant's 1991 and 1994 medical records (which were not submitted into evidence). According to Dr. Jones, atherosclerosis is a process of continued change within the coronary arteries which involves a break down of the walls of the coronary arteries due to rather high sheer forces created by the amount of blood being transmitted to the myocardia. Dr. Jones indicated that coronary artery break down is associated first with genetic factors, but other factors including cholesterol, smoking, and regular exercise may influence the process. Dr. Jones also indicated that recurrence of a lesion at the same location in the claimant's right coronary artery may merely reflect the sheer forces created by blood flow in the artery. In addition, Dr. Jones indicated that atherosclerosis is present in other arteries as well as the right coronary artery and that the claimant can be experiencing a natural progression of that disease process. Moreover, Dr. Jones opined that atherosclerosis, the underlying disease process, is more related to genetic factors and lifestyle conditions (smoking, high cholesterol and hypertension) and is not significantly related to a person's occupation.

Although Dr. Murphy did not address genetic factors or lifestyle conditions in his assessment of the probable etiology of the claimant's 1994 coronary blockage, we note that the claimant testified that Dr. Murphy placed him on a strict walking program and a low cholesterol diet, and advised the claimant to lose weight and quit smoking after identifying the 1994 blockage.

Therefore, after reviewing the opinions of Dr. Murphy and Dr. Jones, and all other evidence in the record, and for the reasons discussed herein, we find that the claimant failed to prove by a preponderance of the evidence that his 1994 coronary blockage is causally related to the compensable injury he sustained in 1991.

The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). The Commission interpreted appellant's only medical evidence, Dr. Murphy's letter, as stating that the only basis for a possible causal connection between the appellant's 1994 coronary blockage and his 1991 coronary blockage is the "mere coincidence that

each blockage occurred at the same location." Mere coincidence is not to be equated with causation. *Lybrand v. Ark. Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (1979). The Commission obviously considered the opinion of Dr. Jones, which indicated that appellant's atherosclerosis was related to genetic and lifestyle factors, and which described the possible connection to his prior blockage as "conjecture." It is the duty of the Commission to translate the evidence on all issues before it into findings of fact. The specialization and experience of the Commission make it better equipped than this court to analyze and translate evidence into findings of fact. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Chamber Door Indus., Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

Because the Commission's opinion displays a substantial basis for the denial of the relief sought, we must affirm.

The Commission's opinion also awarded appellant's attorney a fee of ten percent of appellant's compensation for a seventy-five percent permanent partial anatomical impairment. Appellee cross-appeals, arguing that there is no substantial evidence to show that the issue of permanent partial disability was controverted.

The Commission's opinion notes that appellee initially controverted compensability on appellant's June 1991 injury in its entirety. However, at the start of the hearing on September 23, 1992, appellee proposed stipulations concerning compensability, lump sum temporary total disability benefits, and the commencement of permanent partial disability benefits. Appellee's counsel stated that the claim had been controverted in its entirety, and appellee would pay appellant's counsel "in lump sum attorney's

fees on those benefits which have accrued to date, and then pay him accordingly in some fashion for benefits in the future prior to either a joint petition settlement or further determination by the Commission regarding disability." The agreed order, entered on October 26, 1992, reflects that appellee would begin to pay permanent partial disability on an anticipated anatomical ruling from Dr. Murphy and states that appellant's attorney "is to be paid a maximum attorney's fee on all controverted benefits." Reading the order in light of the stipulations, the Commission stated:

> [W]e understand the administrative law judge's September 23, 1992 order to require [appellee] to pay an attorney's fee on [appellant's] permanent partial disability compensation as well as on [appellant's] reasonably necessary medical expenses and his temporary total disability compensation. Consequently, we find that the issue of the [appellee's] obligation for an attorney's fee on the claimant's 75% permanent partial impairment rating is now *res judicata.*

The Commission further stated that, even if the issue of attorney's fees for appellant's permanent partial disability was not res judicata, it would still find that appellee had controverted appellant's entitlement to permanent partial disability.

Appellee argues that it is undisputed that the issue of permanent partial disability was reserved, as shown in the prehearing order, and that appellee agreed to pay whatever rating was assigned and has done so. The Commission, however, found that the record of the hearing and the ALJ's order from 1992 clearly establish that the parties did in fact raise and develop the permanent partial disability issue at the hearing. Furthermore, the Commission found that the evidence indicates that appellee initially denied liability for any benefits until the September 23, 1992, hearing, but then stipulated that appellant was in fact entitled to compensation for a permanent anatomical impairment rating retroactive to September or October of 1991.

Whether or not a claim is controverted is a question of fact for the Commission, and its finding on this issue will not be reversed unless there is no substantial evidence to support it. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976). Because we cannot say that reasonable minds could not

reach the Commission's conclusion regarding controversion and attorney's fees, we affirm.

Affirmed.

PITTMAN and AREY, JJ., agree.

CRABTREE, MEADS, and ROAF, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I do not believe the Commission's decision is supported by substantial evidence and would reverse.

The facts in this case are characterized by both parties as relating to a subsequent injury or disability, or a recurrence, and their arguments revolve around those concepts. However, it is more appropriate to assess the dispute in terms of whether the second procedure was reasonably necessary medical treatment for Jeter's admittedly compensable 1992 heart attack. The appellant's treating physician, Dr. Murphy, opined that:

> . . . the exact blockage was back at the exact same location in his right coronary artery. It is very clear from his coronary angiograms that a new blockage had not developed but the old blockage had recurred at the exact same site.

However, B.R. McGinty arranged for Jeter's records to be reviewed by another cardiologist, Dr. Jones. Dr. Jones states, in generalities, the causes of heart disease, and then, without ever seeing or treating Jeter, opined that the need for further treatment was caused by genetics or high cholesterol.

Admittedly, the Commission has wide latitude in weighing the medical evidence; however, when a case turns on such evidence, its decision must still be supported by substantial evidence. In this case, the Commission reviewed a cold record giving no weight to the assessment of the determination of credibility made by the ALJ in its *de novo* review of the record. This procedure begs the question of why there is a hearing at all if there is no deference whatsoever given to the tribunal that actually sees and hears the witnesses. It would be more economical to forego a hearing and send the case to the appellate courts without a hearing and solely by depositions. Of course, the abbreviated procedure may fly in

the face of procedural and substantive due process, but it is analogous to the situation that currently exists where the Commission, without assessing the personal attributes of the witnesses testifying, reverses a decision of the ALJ on credibility. This case is particularly notable because the Commission evidently accepted the testimony of a physician hired to review Jeter's medical records who testified to heart disease in general, whereas Dr. Murphy actually treated the appellant and was aware of the unique circumstances of his case.

The Commission cites *Dena Const. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 151 (1979), for the proposition that a decision cannot rest on speculation and conjecture. The *Dena* case has been cited many times for this proposition, but the holding in *Dena* was that of an appellate court and not the Commission. The Commission is to weigh the evidence presented to it and give whatever weight it considers appropriate to the testimony of the witness. *Hanson v. Amfuel*, 54 Ark. App. 370, 925 S.W.2d 166 (1996). They need not set aside their common sense in making their decision. The Commission may make reasonable inferences from the testimony received and base its decision on both the direct evidence and the inferences that may be drawn from that testimony. To reject the testimony of the treating physician in this case, and accept that of a doctor who never saw the patient and testified in generalities, is to shirk the obligation to make a decision based upon reasonable inferences from the evidence. Such a well-settled procedure cannot be characterized as relying on speculation and conjecture.

In this case, there is more than enough evidence in the record to indicate that the medical services provided to the appellant were a result of the initial injury. Dr. Murphy was clear in stating that the blockage was in the exact same place as the previous blockage. The reasonable inference to be drawn from this fact is that the blockage was site-specific as a result of the initial injury. Any other conclusion would in fact result in speculation and conjecture on the part of the Commission.

With due respect to my fellow judges, I dissent.

MEADS, J., joins in this dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I agree with the majority on the affirmance of the direct appeal brought by Jeter. However, I do not agree that the cross-appeal should also be affirmed, and I would reverse.

B.R. McGinty argues on cross-appeal that there is no substantial evidence to support the Commission's finding that it controverted the award of Jeter's permanent partial disability (PPD). It contends that the Commission disregarded controlling authority in *Lambert v. Baldor Elec.*, 44 Ark. App. 117, 868 S.W.2d 513 (1993), and points to the prehearing order filed August 27, 1992, which states in pertinent part:

> Claimant contends in summary that he sustained a compensable heart attack on June 12, 1991; that he is entitled to temporary total disability benefits from June 12, 1991, and continuing through an undetermined date based upon the medical evidence; payment of all medical and related expenses; and controverted attorney's fee on any benefits awarded. *Claimant specifically reserved the issues of vocational rehabilitation and permanent disability.*

(Emphasis added.)

B.R. McGinty contends that the issue of permanent disability was specifically reserved and that it willingly began paying PPD even before a rating had been assigned and the amount established. Further, citing *Aluminum Co. of Amer. v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976), B.R. McGinty contends that the purpose of the attorney fees statute is to discourage respondents from delaying accepting liability for the claim and to deter arbitrary denial of claims, and because it promptly paid the PPD benefits, it should not be penalized. I fully agree with both contentions.

In the August 27, 1992, prehearing order, the issue of permanent impairment was specifically excepted from the scheduled September 23, 1992, hearing. Although the Commission is essentially correct in stating that the "parties did in fact raise and develop the permanent anatomical impairment issue at the September 23, 1992, hearing," this statement is misleading. B.R. McGinty raised this issue only to totally capitulate. The administrative law judge (ALJ) noted on the record B.R. McGinty's decision to pay PPD even though Jeter had not yet been medically

maximized, and stated, "of course, as you all were both aware, the primary issue was one of compensability, and permanent disability, as well as rehabilitation, was specifically reserved even by the terms of the prehearing order filed August the 27th." Accordingly, it was clear that B.R. McGinty could have controverted the amount of PPD, but chose not to. While *res judicata* prevented it from subsequently controverting the amount of PPD benefits, it has nothing to do with deeming a reserved issue controverted.

Moreover, B.R. McGinty justifiably relies upon *Lambert v. Baldor Elec., supra.* In *Lambert*, the employer had fully controverted a claim. However, after the ALJ ruled that the injury was compensable and awarded temporary disability benefits and attorney's fees, the employer settled a later claim for total permanent disability benefits on the day Lambert requested a hearing on the issue. This court rejected Lambert's argument that, because the employer had controverted disability at a prior hearing, such controversion should extend to any disability benefits awarded at any subsequent hearing, stating, "this argument is without merit because Baldor Electric did not controvert Lambert's claim for permanent benefits." This is precisely the scenario presented in the instant case, however, the Commission and this court inexplicably have chosen to penalize B.J. McGinty, who agreed to pay permanent benefits at an even earlier stage than did the employer in *Lambert.*

Although it is true that the question of controversion is one of fact to be determined by the Commission and must be affirmed if supported by substantial evidence, *Aluminum Co. of Amer. v. Henning, supra,* I conclude that there is no evidence of controversion of the reserved issue of PPD. Accordingly, I would reverse the Commission's award of attorney fees based on the PPD award.

CRABTREE, J., joins.

CANTRELL-WAIND & ASSOCIATES *v.*
GUILLAUME MOTORSPORTS, INC.

CA 97-1186 968 S.W.2d 72

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1998

The Nixon Law Firm, by: *David G. Nixon* and *Michael D. Holland*, for appellant.

Gocio, Dossey & Reeves, PLC, by: *Jerry B. Dossey*, for appellees.

SAM BIRD, Judge. Cantrell-Waind & Associates, Inc., has appealed from a summary judgment entered for appellee Guillaume Motorsports, Inc., in its action to recover a real-estate brokerage commission. Because we agree with appellant that the

circuit judge erred in his interpretation of the applicable law and because genuine issues of material fact remain to be tried, we reverse and remand.

On August 1, 1994, appellee, represented by its president and sole stockholder Todd Williams, agreed to lease real property in Bentonville to Kenneth Bower and Kay Bower. The lease gave the Bowers an option to purchase and provided for the payment of a commission to appellant, the real-estate broker in this transaction, as follows:

> In the event of the *exercise* of this option within the first twenty-four (24) month period, ten per cent (10%) of the monthly rental payments shall apply to the purchase price. Thereafter, this credit shall reduce two per cent (2%) per year until the expiration of the original lease term hereof, to the effect that the credit will be eight per cent (8%) during the third year, six per cent (6%) during the fourth year, and four per cent (4%) during the fifth year. The sales price shall be $295,000.00. GUILLAUME MOTOR-SPORTS, INC., agrees [to] pay CANTREL-WAIND & ASSOCIATES, INC., a real estate commission of $15,200.00 upon closing of sale of the property under this Option to Purchase, provided the *closing* occurs within two (2) years from the date of execution of the Lease with Option to Purchase.

The Bowers' attorney, Charles Edward Young III, notified Williams in writing on April 23, 1996, that the Bowers chose to exercise the option to purchase, and that they anticipated closing at the earliest possible date. Young also sent a copy of this letter to Samuel Reeves, appellee's attorney. Soon after this, Williams approached Mr. Bower and offered to credit him with one-half of the appellant's $15,200 commission if he would agree to delay closing until after August 1, 1996. Mr. Bower declined this offer.

Ruth Ann Whitehead, a loan officer at the Bank of Bentonville, notified Mr. Bower on July 19, 1996, that the loan had been approved and that she awaited notification of a closing date. In his deposition, Young said that he attempted to set a July closing date on behalf of the Bowers but had been told by Ms. Whitehead, Reeves, and a representative of the title company that Williams had told them he would be out of the country in late July and unavailable for closing until after August 1.

Young also said that he had asked Reeves if Williams would utilize a power of attorney for closing before August 1 but Williams refused. Williams did not leave the country and was in Bentonville July 22 through 25. Closing occurred on August 14, 1996, and the commission was not paid.

Appellant filed a complaint against Guillaume Motorsports, Inc., on August 12, 1996, for breach of contract. Appellee moved for summary judgment on the ground that it was under no obligation to close the transaction before August 1. In support of its motion, appellee filed the affidavits of Ms. Whitehead and Mr. Carroll, who stated that, to their knowledge, a closing date was not scheduled before August 14, 1996.

Appellee Williams also filed his affidavit stating that a closing date was not established before August 14, 1996, and that the Bowers had not demanded an earlier closing date. Further, he admitted: "While I did in fact approach Kenneth Bower with a proposal to reduce the purchase price if he would agree to establish a closing date after August 1, 1996, my offer was not accepted and no such agreement was made." He said although it would not have bothered him to put the closing off until after August 1, he did not think it was a "conscious decision" not to be available until after August 1.

In a hearing on the motion for summary judgment, counsel for appellee argued that neither the corporation nor Williams was under any obligation to close prior to August 1. He contended there was no bad faith to be inferred by the deliberate avoidance of a real estate commission that is keyed to a "drop-dead" date. He said the real estate broker agreed to the terms of the contract and was bound by it. Counsel pointed out the two separate terms used in the contract when referring to the option to purchase and the closing. The contract stated that to get the maximum discount in the purchase price the Bowers had to *exercise* the option before August 1, 1996. However, the clause referring to the commission stated that the transaction had to *close* by August 1. Counsel stated, "I believe my client had every right to do anything within his power, short of breaching his contract with this buyer,

to see that this closing didn't occur earlier than that date so he would not owe the commission."

In response to appellee's motion for summary judgment, appellant argued that appellee (by Williams) had a duty to act in good faith and that, in taking steps to prevent the transaction from closing before August 1, 1996, appellee had not acted in good faith. Appellant contended that all contingencies and requirements for the loan had been satisfied by July 19, 1996, and that Mr. and Ms. Bower had attempted to establish a closing date before August 1, but had been deliberately prevented from doing so by Williams's misrepresentations that he would be out of the country and unavailable to close until after August 1. Appellant attached as exhibits excerpts from the depositions of Ms. Whitehead, Mr. Young, Laura Tway (who assisted with closing), Mrs. Bower, Mr. Bower, Williams, and Mr. Carroll. Also attached was a copy of Mr. Young's May 28, 1996, letter to Mr. Reeves. In a supplemental response to the motion for summary judgment, appellant also requested summary judgment against appellee.

In his order granting summary judgment, the judge stated that appellee had no obligation to appellant to arrange for a closing date that would have entitled appellant to a commission and said that the real estate commission was "clearly avoidable" by appellee.

On appeal appellant argues that the trial court erred in ignoring Williams's prevention of a condition precedent as a material fact and that the trial court erred in granting summary judgment in appellee's favor. Appellant argues that, although appellee had no duty to insure that closing occurred before August 1, 1996, it did have a duty not to actively hinder or prevent the transaction from closing before that date. Appellee contends that the circuit court acted appropriately in refusing to extend its obligations beyond those created by the express terms of the contract and that Williams was under no obligation to make himself available for a closing date that would have entitled appellant to a commission.

The term of the contract providing that a commission would be due appellant only if closing occurred before August 1, 1996, is a condition precedent. *See Stacy v. Williams*, 38 Ark. App.

192, 834 S.W.2d 156 (1992). When a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable; however, courts will become involved when the party making the decision is charged with bad faith. *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996).

In *Willbanks v. Bibler*, 216 Ark. 68, 224 S.W.2d 33 (1949), the Arkansas Supreme Court held that "he who prevents the doing of a thing shall not avail himself of the nonperformance he has occasioned." *Id.* at 72, 224 S.W.2d at 35. *See also* Samuel Williston, *The Law of Contracts* § 677 (3d ed. 1961). This principle is expressed in 17A AM. JUR. 2d *Contracts* § 703 (1991):

> One who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance. Even more broadly, where a promisor prevents or hinders the occurrence, happening, or fulfillment of a condition in a contract, and the condition would have occurred except for such hindrance or prevention, the performance of the condition is excused and the liability of the promisor is fixed regardless of the failure to perform the condition. Moreover, while prevention by one party to a contract of the performance of a condition precedent excuses the nonperformance of the condition, it must be shown that the nonperformance was actually due to the conduct of such party; if the condition would not have happened whatever such conduct, it is not dispensed with.

A party has an implied obligation not to do anything that would prevent, hinder, or delay performance. *See Housing Auth. of the City of Little Rock v. Forcum-Lannom, Inc.*, 248 Ark. 750, 454 S.W.2d 101 (1970); *Dickinson v. McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939); *Townes v. Oklahoma Mill Co.*, 85 Ark. 596, 109 S.W. 548 (1908); *Smith v. Unitemp Dry Kilns, Inc.*, 16 Ark. App. 160, 698 S.W.2d 313 (1985); *City of Whitehall v. Southern Mechanical Contracting, Inc.*, 269 Ark. 563, 599 S.W.2d 430 (Ark. App. 1980).

Comment b to section 225 of the *Restatement (Second) of Contracts* (1981) provides that the non-occurrence of a condition of a duty is said to be "excused" when the condition need no longer occur in order for performance of the duty to become

due: "It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing." The *Restatement (Second) of Contracts* § 205 (1981) states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." This legal principle also applies to contracts providing for the payment of commissions to real estate agents. *McKay and Co. v. Garland*, 17 Ark. App. 1, 701 S.W.2d 392 (1986). Accordingly, we hold that the circuit court erred in failing to recognize that a duty of good faith and fair dealing was included in this contract and, therefore, appellee was obligated to not deliberately avoid closing the transaction before August 1, 1996.

Our above holding requires a determination of whether there is a genuine issue of material fact as to whether appellee's actions prevented or hindered the occurrence of the condition precedent. The burden of sustaining a motion for summary judgment is on the moving party. *Moeller v. Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985). On appeal, we must view the evidence in the light most favorable to the nonmoving party. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 879 S.W.2d 451 (1994). It is our task to determine whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Johnson v. Harrywell, Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). Summary judgment is not proper where evidence, although in no material dispute, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.* It is not the role of summary judgment to weigh and resolve conflicting testimony but to simply decide whether such questions exist to be resolved at trial. *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997). A summary-judgment analysis does not evaluate evidence beyond the question of whether a dispute exists. *Id.*

Appellant presented evidence that all of the requirements for the transaction to close had occurred by July 19, 1996, and that Mr. and Ms. Bower were eager to close before August 1; that Williams was aware that closing could occur before August 1; and that Williams had stated to Ms. Whitehead that he would be unavailable to close the transaction until after August 1 because he would

be out of the country. In his deposition, and in his answers to appellant's requests for admission, appellee Williams admitted that he was in fact in Bentonville from July 22 through 25 and that he did not leave the country.

In its brief, appellant asserts that it was entitled to summary judgment. We note, however, that appellant did not move for summary judgment but simply requested such relief in the conclusion to its supplemental response to appellees' motion for summary judgment. Consequently, even if the trial court had applied the correct principle of law, and if appellant had properly moved for summary judgment, we could not agree that summary judgment was warranted. In his deposition, appellee Williams testified that he was ready, willing, and able to close and would have closed the transaction before August 1 if he had been contacted. He also stated that, although he was in Bentonville on July 22 through 25, he was not aware until the afternoon of the 25th that the Bowers wanted to close the transaction as soon as possible. In our opinion, genuine issues of material fact remained for trial. Accordingly, we reverse the circuit judge's entry of summary judgment for appellees and remand this case for trial.

Reversed and remanded.

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

HOPE LIVESTOCK AUCTION CO. *v.* Johnny KNIGHTON
and CNA Insurance Co.

CA 97-1314 966 S.W.2d 943

Court of Appeals of Arkansas
Division III
Opinion delivered May 6, 1998
[Petition for rehearing denied June 3, 1998.]

Howell, Trice & Hope, by: *Mark T. McCarty*, for appellant.

Dunn, Nutter, morgan & shaw by: *Nelson V. Shaw*, for appellee CNA Ins.Co.

Wright & Burke, by: *William Ranal Wright*, for appellee Johnny Knighton.

TERRY CRABTREE, Judge.

Appellant Hope Livestock Auction Company appeals the decision of the Workers' Compensation Commission affirming the administrative law judge's finding that the appellant is responsible for appellee Johnny Knighton's bipolar disorder and prior back injuries. We reverse and remand for the Commission to make a finding of fact as required by Ark. Code Ann. section 11-9-113 (Repl. 1996).

In 1978, appellee Johnny Knighton began working at the Hope Livestock Auction in Hope, Arkansas. Since that time, he has suffered several job-related injuries. The first job-related injury was to his knee in 1981. That injury required surgery that was performed the same year. Appellee then injured his back in 1985 and was operated on by Dr. George Bohmfalk, a neurosurgeon. After another injury in 1986, appellee returned to Dr. Bohmfalk, who once again operated on his back. In 1990, Appellee Knighton began having problems in his hip and lower back and began experiencing numbness in his right shin. As before, Dr. Bohmfalk operated on appellee's back, making this appellee's third back surgery.

Appellee Knighton continued performing the same type of work, with the exception that he stopped riding horses as Dr. Bohmfalk had ordered. In 1991, Appellee Knighton went to a pain clinic at Baptist Medical Center because of some continuing back pain. It was also during this time period that Dr. Bohmfalk began prescribing medication to combat appellee Knighton's depression. Dr. Tobey, Knighton's treating psychiatrist, later diagnosed him with a bipolar I disorder.

All of the medical costs incurred by appellee Knighton for the three back surgeries and the related psychological problems were paid by appellant, Arkansas Property and Casualty Guaranty Fund, or some related company.

In November 1995, appellee Knighton was hit by a cow and knocked to the ground. Knighton promptly returned to work after being checked by Dr. Bohmfalk and continued to work until July 3, 1996, when he could no longer handle the job because of his bipolar illness.

Appellee CNA Insurance Company replaced Arkansas Property and Casualty Fund as the workers' compensation insurance carrier for Hope Livestock Auction on January 1, 1995. At all prior times, appellant had workers' compensation coverage provided by Hope Livestock Auction, which paid all medical and psychological costs on the physical and mental conditions that are now in question.

A hearing was held in Texarkana, Arkansas, on October 4, 1996. In an opinion filed on November 13, 1996, the Administrative Law Judge (ALJ) ordered the appellant to pay temporary total disability benefits at the rate of $212.67 per week until it was determined that the healing period had ended, and pay Knighton's medical bills related to his back and psychological disorder. It was further ordered that Appellee CNA Insurance Company was liable for any additional medical costs due to the November 1, 1995, incident.

The full Workers' Compensation Commission affirmed the opinion of the ALJ with the modification that the appellant's responsibility for the bipolar disorder be limited to twenty-six weeks of disability benefits. Appellant argues on appeal that: (1) the Commission's finding that the appellee's alleged mental injury or illness is compensable is not supported by substantial evidence; (2) the full Commission's finding that the appellee is entitled to additional temporary total disability benefits is not supported by substantial evidence; and (3) the full Commission's finding that the appellee's subsequent aggravation was temporary in nature is not supported by substantial evidence. Because this court finds the appellant's first argument convincing and therefore reverses and remands on that point, the other two points on appeal need not be addressed.

This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evi-

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

Appellant argues that the Commission's finding that appellee Knighton's bipolar disorder is compensable is not supported by substantial evidence and that Knighton did not establish the *prima facie* elements of his claim. The applicable statute is Ark. Code Ann. section 11-9-113, which provides:

> *Mental Injury or Illness.*
>
> (2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

Appellant argues that since there was no testimony as to whether the diagnosis meets the criteria of the Diagnostic and Statistical Manual of Mental Disorders (DSMD), the Commission conducted an extrajudicial review of documentation not introduced into evidence. We agree.

■ ■ The ALJ, the Commission, and any reviewing court must construe the provisions of the workers' compensation statutes strictly. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). The ALJ and the Commission are to weigh the evidence impartially and without giving the benefit of doubt to any party. Ark. Code Ann. § 11-9-704(c)(4) (Repl. 1996). In its opinion, the Commission stated that:

> [a]lthough the psychiatrist never testified claimant's diagnosis of bipolar specifically meets the Diagnostic and Statistical Manual of Mental Disorders, when we review this manual we find that the diagnosis of bipolar I disorder satisfies this statutory requirement.

The Commission's *de novo* review is confined to the record established by the ALJ. The extrajudicial review of documentation not introduced into evidence was an error. We reverse and remand for further findings.

Reversed and remanded.

ROGERS and MEADS, JJ., agree.

James BOYD *v.* DANA CORPORATION

CA 97-1539 966 S.W.2d 946

Court of Appeals of Arkansas
Division III
Opinion delivered May 6, 1998

[Petition for rehearing denied August 19, 1998.]

Paul J. Teufel, for appellant.

Kilpatrick, Aud & Williams, L.L.P., by: *A. Gene Williams*, for appellee.

MARGARET MEADS, Judge. Appellant, James Boyd, appeals a decision of the Workers' Compensation Commission that denied his claim for benefits on the finding that he failed to prove by a preponderance of the evidence that his carpal tunnel syndrome was caused by rapid repetitive motion. The Commission also found that appellant failed to prove the alleged compensable injury is the major cause of his disability or need for treatment.

Boyd, a forty-six-year-old man who has diabetes, worked for appellee for sixteen years. In May 1995 he noticed numbness and tingling in his right hand. He continued to work and first reported his injury and symptoms in February 1996 after nerve conduction tests ordered by Dr. Mark Brown determined that he had bilateral carpal tunnel syndrome. Appellee recommended that appellant see the company physician, Dr. Carpenter, who concurred with Dr. Brown's diagnosis. Dr. Brown has not released appellant from treatment and has recommended surgery.

At the hearing on his claim, appellant testified that for the last sixteen years he has performed four steps to make a gear, which involve loading and operating machines. Appellant described the process as follows:

> The first thing when I come in of the morning I load the gear hobs, vertically. There's two gears that goes [sic] on the hob. And they weigh, like I said, on the average of twelve pounds apiece. And after I start the gear hob, I turn around, and the turning lathe loads horizontally. And I'll take the part out of one side of the lathe, put it on a machine that stamps a number on the part, and I'll reach into the other side of the lathe. And when I do I have to extend my hand in this manner and take the gear out. . . . And I take it out of this side of the machine and put it into the other side and chuck it into the other side of the machine. And I reach into the box where the blank gears are and load the other side of the turning lathe. And I get it loaded and get it running, and I stamp my gear on the stamper, and put it over by the hob. And then I'll go down and run the wire brush, you know, that brushes each side of the gear. And like I say, there's two gears. . . . [the motion involved is] [j]ust picking the

> gear up off of the little conveyer, there, and putting it on the wire brush, and closing the door. And it brushes it and then we'll take it and flip it over and brush the other side. . . . And when I get both parts wire brushed, then by that time I got back down to the turning lathe and it's finished. And I'll do the step involved with the turning lathe, getting it going again. And at that point I'll have probably a minute and a half, you know, before the turning lathe cycles through. And then I'll get it loaded again, and by that time the gear hob is ready to be loaded, and the process starts all over again.

Appellant described his job as requiring constant movement and said he works at a fairly rapid speed. When the machine stops he has to load it quickly to get the next set of gears going. He testified further that he averages 115 to 120 gears a day and estimates he has made 280,000 gears during his career. Appellant testified further that the number of gears he does varies according to the factory production rate.

In a letter dated February 27, 1996, Dr. Brown stated that a Nerve Conduction Velocity Study showed moderate right carpal tunnel syndrome and mild left carpal tunnel syndrome, and it was his medical opinion that appellant's diagnosis is work related. On May 6, 1996, Dr. Brown wrote further that:

> [Appellant's] symptoms could certainly be related to his job and that combines with the fact that he has nerve conduction velocity studies documenting carpal tunnel syndrome on the right and the fact that he has been employed at Dana for years . . . leads me to believe this is a work-related problem.

The Administrative Law Judge found that appellant proved that he sustained a gradual injury caused by rapid and repetitive motion which was the major cause of his disability or need for medical treatment. The Commission reversed the law judge, holding that appellant failed to prove he sustained a compensable rapid repetitive motion injury, and further that he failed to prove the alleged compensable injury is the major cause of his disability or need for treatment.

The Commission stated that appellant prepared one gear every 4.78 minutes with a 1.5-minute interval before beginning a new gear. It stated one gear prepared every 4.78 minutes is not

evidence of swift or quick motion, nor is it marked by a notably high rate of motion. Citing *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997), the Commission held that movement intensive work does not rise to the level of rapid when the movements are separated by periods of delay or hesitation. In regard to the major cause requirement, the Commission held that appellant's symptoms and diagnostic findings are also associated with diabetes. It stated that "although symptoms consistent with carpal tunnel syndrome are quite commonly said to be caused by repetitive trauma, these symptoms and diagnostic findings are also associated with diabetes" and held that appellant's problems are "just as consistent with a diabetes-related neuropathy as they are with a trauma-caused carpal tunnel syndrome."

On appeal, appellant argues that the Commission's opinion is not supported by substantial evidence. When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). However, this standard must not totally insulate the Commission from judicial review and render this court's function in these cases meaningless. *Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). We will reverse a decision of the Commission when we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

Arkansas Code Annotated Section 11-9-102 (Supp. 1997) provides:

> (5)(A) "Compensable injury" means:
>
> . . . .
>
> (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it

> is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> (a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

In determining that appellant's carpal tunnel syndrome was not caused by rapid repetitive motion, the Commission emphasized that appellant prepared one gear every 4.78 minutes with a 1.5 minute interval before beginning a new gear, and concluded that appellant's movement intensive work separated by a period of delay or hesitation did not rise to the level of rapid. Citing *Lay, supra*, the Commission held that appellant failed to prove his movements and motion to prepare the gear met the requirement of rapid repetitive motion. The Commission stated, "When we analyze this case with the Court of Appeals' holding in *Michael Lay v. UPS*, we find that claimant has failed to prove that his movements and motion to prepare a gear meet the requirement of rapid repetitive motion."

We do not believe that *Lay, supra*, is dispositive. In that case, the appellant asserted that his motions were rapid because he made nearly 80 deliveries per day during a ten- to eleven-hour shift. Although that appellant made up to eighty deliveries a day and briefly performed several different rapid repetitive motions, between those motions he drove to new locations, walked up to houses, and walked back to his truck. This court held that Lay's particular motions separated by periods of several minutes or more do not constitute rapid repetitive motion.

To the contrary in the instant case, the evidence is that appellant's series of repetitive motions were performed 115 to 120 times per day separated by periods of only 1.5 minutes, and we do not think that this brief interval rises to a period of "several minutes or more" as stated in *Lay*. Moreover, appellant testified that he had to load the gears "quickly," that the speed at which he worked was "fairly rapid," that there was constant movement until the gear got to the next station, and that the steps were repetitive. Based upon the evidence in this case, we do not believe fair-minded persons with the same facts before them could have reached the Commission's conclusion.

Nor do we agree that appellant failed to satisfy the "major cause" requirement of our Workers' Compensation Law. In its opinion, the Commission stated that appellant's problems are just as consistent with a diabetes-related neuropathy as with a trauma-caused carpal tunnel syndrome. However, there is no evidence in the record from which the Commission could conclude that appellant suffered any neuropathy as a result of his diabetes, and we think that the Commission engaged in speculation in making this finding. The only evidence in the record regarding appellant's diabetes is appellant's testimony that he had been diagnosed with diabetes for approximately four years, that Dr. Brown treats his diabetes, that he takes insulin, and that his doctor has not warned him that his diabetes can cause numbness of his hands and feet. Indeed, it was Dr. Brown's medical opinion that appellant's carpal tunnel syndrome is work related. Thus, the only evidence indicated that the sole cause of appellant's carpal tunnel syndrome was his work activity. An administrative body like the Commission is not granted leeway to arbitrarily disregard the testimony of any witness, nor may it reach outside the record for facts that may or may not exist. *Wade v. Mr. C. Cavenaugh's, supra.*

Finally, we are somewhat disturbed by the Commission's apparent reliance on the dissent in *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997). Regardless of whether the dissent articulated a "meaningful standard that can be used to assess the proof" in a rapid repetitive motion case, they are not at liberty to follow it. *Sitz v. State*, 23 Ark. App. 126, 128, 743 S.W.2d 18, 20 (1988).

Reversed.

ROGERS and CRABTREE, JJ., agree.

Paul A. BROOKS *v.* DIRECTOR, Arkansas Employment Security Department; and Rocky's Corner, Inc.

E 97-284 966 S.W.2d 941

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1998

ANDREE LAYTON ROAF, Judge. This is an unbriefed employment security case. Paul A. Brooks appeals from the Board of Review's decision that he voluntarily left his last work without good cause connected to the work. We hold that the Board's decision is not supported by substantial evidence, and reverse and remand for an award of benefits.

Brooks was employed by appellee Rocky's Corner in Hot Springs as a daytime pizza cook from December 1995 until August 1997. At the hearing before the Appeals Tribunal, Brooks testified that he quit his job on August 30, 1995, because the air conditioning was not working, the temperature outside was one hundred degrees, the heat in the kitchen where the pizza ovens were located was unbearable, there was no circulation because the manager refused to allow the outside door to the kitchen to be opened to provide some relief, and also would not allow a door between the kitchen and the dining area, where the air conditioning was working, to be opened while customers were on the premises.

Brooks further testified that the problem with the air conditioning had been going on all summer, that he had complained to the owner three to four times about the heat in the kitchen, and that the owner had attempted without success to have the air conditioner repaired. Brooks testified that he had to work right next to the pizza ovens, and that on the day in question, the kitchen was so hot that sweat was running down his face into the pizzas.

The manager at Rocky's Corner, Patty Bates, testified at the hearing and stated that they were continually calling people to work on the air conditioners, that it was a constant problem that summer, that she closed and locked the outside kitchen door on the owner's instructions, and admitted that the temperature was one hundred degrees outside on the day Brooks quit.

Brooks appealed the denial of unemployment benefits by the Employment Security Department, and the Appeal Tribunal reversed the agency determination, finding that Brooks left because of good cause connected with the work, and that he had made reasonable efforts to resolve the problem. The Board of Review reversed the decision of the Appeal Tribunal, stating that "[w]orking in a kitchen is hot. That is the nature of the work." The Board also found that Brooks had not presented sufficient evidence of his working conditions, such as the exact temperature in the kitchen, the amount of time left on his shift, amount of time he had worked on his last day, whether any other employees complained, and whether there were other remedies to the problem besides quitting.

In appeals of unemployment compensation cases, the findings of fact by the Board of Review are conclusive if supported by substantial evidence, and our review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it. *Hiner v. Director*, 61 Ark. App. 139, 965 S.W.2d 785, (1998); *Rodriguez v. Director*, 59 Ark. App. 8, 952 S.W.2d 186 (1997). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. This court reviews the evidence and all reasonable inferences deducible therefrom in a light most favorable to the Board of Review's findings. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). We do not conduct a *de novo* review in appeals from the Board of Review. Even when there is evidence

upon which the Board might have reached a different decision, our review is limited to a determination of whether the Board could have reasonably reached its decision based upon the evidence before it. *Hiner, supra, Cowan v. Director*, 56 Ark. App. 17, 936 S.W.2d 766 (1997).

Arkansas Code Annotated section 11-10-513(b) (Repl. 1996) provides that, as a prerequisite to receiving unemployment benefits, an employee is required to make every reasonable effort to preserve his job rights before leaving employment, *Boothe v. Director*, 59 Ark. App. 169, 954 S.W.2d 946 (1997); *Ahrends v. Director*, 55 Ark. App. 71, 930 S.W.2d 392 (1996). In *Boothe, supra*, this court said:

> such reasonable efforts include taking appropriate measures to prevent an unsatisfactory situation on the job from continuing. *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980). But the employee is not required to take measures to resolve a problem with his employer if such measures would constitute nothing more than a futile gesture. *Oxford v. Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981).

Boothe, 59 Ark. App. at 173-74, 954 S.W.2d at 949.

Viewing the evidence in the light most favorable to the Board of Review, we hold that there is not substantial evidence to support its finding that Brooks voluntarily quit his employment without good cause connected to the work. Both Brooks and the employer's representative testified that the temperature outside was at least one hundred degrees on the day Brooks quit, that the door to the kitchen was closed on orders from the owner, who was well aware of the problem, and that the problem with the kitchen air conditioning had persisted all summer. Although Brooks complained about the problem several times to the owner of the business, the problem had not been corrected by August 30, during the hottest part of the summer. Brooks took appropriate measures to rectify the intolerable working conditions by complaining several times to the owner, and under the circumstances, he could have reasonably believed that making further complaints would have been a futile gesture.

Reversed and remanded.

ROBBINS, C.J., and BIRD, J., agree.

William R. VIER *v.* Tammy VIER (Hart) and David P. Hart

CA 97-534 968 S.W.2d 657

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1998

Josh E. McHughes, for appellant.

Kenneth G. Fuchs, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant William R. Vier and appellee Tammy Vier (now Hart) were married on December 23, 1983. Although they separated in October 1991, their child, Jessica Vier, was born on March 20, 1992. The parties divorced on March 31, 1992, and the divorce decree provided that Mrs. Hart was to have custody of the child. Mr. Vier was given liberal visitation, but limited to the presence of either Mrs. Hart or Mr. Vier's parents. Mr. Vier visited with Jessica on several occasions, but it is undisputed that his last visit occurred on February 13, 1993.

On July 18, 1994, Mrs. Hart and her current husband, David P. Hart, filed a petition for adoption in the Faulkner County Probate Court. In the petition, it was alleged that Jessica had had no contact with her natural father for more than one year, and that

she had been reared by the petitioners since the time of her birth. Mr. Vier contested the adoption, contending that he had failed to visit Jessica only because the appellees had prohibited him from doing so. In addition, Mr. Vier filed a motion for visitation on November 29, 1994, in which he requested that the chancery court enter an order establishing his entitlement to specific visitation with the child. After hearings were conducted before the chancery and probate courts on these pleadings, the probate court granted the appellee's petition for adoption, finding that Mr. Vier failed without justifiable cause to have any meaningful contact with Jessica since February 1993, and that adoption by Mr. Hart was in the child's best interest. Mr. Vier now appeals this ruling, arguing that the probate court erred in finding that he failed to maintain meaningful contact with Jessica and that such failure was without justifiable cause. We affirm.

Mrs. Hart testified at the hearings and expressed her desire that Mr. Hart adopt Jessica. Mrs. Hart indicated that Mr. Vier moved to Louisiana after they separated and that she has continued to reside in Mayflower, Arkansas, with Mr. Hart, Jessica, and a child that was born of her current marriage. According to Mrs. Hart, Mr. Vier visited Jessica fairly regularly until February 13, 1993. Then, in March 1993, when he came to Mayflower for visitation, he was arrested for failing to pay child support. Mr. Vier did not see Jessica on that occasion, and had not returned to Mayflower prior to the institution of these proceedings. Mrs. Hart acknowledged that, since the March 1993 incident, Mr. Vier has stayed current on his child-support obligation. However, she asserted that his parental rights should be terminated because "he [Mr. Hart] is the only father she [Jessica] has known." With regard to Mr. Vier's efforts to visit with Jessica, Mrs. Hart testified that, "I have done nothing to prevent Bill Vier from visiting or seeing his child." Mrs. Hart stated that she is a veterinarian and her husband is the Mayflower Chief of Police, and asserted that they are financially able to support both of her children.

Mr. Hart testified that he frequently spends time with Jessica and wants to adopt her because he has raised her since she was seven months old. He further testified that he has never discouraged visitation between Jessica and Mr. Vier.

Mr. Vier testified that he has remarried, and that for the past three years he has lived with his wife in Ventress, Louisiana. He acknowledged that he has not seen Jessica since February 1993, but indicated that he had repeatedly tried to do so, but his efforts were thwarted by Mrs. Hart. Mr. Vier testified that he did not know Mrs. Hart's home phone number because it was unlisted, but that he attempted to contact her on a monthly basis at her veterinary clinic. Mr. Vier insisted that on each occasion he would leave a message asking Mrs. Hart to return his call and set up a time for visitation, but that Mrs. Hart never returned any of his calls. In her testimony, Mrs. Hart acknowledged that phone records revealed that Mr. Vier called the clinic for one minute each in March, September, October, November, and December 1993, and also in January 1994. However, she testified that she rarely answers the telephone at the clinic, and that she never instructed anyone to hang up on him or be uncooperative. Indeed, two of her employees, who were responsible for answering the telephone, could not recall receiving any calls from Mr. Vier. Mrs. Hart asserted that she never received any messages or had any other contact with Mr. Vier during this time frame, and surmised that Mr. Vier must have been calling and hanging up.

Mr. Vier also testified that, in the spring of 1994, he sent Mrs. Hart a letter and asked her to call him, but that she failed to do so. However, Mrs. Hart denied receiving such a letter. Mr. Vier acknowledged that, despite his repeated failed efforts to set up visitation with Jessica, he never had Mrs. Hart cited for contempt, nor did he take any other legal action until after he was served with the petition for adoption. However, he explained that although he had planned to take legal action earlier he did not have enough money to hire a lawyer.

For reversal in this case, Mr. Vier asserts that the probate court erred in ordering Jessica's adoption. Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 1993) provides:

> (a) Consent to adoption is not required of:
>
> (2) A parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii)

> to provide for the care and support of the child as required by law or judicial decree[.]

Mr. Vier does not dispute that he failed to communicate with Jessica for more than one year. However, he notes that "failed significantly" means a failure that is "meaningful or important," *see Taylor v. Hill*, 10 Ark. App. 45, 661 S.W.2d 412 (1983), and submits that his failure to communicate was not significant because any communication would not have been meaningful to the young child because of her age and the fact that the only father figure that she knew was Mr. Hart. Mr. Vier further argues that the probate court erred in finding that his failure to visit was without justifiable cause, and notes that parental rights should not be terminated unless the lack of visitation was willful in the sense of being voluntary and intentional. *See Taylor v. Hill, supra.* Mr. Vier contends that he justifiably failed to visit Jessica because he repeatedly attempted to contact Mrs. Hart but was unable to do so, and because he was afraid to enter Faulkner County for fear of getting arrested. He points out that, in the past few years, he had twice been arrested in Faulkner County for allegedly writing hot checks, and his wife had been arrested once. The last time Mr. Vier presented for visitation in March 1993, he drove a long distance, was arrested, and was never able to see the child.

We have held that the party seeking to adopt a child without the consent of the natural parent bears the heavy burden of proving by clear and convincing evidence that the party failed significantly and without justifiable cause to communicate with the child. *Taylor v. Hill, supra.* We review probate proceedings de novo, and the decision of the probate court will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Dale v. Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987). We have stated that the personal observations of the trial judge are entitled to even more weight in cases involving the welfare of a small child. *In the Matter of Adoption of Titsworth*, 11 Ark. App. 197, 669 S.W.2d 8 (1984). In the instant case, giving due regard to the trial court's assessment of the credibility of the witnesses, we find its decision that the appellees met their burden by clear and convincing evidence was not clearly erroneous.

From March 1993 until appellees filed their petition for adoption on July 18, 1994, there was evidence that Mr. Vier placed six one-minute telephone calls to Mrs. Hart's veterinary clinic. There was also some evidence that he attempted to write her a letter in the spring of 1994, but the trial judge was entitled to believe Mrs. Hart's statement that the letter was never received. Other than these efforts, Mr. Vier made no attempt to contact or visit his daughter. It is undisputed that he did not return to Faulkner County until after the adoption action was brought in July 1994. Mrs. Hart and Mr. Hart both testified that they did not prevent Mr. Vier from visiting the child. On these facts, we cannot find error with the probate judge's finding that Mr. Vier unjustifiably failed to maintain contact with Jessica. It is significant that Mr. Vier never attempted to effect his visitation through legal intervention, and he never apprised the trial court of any alleged interference with his visitation rights until nineteen months after his last visit with Jessica. It has been held that, for purposes of determining whether a parent willfully deserted his child or intended to maintain his or her parental role, the trial court may consider as a factor the parent's failure to seek enforcement of his or her visitation rights during the relevant one-year period. *See Mead v. Roberts*, 702 P.2d 1134 (Or. App. 1985). As for Mr. Vier's contention that his parental rights were not waived because any visitation would not have been meaningful due to his anonymity and the child's young age, suffice it to say that the pertinent statute did not contemplate such an exception and this argument is unsupported by any authority or convincing argument. *See Rogers v. Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994).

Affirmed.

BIRD and ROAF, JJ., agree.

IN the MATTER of the ADOPTION OF K.M.C.

CA 97-1221 969 S.W.2d 197

Court of Appeals of Arkansas
Division II
Opinion delivered May 13, 1998

Kelley Law Firm, by: *Eugene T. Kelley* and *Glenn E. Kelley*, for appellants.

Jim Johnson, for appellee.

JOHN MAUZY PITTMAN, Judge. This case involves the adoption of an infant born to a sixteen-year-old mother. No significant relationship existed between the mother and the biological father, who was himself a teenager, either before or after the child's conception. The mother put the child up for adoption. Appellants (the prospective adoptive parents) filed a petition to adopt the child; however, appellee (the biological father) then established his paternity and withheld his consent. The petition to adopt was dismissed after a hearing in which it was held that the appellee did not unreasonably withhold his consent to the adoption contrary to the best interest of the child. From that decision, comes this appeal.

For reversal, appellants contend that the probate judge erred in ruling that evidence of appellee's actions prior to the birth of the child, and evidence of psychological studies performed on appellee, were inadmissible in determining whether appellee unreasonably withheld his consent to adoption contrary to the best interests of the child. We agree, and we reverse.

Arkansas Code Annotated § 9-9-220 (Supp. 1995) provides, in pertinent part:

> (a) . . . [T]he rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated in or prior to an adoption proceeding as provided in this section.

. . . .

(c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground provided by other law for termination of the relationship, or on the following grounds:

. . . .

(3) That in the case of a parent not having custody of a child, his consent is being unreasonably withheld contrary to the best interest of the child.

The probate judge refused to admit the challenged evidence on the grounds that it lacked relevance. The determination of the relevance of evidence is within the sound discretion of the trial court, and that determination will not be reversed in the absence of an abuse thereof. *Waeltz v. Arkansas Department of Human Services*, 27 Ark. App. 167, 768 S.W.2d 41 (1989). The record reflects that the child was born in December 1996. The hearing was held approximately four months later, in April 1997. The evidence in the case at bar showed that, in the years immediately before the child was born, appellee had been involved in organizing street gangs, in illegal drug use, and in assaults and other violent behavior. It also depicted him as marginally self-sufficient, unmotivated, underemployed, and generally lacking stability. The probate judge ruled that this evidence was inadmissible, stating that the inquiry was restricted to appellee's conduct after the birth of the child.

The probate judge cited no rule or reason for thus limiting the inquiry, and we think he was clearly wrong. In making a decision of whether to terminate the parental rights of a party, the trial court had a duty to look at the entire picture of how that parent discharged his duties as a parent, the substantial risk of serious harm the parent imposed, and whether or not the parent was unfit. *Waeltz v. Arkansas Department of Human Services, supra.* Any evidence having probative value as to the present or prospective fitness of a parent is admissible to determine whether consent has been unreasonably withheld. *Lindsey v. Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983). The *Lindsey* court itself recited evidence concerning the mother's habits and behavior

prior to the birth of her child. A Virginia appellate court reviewing a similar case dealing with the reasonableness of a father's refusal to consent to adoption attached great weight to that father's antisocial behavior prior to the birth of the child, noting that past actions over a meaningful period serve as good indicators of what the future may be expected to hold. *Frye v. Spotte*, 4 Va. App. 530, 359 S.E.2d 315 (1987). In the case at bar, only four months passed between the child's birth and the hearing: limiting the evidence to that four-month period, as the probate judge did here, prevents consideration of past actions over anything remotely approaching a "meaningful period." The probate judge, whose duty it is to "peer into the future to make a projection" bearing on the future welfare of the child, 2 AM. JUR. 2D *Adoption* § 90 (1994), has rendered himself blind and incapable of making an accurate prediction of the future by needlessly limiting his consideration to a statistically insignificant period of time.

The probate judge's refusal to consider the psychological evidence was likewise in error. The excluded evidence included an assessment of appellee's ability to provide a safe and nurturing environment for a child, and of the likelihood of appellee's continued involvement with violence, drugs, and antisocial behavior. The probate judge refused to consider this evidence because he believed that his decision needed to be based on "whether or not in the opinion of the court that [appellee] has done anything to forfeit his right to consent to the adoption." The question, however, is not fault but is instead fitness, *see Lindsey, supra*, and the excluded psychological evidence is relevant to appellee's fitness as a parent.

We reverse and remand to the probate court for further proceedings consistent with this opinion. This case involves the adoption of an infant, and it needs to be expeditiously resolved. We do not limit the scope of the probate judge's inquiry on remand, but we direct that it be concluded as quickly as is prudent, and we order that the mandate from this court be issued immediately.

Reversed and remanded.

AREY and GRIFFEN, JJ., agree.

Margaret B. GRIDER *v.* Grady Pat GRIDER

CA 97-803 968 S.W.2d 653

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 13, 1998

The Harper Law Office, by: *Kenneth A. Harper*, for appellant.

Hilliard Law Office, by: *Zenola M. Hilliard*, for appellee.

D. FRANKLIN AREY, III, Judge. The Cleveland County Chancery Court granted appellant Margaret B. Grider a decree of separate maintenance on her counterclaim against the appellee, Grady Pat Grider. However, the chancellor declined appellant's request that he enforce the separation and property settlement agreement previously entered into by the parties. On appeal, appellant contends the chancellor erred in failing to enforce this agreement. We agree that the chancellor had the power to enforce the agreement, so we reverse and remand this matter for further proceedings consistent with this opinion.

Appellant and appellee entered into a "Separation and Property Settlement Agreement" in February of 1996. The agreement noted the parties' intent to live separate and apart for the rest of their lives, and purported to determine their rights and obligations during their separation. It divided the parties' personal property and allowed appellant the use of the marital home. It specifically stated that it constituted an independent contract of the parties that would constitute a stipulation between them in any divorce action.

Appellee filed for divorce two months after the parties entered into the agreement. Appellant filed a counterclaim for separate maintenance. At trial, appellee failed to provide corroboration of the alleged grounds for divorce, so the chancellor granted a directed verdict against him. Since appellant proved her case, the chancellor entered a separate maintenance decree on her counterclaim.

Despite appellant's request, the chancellor did not enforce the parties' agreement. He believed that a decision on the agreement's enforceability would be premature and inappropriate

because no decree of divorce had yet been awarded in the proceeding.

We are asked to determine whether the chancellor has the power to enforce an agreement that divides the parties' marital property in the course of a proceeding that results in a decree of separate maintenance. Appellee contends that the chancellor lacked jurisdiction to absolutely divide the parties' property in the decree of separate maintenance. In her own words, appellant responds that she "is appealing the trial court's decision that it lacked the power to enforce the [a]greement between the parties, not its failure to proactively divide the property in its legal separation order."

The chancellor did have the power to enforce the parties' agreement, even though no decree of divorce was entered. "Courts of equity may enforce the performance of written agreements between husband and wife made and entered into in contemplation of either separation or divorce . . . ." Ark. Code Ann. § 9-12-313 (Repl. 1993). The agreement at issue indicates that it was "entered into in contemplation of . . . separation"; it determined the rights and obligations of the parties as to their marital property during their separation. Thus, section 9-12-313 provides the chancellor with the power to enforce the agreement.[1]

This conclusion is supported by *Strasner v. Strasner*, 232 Ark. 478, 338 S.W.2d 679 (1960). In that case, no action for divorce was instituted by either party prior to our supreme court's decision. At issue was an agreement between the husband and wife that divided their marital property, among other things. The wife brought an action in chancery court seeking specific performance of the agreement. The chancellor found that the agreement was valid, decreed specific performance of the property settlement agreement, and awarded the wife judgment for delinquent pay-

[1] The dissent highlights the following language in section 9-12-313: ". . . as are in conformity with rules and practices of courts of equity." This language is cited as support for the dissent's argument that a court of equity has no power to act in cases such as the one before us. We think the highlighted language modifies the "lawful ways and means" a court of equity may employ to enforce the agreement. It does not modify its power to act in the first instance. *See* § 9-12-313.

ments. *Id.* at 480, 338 S.W.2d at 680. On appeal, the husband argued that the chancellor lacked subject matter jurisdiction to enforce the agreement because the wife had an adequate remedy at law for breach of contract. Our supreme court affirmed the chancellor's jurisdiction, noting "that the Legislature settled the matter of jurisdiction by the passage of Act 290 of 1941 . . . ." *Id.* at 481, 338 S.W.2d at 681. Act 290 of 1941 is now codified as section 9-12-313.

Similarly, the enforcement of a separation and property settlement agreement was at issue in *Rucks v. Taylor*, 282 Ark. 200, 667 S.W.2d 365 (1984). The husband died after the parties entered into an agreement, but before a divorce decree was granted. The supreme court found that the language of the agreement at issue demonstrated an intent to terminate all property rights between the parties with the signing of the agreement.

> While the agreement was to be incorporated into a divorce decree, if any, it was not contingent upon their obtaining a divorce. The chancellor has jurisdiction over such agreements even in the absence of a divorce action.

Rucks, 282 Ark. at 202, 667 S.W.2d at 366. The deceased husband's widow sought to take a piece of property by virtue of her survivorship of an estate by the entirety with the deceased husband; our supreme court affirmed the chancellor's enforcement of a provision of the agreement requiring a sale of the property and equal division of the proceeds. *Id.*

This line of cases supports the proposition that the chancellor had the power to enforce the parties' agreement even though no divorce decree was entered. Therefore, entry of a decree of separate maintenance did not foreclose the chancellor's exercise of jurisdiction to enforce the agreement.

The chancellor relied upon another line of cases for the proposition that marital property can only be distributed at the time a divorce decree is entered. *See Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987); *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987); *Coleman v. Coleman*, 7 Ark. App. 280, 648 S.W.2d 75 (1983). The cases cited by the chancellor articulate the following rule:

> We have been unable to find any case holding that property rights are to be adjudicated upon the rendition of a decree of separate maintenance. We held in the recent case of *Mooney v. Mooney*, 265 Ark. 253, 578 S.W.2d 195 (1979), that the property belonging to the parties could not be divided unless a divorce was granted.

Spencer v. Spencer, 275 Ark. 112, 114, 627 S.W.2d 550, 551 (1982). Similarly, we have read Arkansas Code Annotated section 9-12-315(a) (Repl. 1993) to mean "that marital property shall be distributed at the time the divorce decree is entered. A chancellor has no authority to dispose of property rights in an award of separate maintenance." *Moore*, 21 Ark. App. at 169, 731 S.W.2d at 218.

■ ■ These cases are distinguishable and do not prevent the chancellor's exercise of power in this instance. They indicate that the *chancellor* cannot adjudicate marital property upon an award of separate maintenance. However, they do not prevent the chancellor from enforcing the *parties' agreement. Compare* Ark. Code Ann. § 9-12-313 *and Strasner, supra, with Moore, supra.* Our holding in this case does not authorize the chancellor to adjudicate property rights; rather, pursuant to the statute, the chancellor is authorized to enforce the parties' agreement "made and entered into in contemplation of . . . separation . . . ." *See* Ark. Code Ann. § 9-12-313.

Reversed and remanded for further proceedings consistent with this opinion.

ROBBINS, C.J., and BIRD, Neal, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I disagree with the refusal to follow our long line of cases holding that a chancellor lacks the power to divide marital property absent a divorce decree. In *Mooney v. Mooney*, 265 Ark. 253, 578 S.W.2d 195 (1979), our supreme court affirmed a chancellor's refusal to divide marital property where the appellant's counterclaim for divorce was dismissed for failure to prove grounds, and stated:

> The appellant asked the trial court to grant him a divorce and divide the property according to law. On appeal, the appellant asks us to do the same. The property, of course, cannot be divided unless a divorce is granted.

Id. at 256-57, 578 S.W.2d at 197.

Likewise, in *Spencer v. Spencer*, 275 Ark. 112, 627 S.W.2d 550 (1982), the supreme court followed its decision in *Mooney* in a divorce case where the appellant amended her original divorce action to ask for separate maintenance. The chancery court rejected the appellee's complaint for divorce, and granted a decree on appellant's amended complaint for separate maintenance. The chancellor then divided the marital property, acting under Arkansas Statute Annotated § 34-1214 (Supp. 1979). The supreme court reversed and remanded the case with directions that the chancellor enter an appropriate order, stating:

> Prior to Act 705 of 1979, Ark. Stat. Ann. § 34-1214 provided: "In every final judgment for divorce from the bonds of matrimony . . ." the property rights were to be disposed of by the court. The present act as amended states: "At the time a divorce decree is entered . . ." the property shall be divided in accordance with the formula set forth therein. We have been unable to find any case holding that property rights are to be adjudicated upon the rendition of a decree of separate maintenance. (Emphasis added.)

Spencer, supra, 275 Ark. at 114, 627 S.W.2d at 551.

This court has followed the *Mooney* and *Spencer* holdings. In *Coleman v. Coleman*, 7 Ark. App. 280, 648 S.W.2d 75 (1983), we reversed a chancellor's action in distributing a certificate of deposit to the appellee who was awarded a decree of separate maintenance, and termed the order awarding the CD "an improper final award of property." In *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987), we held that a chancellor had no authority to divide stock owned by a husband to his estranged wife, even though the couple was separated and a divorce action was pending, because they had not been divorced. In *Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987), we stated: "The appellant correctly argues that the chancellor cannot enter an order

absolutely dividing the marital property in an order granting legal separation." *Id.* at 291-92, 731 S.W.2d at 789.

The majority dismisses this line of cases from our supreme court and our court by drawing a distinction between instances where a chancellor adjudicates marital property upon an award of separate maintenance and those cases where a chancellor enforces an agreement by the parties to divide their property. Perhaps this distinction would matter if the law held that parties may contract to vest jurisdiction in a court to engage in action that is otherwise beyond its powers. But no such rule has been cited by the majority for good reason—it has never existed.

There is an obvious difference between having the power to enforce an agreement that is within the power of the court to adjudicate and having the power to engage in an *ultra vires* act. Chancellors may enforce legally enforceable agreements because they *can* enforce them. They can enforce them because they have the authority to enforce them. They have the authority to enforce them because the subject matter of the agreements falls within the scope of the powers vested upon chancellors by the people of Arkansas, from whom judicial power is obtained to do anything. But the people of Arkansas have never delegated to individual litigants the authority to vest chancellors with power to distribute marital property absent a divorce decree. If that was the case, then chancellors would be empowered to do whatever litigants agreed, even if the agreements contravene public policy.

The majority arrives at its remarkable conclusion by reading Arkansas Code Annotated § 9-12-313, as if the words of its final clause do not exist. That statute reads as follows:

> Courts of equity may enforce the performance of written agreements between husband and wife made and entered into in contemplation of either separation or divorce and decrees or orders for alimony and maintenance by sequestration of the property of either party, or that of his or her sureties, or by such other lawful ways and means, including equitable garnishments or contempt proceedings, *as are in conformity with rules and practices of courts of equity.*

As previously indicated, Arkansas has never recognized a power in courts of equity to divide marital property except upon a decree of divorce. In fact, Arkansas Code Annotated § 9-12-315(a)(1)(A) (Repl. 1993) provides that all marital property shall be distributed "at the time a *divorce decree* is entered." (Emphasis added.) If parties to divorce actions could vest chancellors to distribute marital property absent a divorce decree, then the language of § 9-2-315 makes no sense, and the final clause of § 9-12-313 that speaks of conformity with rules and practices of courts of equity is useless verbiage.

It is also worth noting that the appellee in this case did not agree to a division of the marital property in any event other than a divorce decree. The pertinent language of the separation and property settlement agreement that the parties signed reads:

> It is clearly understood that this Agreement constitutes the independent contract of the parties, merger and incorporation by reference into any *divorce decree* notwithstanding, and the same may not be modified, altered, or changed, except by the mutual written consent of the parties. The sole purpose of this Separation and Property Settlement Agreement with the decree is to confer jurisdiction upon the Chancery Court of Jefferson County (sic), Arkansas, for the purpose of enforceability through contempt proceedings.
>
> This agreement shall constitute a stipulation between the parties *in any divorce action. This is an independent contract to be merged into a chancery decree.* (Emphasis added.)

The chancellor was absolutely correct in his letter opinion when he stated that the agreement contemplated a divorce proceeding rather than a decree of separate maintenance, and that he could not enter an order absolutely dividing property in a decree granting legal separation. Appellee did not agree to vest the chancellor with jurisdiction to divide the marital property in the event of a decree granting legal separation, and the agreement explicitly provides that it may not be "modified, altered, or changed, except by the mutual written consent of the parties." Even if the majority is right about the chancellor having the power to enforce agreements between the parties, it does not follow that a chancellor has the power to enforce a non-agreement.

Arkansas law has never held that a chancellor has the power to distribute marital property absent a divorce decree. The only issue presented to the supreme court in *Strasner v. Strasner*, 232 Ark. 478, 338 S.W.2d 679 (1960), was whether a written property settlement agreement was amenable to an action for specific performance where an alleged nonbreaching party had a complete and adequate remedy at law. The supreme court did not hold that a chancery court has the power to distribute marital property into a separate maintenance action simply because the parties entered into a written property settlement agreement.

I refuse to engage in the amazing notion whereby the plain language of an agreement that contemplates a "divorce decree" is construed to mean a decree for separate maintenance. I also will not pervert the meaning of the agreement and the plain language that prohibits it from modification, alteration, or changing "except by the written consent of the parties" by a conclusion that the agreement can be modified, altered, or changed without that consent, not to mention over the objection of a party. A court of *equity*, of all entities, has no power to compel a party to specifically perform what he never agreed to do, especially when the explicit condition relative to his performance is lacking.

Public policy shapes the rules followed by courts of equity and defines the practices and prescribes the powers of chancellors, not private contracts. Litigants may not constitute a law unto themselves for their private convenience and in the face of a settled body of case and statutory law. Before today, our court appeared to understand this reality; it now appears to have forgotten it. Perhaps the supreme court will issue a reminder if it chooses to grant a petition for review of the majority decision. Meanwhile, I dissent.

Jean FLOWERS *v.* ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT

CA 97-1182 968 S.W.2d 660

Court of Appeals of Arkansas
Division IV
Opinion delivered May 13, 1998

[redacted]

David H. McCormick, for appellant.

Calvin Gibson, for appellee.

JOHN F. STROUD, JR., Judge. This appeal comes from the Arkansas Workers' Compensation Commission's denial of a claim for a knee injury sustained by Jean Flowers when a co-worker pulled a chair out from under her. The Commission's decision reversed the administrative law judge's finding that the claim was compensable. Ms. Flowers now appeals to this court, contending that the Commission erred in holding that her injury was barred under our workers' compensation statutes. Appellee, the Arkansas State Highway and Transportation Department, has filed no brief regarding her appeal. We find that Ms. Flowers's injury was not statutorily barred and that it was compensable. We therefore reverse the Commission's denial of her claim.

Where, as here, the Commission denies a claim because the claimant has failed to show entitlement by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Barnard v. B & M Constr.*, 52 Ark. App. 61, 915 S.W.2d 296 (1996). Substantial evidence is that which reasonable minds might accept as adequate to support a conclusion. *Id.* On appeal, this court must view the evidence in the light most favorable to the Commission's findings and give the

testimony its strongest probative force in favor of the Commission's action. *Chamber Door Indus., Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). We reverse the Commission's findings only when we are convinced that fair-minded people with the same facts before them could not have arrived at the conclusion reached by the Commission. *Id.*

This action began as a claim for two separate injuries to appellant's right knee. The first was sustained in 1995 when appellant twisted her knee getting out of a highway crew truck, and the second occurred on January 30, 1996, in a locker room at highway department facilities. The administrative law judge found that both injuries were compensable. The Commission affirmed the law judge's finding regarding the first injury but reversed the finding that the second was compensable.

Appellant states that her appeal raises questions of legal significance regarding Arkansas Code Annotated section 11-9-102(5)(B) (Supp. 1997). She presents two points: 1) whether the Commission erred in holding that her injury was barred by the statute, and 2) whether the Commission erred in determining that the statute barred her claim for benefits as a result of her injury. Viewing these two points as one, we hold that the Commission improperly applied the statute to appellant's claim.

The Commission based its denial of appellant's claim for her 1996 injury on Arkansas Code Annotated section 11-9-102(5)(B) (Supp. 1997). The statute reads in pertinent part:

> (B) "Compensable injury" does not include:
>
> (i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants, and which said assault or combat amounts to a deviation from customary duties; further, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries[.]

Subsection (5)(A)(i) states that an accidental injury causing physical harm to the body, arising out of and in the course of employment and which requires medical services, is a compensable

injury. Under subsection (5)(E), the burden of proving such an injury shall be on the employee and shall be by a preponderance of the evidence.

The only testimony before the Commission was that given by appellant at the hearing before the administrative law judge. Appellant testified that all employees were required to clock in at the beginning of each work day and then change into work clothes in a room provided by the employer, and that they were required to change back into street clothes before being allowed to clock out at the end of the day. She testified that on January 30, 1996, while she was seated and changing from work clothes into street clothes, a co-worker approached her and demanded, "What are you doing in my damn chair?" Appellant's testimony continued:

> And, she put her hand on the back of the chair. And, I never thought anything of it. And, the next thing I knew, the chair was pulled out from underneath me, and I went to the floor. And, my right knee got bent from, I guess, trying to brace myself. And, when I landed, my right knee was turned — my — the bottom part of my leg was turned towards the back, and I had heard it pop.

Medical records reveal that after the incident with her co-worker, appellant received medical treatment culminating in arthroscopic surgery to her knee.

In denying appellant's claim, the Commission cited Arkansas Code Annotated section 11-9-102(5)(B)(i) and stated:

> No one contends that the incident involving the co-worker was horseplay. Rather, the incident where the chair was pulled out from underneath claimant is clearly an assault upon claimant by her co-worker. There is no evidence that this assault arose out of the employment relationship between claimant and claimant's co-worker. Claimant filed a grievance against her co-worker for the assault which occurred. Claimant's co-worker was disciplined by the supervisor regarding the incident. There is insufficient evidence in the record to suggest what precipitated the event. All the record reveals with regard to why the incident occurred is that claimant sat down in a chair which claimant's co-worker contended was hers. In our opinion, such incident does

> not arise out of a work related animus or hostility between claimant and her co-worker. Therefore, we find that claimant has failed to prove by a preponderance of the evidence that the January 30, 1996 incident is compensable.

It is clear to us that the injury suffered by appellant does not fall under the exclusion of Arkansas Code Annotated section 11-9-102(5)(B)(i). The first words of the subsection plainly state that coverage is barred for injury "to any *active participant* in assaults or combats" (emphasis added). Evidence before the Commission shows that appellant had not clocked out and was sitting in a chair changing clothes. She was doing exactly what her employer required her to do and thus was performing services for the employer. There was no evidence before the Commission from which reasonable minds could have concluded that appellant was an active participant in the assault upon her. Therefore, there is no evidence to uphold the Commission's decision that appellant's claim was barred by Arkansas Code Annotated section 11-9-102(5)(B)(i).

Reversed and remanded for an award of benefits in keeping with this opinion.

JENNINGS and NEAL, JJ., agree.

Frank KING *v.* STATE of Arkansas

CA CR 97-1174 969 S.W.2d 199

Court of Appeals of Arkansas
Division IV
Opinion delivered May 13, 1998

[redacted]

[redacted]

[redacted]

[redacted]

Appellant, pro se.

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

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

JOHN F. STROUD, JR., Judge. A jury found appellant, Frank King, Jr., guilty of residential burglary and rape. He was sentenced as an habitual offender to twenty years' imprisonment on the residential burglary charge and forty years' imprisonment on the rape charge. The court ordered that the sentences be served consecutively.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on grounds that the appeal is without merit. The clerk of this court furnished appellant with a copy of his counsel's brief and notified him of his right to file a *pro se* brief within thirty days, which he has done. In response, the State has also filed a brief.

Appellant's counsel's motion was accompanied by an abstract and brief purportedly referring to everything in the record that might arguably support an appeal. Six defense objections or motions were listed to which there were adverse rulings, and we

find that all rulings adverse to appellant were addressed by his counsel. There were no errors with respect to any of them. Appellant's *pro se* brief raised several issues, many of which duplicated those raised by his counsel; the remaining ones either were not preserved for appeal or involved alleged inconsistencies in testimony that were for the jury to resolve, not this court. The State's brief, which summarizes appellant's issues as four basic arguments, agrees that the appeal has no merit.

I.

One of the adverse rulings was the trial court's denial of appellant's motion for a directed verdict. The basis for the motion was twofold: 1) that appellant had not been adequately identified as the perpetrator of the rape and that consequently the remaining evidence against him, the fingerprint and the DNA, was not sufficient to connect him to the offenses charged; and 2) that based on the evidence presented, no reasonable jury could find him guilty beyond a reasonable doubt of either rape or burglary. We find no error.

A motion for a directed verdict is a challenge to the sufficiency of the evidence, the test for which is whether there is substantial evidence to support a verdict, viewing the evidence in the light most favorable to the appellee. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997). Evidence is sufficient to support a conviction if the evidence is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). The fact that evidence is circumstantial does not render it insubstantial. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987). Here, appellant's fingerprint was found on a fan that was located inside the victim's house. Furthermore, the DNA that was recovered from semen in the victim's underwear matched that of appellant. This evidence was sufficient to connect appellant to the residential burglary and rape and to support the jury's conclusion that appellant had committed both offenses.

II.

Appellant objected to the composition of the jury venire based solely upon the disproportionate number of African-American jurors present because only four of the thirty-nine potential jurors were African-American. He moved to dismiss the panel. The motion was denied. After the jury was chosen, the court noted for the record that the State's only strike was with respect to a Caucasian female and that two of the four African-Americans summoned were seated in the jury. The trial court considered the motion again, in light of the final makeup of the jury panel, and again denied it. The trial court did not err in doing so.

The selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a trial by jury; however, there is no requirement that the petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. *Cleveland v. State*, 315 Ark. 91, 865 S.W.2d 285 (1993). It is the State's purposeful or deliberate denial to blacks, on account of race, of participation in the administration of justice by selection for jury service that violates the equal protection clause. *Id.* Appellant did not allege any impropriety in the selection of the jury venire, just the disproportionate numbers. That showing alone does not prove a case of racial discrimination. *Id.*

III.

Appellant attempted to impeach the victim's testimony by using a submission sheet prepared by Detective Tina Smith that summarized the evidence in the case. The document contained a notation that the victim had earlier told police officers that the man who raped her was named "Frank," whereas the victim testified at trial that the man who raped her told her his name was "Freddie." The court refused to allow appellant to impeach the victim with a summary of evidence prepared by someone else based on reports from other officers, not the victim; however, the trial court allowed appellant to establish through questioning of Detective Smith that the victim had told some of the patrol officers that the perpetrator's name was Frank, rather than Fred-

die. Thus, the jury was presented with the evidence of a prior inconsistent statement made by the victim, and if there was any error in refusing to allow the submission sheet for that purpose, which we do not hold, it was thereby rendered harmless.

Moreover, the trial court allowed appellant to use the submission sheet to refresh the victim's memory, but refused to allow the victim to read the statement aloud. There was no error in the refusal. A prior inconsistent statement may not be quoted into evidence as part of the impeachment process. *Williams v. State*, 55 Ark. App. 156, 934 S.W.2d 931 (1996).

IV.

Appellant objected to the State's asking Mr. Kermit Channel, a supervisor in the DNA section of the State's crime lab, about the statistical probability of finding the DNA profile he established from appellant's blood in the general population. He argued that Channel had not been qualified as a statistician. Appellant renewed the objection after the State had Channel lay a foundation for the testimony. The trial court overruled the objection and did not err in doing so. Our supreme court has held that in DNA profiling the expert need only show that he properly performed a reliable methodology, *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996), and that challenges to the expert's conclusions are to be made by cross-examination of the expert and the presentation of experts by the defense. *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996). Appellant did not challenge the expert's methods, nor did he call his own experts to challenge the State's expert's results. Also, as noted by appellant's counsel's brief, the defense in this case was that the sex was consensual. Consequently, the presence of appellant's semen was not really at issue.

V.

During its closing argument on rebuttal, the State challenged an assertion the defense had made in its closing argument, *i.e.*, that Detective Smith testified that one of the officers was told that the perpetrator's name was Frank, arguing that the informa-

tion was not in evidence. Appellant objected, asking the court to instruct the jury that the information *was* in evidence. The court declined to do so, explaining that it could not comment on the evidence. The court was correct because it is prohibited from doing so by the Arkansas Constitution, article 7, section 23. It is reversible error for a judge to express an opinion concerning a fact in the presence of the jury. *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980). Moreover, the jury was instructed that any remarks of counsel having no basis in the evidence were to be disregarded.

VI.

The remaining adverse decision had to do with appellant's habitual-offender status. Appellant objected to the admissibility of State Exhibit 10, a certified copy of information from the circuit court files of St. Francis County, Arkansas, showing a conviction for "Frank King." There was no error in this regard because Arkansas Code Annotated section 5-4-504(1) (1993) provides that a previous conviction may be proved by a certified copy of the record of the previous conviction.

Appellant's objection also encompassed a challenge as to whether State Exhibit 10 established that it was in reference to the same "Frank King" as appellant. The court determined that the exhibit made a prima facie case but invited appellant's counsel to controvert that finding before the jury, which was not done. Therefore this issue was not preserved, a fact acknowledged by appellant's counsel in his brief.

Finally, although not raised by appellant, the trial court raised the issue of whether a suspended imposition of sentence with probation constituted a "conviction" since the probation had not been revoked. The court concluded that it was sufficient to show a prior finding of guilt for habitual-offender purposes. The court was correct.

Suspended sentences are still "convictions" within the meaning of the habitual-offender statute. *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989); *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978). The statute does not require that the defend-

ant has previously been sentenced to serve a jail sentence; it is enough that he has been found guilty and put on probation. *Campbell v. State*, 264 Ark. 575, 572 S.W.2d 845 (1978). Here, the appellant had pled guilty in the St. Francis County case, and the court suspended imposition of sentence, placing him on probation for five years. The five years had not run at the time of the sentencing in the instant case, and the probation had not been revoked.

Appellant's *pro se* brief lists nine "issues of law," the first six of which are addressed in appellant's counsel's brief and previously discussed in this opinion. The remaining issues were either not preserved for appeal, *Dickerson v. State*, 51 Ark. App. 64, 909 S.W.2d 653 (1995), or they involved alleged inconsistencies in testimony that were for the jury to resolve, not this court, *Larue v. State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991).

From our review of the record and the briefs presented to us, we find that there was compliance with Rule 4-3(j) and that the appeal is without merit. Accordingly, we grant counsel's motion to withdraw and affirm the judgment of conviction.

Affirmed.

JENNINGS and NEAL, JJ., agree.

GENERAL ELECTRIC RAILCAR REPAIR SERVICES *v.* Ace HARDIN

CA 97-1170 969 S.W.2d 667

Court of Appeals of Arkansas
Division III
Opinion delivered May 13, 1998

Lavender, Rochelle, Barnette, PLC, by: *Charles D. Barnette*, for appellant.

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

WENDELL L. GRIFFEN, Judge. General Electric Railcar Repair Services (General Electric) challenges a decision by the Workers' Compensation Commission that required them to continue paying for medical treatment by Dr. C.C. Alkire on behalf of Ace Hardin. The Commission held that Hardin's continuing treatments by Dr. Alkire were reasonable and necessary. For reversal, General Electric argues that the Commission's decision that Hardin's continuing treatments by Dr. Alkire were reasonable and necessary is not supported by substantial evidence, and that the Commission erred, as a matter of law, because it failed to use the "major cause" analysis in deciding this issue. We disagree; therefore we affirm.

Ace Hardin worked primarily as an electrician and maintenance man for General Electric for more than thirty-seven years. On September 30, 1993, Hardin sustained a compensable injury when he fell from a ladder and injured his neck, back, and shoulders. Hardin initially consulted Dr. M. Leon Purifoy, who diagnosed him with a cervical spine strain. Dr. Purifoy subsequently referred him to Dr. C.C. Alkire, an orthopedic surgeon. Dr. Alkire treated Hardin several times over a period of two-and-a-half years. General Electric accepted the injury as compensable and paid for his medical treatment through June 1996. However, in July 1996, General Electric decided not to pay for the treatments by Dr. Alkire any longer. Hardin then filed a workers' compensation claim seeking continued payment for medical treatments by Dr. Alkire.

After a hearing, an administrative law judge found that Hardin was entitled to ongoing visits with Dr. Alkire for maintenance

of pain and is entitled to medications which Dr. Alkire may prescribe. General Electric appealed this decision to the Commission, which affirmed and adopted the findings of the administrative law judge. General Electric then brought this appeal.

In considering appeals from decisions of the Commission, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and will affirm the decision if the findings are supported by substantial evidence. *See Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* If reasonable minds could reach the Commission's decision, we must affirm the decision. *Id.* It is the exclusive function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Kuhn v. Majestic Hotel*, 50 Ark. App. 23, 899 S.W.2d 845 (1995) (citing *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994)). This court may reverse the decision of the Workers' Compensation Commission only when convinced fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Tiller v. Sears, Roebuck & Co.*, 27 Ark. App. 159, 767 S.W.2d 544 (1989).

First, General Electric argues that the Commission erred by finding that continuing treatments by Dr. Alkire were reasonable and necessary because Hardin no longer suffered from the job-related injury. General Electric also argues that Dr. Alkire was treating Hardin for only a preexisting condition and, therefore, Dr. Alkire's treatments were no longer reasonable and necessary for the job-related injury. The Commission, however, found that Hardin was entitled to ongoing visits with Dr. Alkire for maintenance of pain and is entitled to medications which Dr. Alkire may prescribe. What constitutes reasonable and necessary treatment under Arkansas Code Annotated § 11-9-508 (Repl. 1996), is a fact question for the Commission. *See Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

It is undisputed that Hardin was diagnosed with a preexisting degenerative disc disease by Dr. Alkire. However, Dr. Alkire also opined that Hardin's degenerative disc disease was exacerbated by his job-related injury. When asked whether Har-

din was being treated "strictly" for degenerative disc disease, Dr. Alkire noted that,

> As I'm sure you're well aware having dealt with workers' compensation insurance claims for years, most workers' compensation injuries, particularly those in the cervical spine and lumbar spine are always related to some degenerative process, regardless of the type of injury a patient may have. In Mr. Hardin's case if you will review my notes, he had an on-the-job injury that almost for sure exacerbated a pre-existing degenerative condition. At this time (March 4, 1996), I'm currently treating Mr. Hardin for his on-the-job injury that just happens to involve some degenerative changes in his cervical spine.

According to Dr. Alkire, Hardin was still being treated for his cervical spine strain as late as March 1996. The Commission specifically stated that, "There is nothing in Dr. Alkire's reports, after careful review, that indicates to this examiner that the treatment being rendered by Dr. Alkire is unreasonable and/or unnecessary." Accordingly, Dr. Alkire's notes constitute substantial evidence in support of the Commission's finding that continued treatments by Dr. Alkire were reasonable and necessary.

Next, General Electric argues that the Commission erred, as a matter of law, because it failed to use the "major cause" analysis, pursuant to Arkansas Code Annotated § 11-9-102(5)(E)(ii) (Repl. 1996). This argument, however, is meritless because the "major cause" analysis applies to injuries that are not identifiable by time and place pursuant to Arkansas Code Annotated § 11-9-102(5)(E)(ii) (Repl. 1996), and to claims where a claimant is seeking permanent disability benefits pursuant to Arkansas Code Annotated section 11-9-102(F)(ii)(b) (Repl. 1996). In the present case Hardin was seeking the continued payment of medical treatments by Dr. Alkire, not permanent disability benefits. Also, his claim involved an injury that was identifiable by time and place.

Affirmed.

ROBBINS, C.J., and MEADS, J., agree.

Detric L. CONWAY *v.* STATE of Arkansas

CA CR 97-1376 969 S.W.2d 669

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1998

Daniel D. Becker and *Ann C. Hill*, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Detric L. Conway appeals his conviction in a Garland County jury trial of theft by receiving property worth over $500. He received a thirty-year sentence in the Arkansas Department of Correction as an habitual offender. On appeal, Conway raises two arguments: 1) the trial court erred in admitting his statement to police that he owned the vehicle he was driving, in violation of his *Miranda* rights; and 2) the use of AMCI 3605 in instructing the jury violated his right not to testify and conflicted with AMCI 111. We affirm.

On April 2, 1997, Officer Paul Norris of the Hot Springs Police Department made a traffic stop of Conway. The bronze-colored 1981 Cadillac Fleetwood that Conway was driving had no license plate. Conway was unable to produce a driver's license, proof of insurance, or proof of registration, but told the officer that it was his car. Officer Norris gave Conway traffic citations and told him that he would not be allowed to continue to operate the vehicle without tags, registration, proof of insurance, and a driver's license. Conway was allowed to park the car at a nearby gas station, and Norris ended the encounter. At the time, Conway was not suspected of any other criminal activity. According to Officer Norris, a check of the vehicle identification number conducted at that time revealed that the car was not stolen.

On April 3, 1997, Hot Springs Police Department Lieutenant Bob Southard, who backed up Officer Norris on the traffic

stop the day before, again stopped Conway for driving the bronze-colored 1981 Cadillac. This time the vehicle bore a fictitious plate, and Conway was arrested. When the police conducted an inventory search of the vehicle, they discovered several stereo speakers and other stereo components.

Detective Gary Hawkins traced the stereo speakers and components found in Conway's vehicle to burglaries at W.C.'s Pawn Shop and the residence of James Kidd. Wade Singleton, the owner of W.C.'s Pawn Shop, and James Kidd subsequently identified the items as their property.

Conway was charged by information with theft by receiving property valued in excess of $500. The information also alleged that Conway was an habitual offender and reflected that he had been convicted of Criminal Attempt to Commit Burglary on September 19, 1995, two counts of felony Theft by Receiving on October 26, 1993, one count of felony Theft by Receiving on October 27, 1992, and Breaking or Entering on August 17, 1992.

Trial was held on July 11, 1997. Conway moved to suppress his statement that he owned the 1981 bronze-colored Cadillac, made during the April 2, 1997, traffic stop. The motion was denied. At the close of the trial, Conway objected to the use of AMCI 3605, and proffered a version that did not include the unexplained-possession-of-stolen-property presumption. The trial court overruled the objection.

Conway first argues that the trial court erred in admitting his statement. Relying on *Miranda v. Arizona*, 384 U.S. 436 (1965), Conway asserts that his statement that he owned the vehicle he was driving at the time of the April 2, 1997, traffic stop should not have been admitted because the circumstances under which he gave the statement constituted custodial interrogation and he was not given his *Miranda* warnings. This argument is without merit.

The statement that Conway seeks to have suppressed was given in the course of a routine traffic stop, while he remained seated in his car. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the U.S. Supreme Court held that an individual in this situation is not subjected to restraints comparable to those associated with a for-

mal arrest and therefore it does not constitute custodial interrogation for *Miranda* purposes. *See Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992)(holding that where officer issued offender a citation in lieu of arrest after a routine traffic stop, the accused was not "in custody" for purposes of Miranda warnings).

When this court reviews a trial court's denial of a motion to suppress an inculpatory statement, it makes an independent determination based on the totality of the circumstances, and only reverses if the trial court's decision was clearly against the preponderance of the evidence. *Milton v. State*, 54 Ark. App. 96, 924 S.W.2d 465 (1996). Under the totality of the circumstances standard, the trial court's decision not to suppress Conway's statement is not clearly erroneous.

Conway next argues that the use of AMCI 3605 in instructions to the jury violated his right not to testify and conflicted with AMCI 111. Citing Article 2, § 8, of the Arkansas Constitution, Conway asserts that he has an absolute right not to testify, and that right was promulgated to the jury at his trial in AMCI 111. He argues, however, that AMCI 3605, another jury instruction used in his trial, directly conflicts with this right. The offending jury instruction stated:

> Detric L. Conway is charged with the offense of Theft by receiving. To sustain this charge, the State must prove beyond a reasonable doubt that Detric L. Conway acquired possession or control of stolen property of another person, knowing or having good reason to believe that it was stolen.
>
> *If you find that Detric L. Conway was in unexplained possession or control of recently stolen property, you may consider that fact* along with all the other evidence in the case in deciding whether Detric L. Conway knew or believed that the property was stolen.

(Emphasis added.) Conway asserts that AMCI 3605 forced the jury to consider his failure to explain his possession of the stolen property, and thus is in conflict with his absolute right not to testify.

Conway acknowledges that the supreme court has turned aside similar challenges to this instruction in *Grooms v. State*, 283 Ark. 224, 675 S.W.2d 353 (1984), *Newton v. State*, 271 Ark. 427, 609 S.W.2d 328 (1980), *Petty v. State*, 245 Ark. 808, 434 S.W.2d

602 (1968), and *Hammond v. State*, 244 Ark. 1113, 428 S.W.2d 639 (1968), and that this court does not have the authority to overrule these cases, but asks that this case be certified to the supreme court to reconsider and overturn these decisions. Relying on *Wells v. State*, 102 Ark. 627, 145 S.W. 531 (1912), Conway asserts that the conflict between AMCI 111 and AMCI 3605 violates his right to have his case submitted on correct instructions, because the jury could only follow one or the other, but not both.

However, this very argument was rejected in *Grooms v. State*, *supra*, and *Hammond v. State*, *supra*. The validity of the instruction was similarly upheld, albeit in the face of different arguments and facts in *Newton v. State*, *supra* (holding that the instruction was not an impermissible comment on the evidence where both appellants testified and denied knowing that the property was stolen), and *Petty v. State*, *supra* (holding that a permissible inference is not a comment on the weight of the evidence). The supreme court has had the opportunity to address the constitutionality of AMCI 3605 as recently as 1994, in *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994), but did not disturb its earlier holdings.

Moreover, in *Barnes v. United States*, 412 U.S. 837 (1973), the United States Supreme Court upheld the validity of a similar jury instruction in the face of a virtually identical argument. The court in *Barnes* held that the permissive inference promulgated by the jury instruction did not infringe on the accused's privilege against self-incrimination.

This court cannot overrule precedent handed down by our supreme court, *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994), and we do not see such an obvious flaw in the basis of these decisions as to warrant certification to the supreme court for reconsideration.

Affirmed.

ROBBINS, C.J., and BIRD, J., agree.

Brenda Kay JAMES, et. al *v.* Melba Joe TAYLOR

CA 97-1404 969 S.W.2d 672

Court of Appeals of Arkansas
Division III
Opinion delivered May 20, 1998

[redacted]

Irwin Law Firm, by: *Robert E. Irwin*, for appellants.

Lightle, Beebe, Raney, Bell & Simpson, by: *A. Watson Bell*, for appellee.

JOHN MAUZY PITTMAN, Judge. The issue in this case is whether a deed from the late Eura Mae Redmon to her three children, W.C. Sewell, Billy Sewell, and appellee Melba Taylor, was a conveyance to them as tenants in common or as joint tenants with the right of survivorship. The chancellor held that Mrs. Redmon intended for her children to take the property as joint tenants with the right of survivorship. We reverse and remand.

The deed in question was executed by Mrs. Redmon on January 14, 1993. The conveyance was made to the three grantees

"jointly and severally, and unto their heirs, assigns and successors forever," with the grantor retaining a life estate. W.C. Sewell and Billy Sewell died on November 18, 1993, and May 11, 1995, respectively. Mrs. Redmon died on February 17, 1997. Shortly thereafter, appellee filed a complaint in White County Chancery Court seeking a declaration that her mother had intended to convey the property to the grantees as joint tenants, thereby making appellee, by virtue of her brothers' deaths, sole owner of the property. Appellants, who are descendants of W.C. and Billy Sewell, opposed the complaint on the ground that the deed created a tenancy in common among the grantees.

The case went to trial, and the chancellor, upon hearing extrinsic evidence of Mrs. Redmon's intent, found that she meant to convey the property to her children as joint tenants with the right of survivorship. He thereby quieted title to the property in appellee. It is from that order that this appeal has been brought.

Appellants and appellee agree that the term "jointly and severally" as used to describe an estate in property is ambiguous. However, they disagree over the rule of construction to be applied in the face of such ambiguity. Appellants contend that, under Arkansas law, a deed to two or more persons presumptively creates a tenancy in common unless the deed expressly creates a joint tenancy. They cite Ark. Code Ann. § 18-12-603 (1987), which reads as follows: "Every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy." According to appellants, the very existence of an ambiguity within the deed means that, under the statute, a tenancy in common has been created. Appellee, on the other hand, points to the well-established rule that, when faced with an ambiguity in a deed, the trial court may determine the intent of the grantor by looking to extraneous circumstances to decide what was really intended by the language in the deed. *See Wynn v. Sklar & Phillips Oil Co.*, 254 Ark. 332, 493 S.W.2d 439 (1973); *Barnett v. Morris*, 207 Ark. 761, 182 S.W.2d 765 (1944). Because, appellee argues, the chancellor in this case had strong evidence before him that Mrs. Redmon intended to create a joint tenancy in her children, his finding should not be

overturned unless clearly erroneous. *See generally Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992); *Lee v. Lee*, 35 Ark. App. 192, 816 S.W.2d 625 (1991).

The extrinsic evidence considered by the chancellor in this case weighs in favor of appellee. That evidence consisted of appellee's testimony that her mother had informed her attorney that she wanted the deed drafted so that, if one of her children died, the property would belong to the other two children, and so on; that shortly after the death of W.C. Sewell, Mrs. Redmon executed a new will leaving her property to Billy Sewell and appellee and leaving nothing to W.C.'s children; that Mrs. Redmon had set up bank accounts payable upon her death to her children, and, after W.C. and Billy died, deleted their names leaving the name of the surviving child; and that Mrs. Redmon was upset before her death upon learning that there was a problem with the deed. However, we hold that the considerations expressed in Ark. Code Ann. § 18-12-603 override the rule of construction urged by appellee.

Section 18-12-603 is a statute like one of many throughout the country. At common law, joint tenancy was favored and, where possible, that estate was held to exist. *Ferrell v. Holland*, 205 Ark. 523, 169 S.W.2d 643 (1943). However, in Arkansas, and in many other states, statutes have been adopted which presumptively construe an instrument to create a tenancy in common rather than a joint tenancy. *Id.*; 20 AM. JUR.2d *Cotenancy* § 17 at 118 (rev. ed. 1995). These statutes do not prohibit joint tenancies but merely provide for a construction against a joint tenancy if the intention to create it is not clear. *Mitchell v. Mitchell*, 263 Ark. 365, 565 S.W.2d 29 (1978); *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 742, 434 S.W.2d 266 (1968). A statute such as section 18-12-603 is not an expression of a public policy against joint tenancies but is merely a choice by the legislature of a rule of construction that selects one of two possible interpretations of a provision otherwise ambiguous. *See Renz v. Renz*, 256 N.W.2d 883 (N.D. 1977).

Ordinarily, a statute such as section 18-12-603 does not require the actual use of the words "joint tenancy." *See* 20 AM. JUR. 2d *Cotenancy* § 17 at 119 (rev. ed. 1995). For example,

Wood v. Wood, 264 Ark. 304, 571 S.W.2d 84 (1978), involved a conveyance to "Boyd E. Wood and Murtha A. Wood, husband and wife, as tenants by entirety." In fact, the grantees were not legally married, and no entireties estate was created. However, our supreme court held that the conveyance satisfied the requirements of the statute necessary to create a joint tenancy because it was clear that the grantor intended to convey a survivorship estate. Survivorship is the distinctive characteristic of a joint tenancy. 48A C.J.S. *Joint Tenancy* § 3 at 302 (1981). Where, from the four corners of an instrument, a court can interpret the intention of the grantor or testator as creating a survivorship estate, the court will deem the estate to be a joint tenancy with the right of survivorship. *Wood v. Wood, supra. See also Brissett v. Sykes*, 313 Ark. 515, 855 S.W.2d 330 (1993).

Nothing appears from the four corners of the deed in this case to indicate Mrs. Redmon's intent to convey a survivorship interest, unless that intention is to be found in the term "jointly and severally." Appellants do not cite, nor have we discovered through our own research, any Arkansas case in which a grant of ownership was made to two or more parties "jointly and severally." As the chancellor noted below, "jointly and severally" are words of tort, not property. They have no meaning in the world of estates. In the context of an ownership interest, such a term is a legal anomaly; several ownership is, by definition, a denial of joint ownership. *See Park Enters., Inc. v. Trach*, 233 Minn. 467, 47 N.W.2d 194 (1951). However, two cases from other jurisdictions are persuasive. In *In re: Kwatkowski's Estate*, 94 Colo. 222, 29 P.2d 639 (1934), the court interpreted a will that had devised property to two devisees "jointly and severally." The court held that, in light of a statute similar to ours, no joint tenancy was created. In so holding, the court said the following:

> It thus appears that for over seventy years the policy of this jurisdiction, as declared by the Legislature, has been to prefer tenancies in common at the expense of joint tenancies. Our problem is therefore not the usual one of merely applying a liberal interpretation and construction to a will. We are called upon to enforce a statute. We are not at liberty to nullify it. To do so would be to encroach upon a co-ordinate branch of the state government . . . . The duty to enforce the law as we find it

> cannot be side-stepped by simply saying that notwithstanding the absence of the above mentioned declaration, the testator intended to establish a joint tenancy, either because there is parol evidence of the alleged intention, or because we might indulge a conjecture that such was his intention on account of the expression "jointly and severally" found in the will.

Id. at 224-25; 29 P.2d at 640. *See Konecny v. Gunten*, 151 Colo. 376, 379 P.2d 158 (1963) (where an instrument is silent or ambiguous as to the nature of the joint estate created, it will be construed as creating a tenancy in common).

In *Montgomery v. Clarkson*, 585 S.W.2d 483 (Mo. 1979), property was deeded to two grantees "jointly." The Missouri court, relying on a statute virtually identical to ours, held that a joint tenancy was not created by the use of such language. In doing so, the court quoted the following language from *Lemmons v. Reynolds*, 170 Mo. 227, 71 S.W. 135, 136 (1902) (overruled on other grounds in *Holloway v. Burke*, 336 Mo. 380, 79 S.W.2d 104 (1935)), a case involving a devise in a will:

> "It is essentially true that the intention of the testator shall be sought and effectuated in construing and enforcing wills, but this rock-ribbed rule of construction, so strictly and faithfully followed in this state, is subject to this very vital qualification, to wit, that it must not conflict with any inflexible rule or requirement of law. Such is the case here. The statute . . . has declared the effect of a conveyance or devise of real estate in the event that the grant or devise does not expressly declare that a joint tenancy is intended. No such intention is expressly declared in this will . . . . It is therefore not within the power or province of the courts, under any rule of interpretation, or to carry out any unexpressed intention of the grantor or testator, to construe such a grant or devise to be a joint tenancy, for the statute says it is a tenancy in common."

585 S.W.2d at 484. The holding in *Montgomery* is in accord with the rule that a conveyance to grantees "jointly" does not create a joint tenancy. *See* Annot., *What Constitutes a Devise or Bequest in Joint Tenancy Notwithstanding Statute Raising a Presumption Against Joint Tenancy*, 46 A.L.R.2d 523, § 2 (1956). *See also* 2 *American Law of Property* § 6.3 at 13 (1952) (the better rule is that the word "jointly" is equivocal).

If use of the word "jointly" is not sufficient to create a joint tenancy, the term "jointly and severally," with its elusive connotation, cannot do so either. Further, Arkansas recognizes that the practice of divining the intent of a grantor or testator is subject to the qualification that such practice must not conflict with settled principles of law and rules of property. *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974); *Missouri Pacific Rd. Co. v. Strohacker*, 202 Ark. 645, 152 S.W.2d 557 (1941). *See Smith v. Wright*, 300 Ark. 416, 779 S.W.2d 177 (1989) (a rule of property law should be applied whenever the language of the conveyance fits under the rule, without regard to the conveyor's intention).

Appellee argues that, given the deed's ambiguity, our focus should be on the intent of the grantor as gleaned not only from the instrument itself but from the extrinsic evidence presented at trial. However, evidence of the grantor's intention cannot prevail over the statute. To allow that would be to render section 18-12-603 meaningless.

Based upon the foregoing, we hold that the deed in this case did not create a joint tenancy in the grantees. The language of the deed is insufficient to overcome the statutory presumption of a tenancy in common. We therefore reverse and remand with directions for entry of an order consistent with this opinion.

In light of our holding, we need not address appellants' second argument, that the trial court erred in admitting evidence of changes Mrs. Redmon made in her will.

Reversed and remanded.

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

Tina HARDING *v.* CITY of TEXARKANA

CA 97-1511 970 S.W.2d 303

Court of Appeals of Arkansas
Division III
Opinion delivered May 27, 1998

Patton, Tidwell, Sandefur & Paddock, by: *Kelly Tidwell* and *William R. Patterson*, for appellants.

J. Chris Bradley, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case was employed by the appellee answering 911 emergency calls on the third floor of the Bi-State Justice Building in Texarkana. She was not allowed to smoke on the third floor, but there was a designated smoking area on the first floor. On March 11, 1997, she exited the elevator on the first floor on her way to the smoking area, tripped over a rolled-up carpet, and was injured. Appellee initially accepted the claim as compensable but later controverted the claim in its entirety. After a hearing, the Commission found that the claim was not compensable because appellant was not performing employment services when she was injured. From that decision, comes this appeal.

For reversal, appellant contends that the Commission erred in finding that she was not performing employment services when she was injured. We find no error, and we affirm.

Act 796 of 1993, which applies to all injuries occurring after July 1, 1993, requires the courts to construe its provisions strictly. Arkansas Code Annotated § 11-9-102(5)(B)(iii) (Supp. 1997), which is part of Act 796 of 1993, excludes from the definition of "compensable injury" any injury "which was inflicted upon the employee at a time when employment services were not being performed." An employee is performing "employment services" when he is engaged in the primary activity that he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity. *See Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Appellant argues, on public-policy grounds, that her break advanced her employer's interest by allowing her to relax, which in turn helped her to work more efficiently throughout the rest of her work shift. We are not unsympathetic to this argument.

Under former law, the definition of compensable injury did not include a strict requirement that the injury occur while the worker was performing employment services, and a claimant's activities at the moment of injury were relevant only to the separate and broader question of whether the injury arose out of and in the course of the employment. *See id.* It is clear that, under former law, appellant's injury while en route to the break area would have been in the course of her employment pursuant to the personal-comfort doctrine. *See Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73, 923 S.W.2d 292 (1996). It may be true that the interests of both workers and employers would be better served by a more uniform application of an administrative remedy than they would be by the uncertainty inherent in a tort claim based on premises liability. Nevertheless, the legislature, rather than the courts, is empowered to declare public policy, *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997), and whether a law is good or bad, wise or unwise, is a question for the legislature, rather than the courts. *Longstreth v. Cook*, 215 Ark. 72, 220 S.W.2d 433 (1949). In the present case, Act 796 of 1993 applies and, although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we hold that the Commission did not err in finding that appellant was not performing employment services when she was injured.

Nor do we find merit in appellant's contention that the employer, by initially accepting the claim as compensable, waived the issue of whether appellant was performing employment services. Waiver is in most cases a question of fact, *see Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992), and neither the administrative law judge nor the Commission made any finding regarding waiver in the case at bar. We do not address issues raised for the first time on appeal. *Teague v. C & J Chemical Company*, 55 Ark. App. 335, 935 S.W.2d 605 (1996).

Affirmed.

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

Jacqueline HOLLOWAY *v.* STUTTGART REGIONAL MEDICAL CENTER, ET AL.

CA 97-1297 970 S.W.2d 301

Court of Appeals of Arkansas
Division IV
Opinion delivered May 27, 1998
[Petition for rehearing denied July 1, 1998.]

John P. Lewis, P.A., by: *John P. Lewis*, and *Steve Westerfield*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard P.L.L.C., by: *L. Kyle Heffley*, for appellee Stuttgart Regional Medical Center.

Anderson, Murphy & Hopkins. L.L.P., by: *C. Timothy Spainhour*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order of summary judgment dismissing appellant's complaint in negligence based on a finding that appellees owed no duty to protect her from an attack perpetrated by a third person. Because we are unable to address appellant's argument for reversal, we affirm.

On May 4, 1993, the appellant, Jacqueline Holloway, went to the emergency room at appellee Stuttgart Memorial Hospital for treatment of minor injuries she had sustained in an altercation with Barbara Peters, who was also a patient at the emergency room. Appellant was accompanied by her daughter and her niece, who twice sought but were denied permission to enter the treatment room occupied by appellant. Stationed in the emergency waiting room was a security guard, who was armed and in uniform, and who was an employee of appellee Burns International Security Services that was under contract to provide security at the hospital. A woman identifying herself as appellant's mother approached the security guard and asked for permission to see appellant. The guard referred the woman to appellee Debbie Stone, a nurse, who pointed out appellant's treatment room and allowed the woman to enter without escort. This woman, however, was not appellant's mother; she was Kathy Peters, the mother of appellant's combatant, Barbara Peters. The elder Peters entered the treatment room, struck appellant on the head, and proceeded to slash and cut her with a box-cutter knife. Instead of answering appellant's cries for help, the security guard held appellant's niece and daughter at bay in the waiting room. The wounds that were inflicted upon appellant and resulting loss of blood necessitated a stay in the hospital's intensive care unit.

Appellant brought this lawsuit contending that appellees were liable for the injuries she sustained as a result of their failure to use reasonable care to ensure her safety. Appellees filed motions for summary judgment premised on the general rule, taken from *Restatement (Second) of Torts* § 315 (1965), that one is not ordinarily liable for the criminal acts of third persons absent a duty of care arising from a special relationship. Aside from this rule, appellees also relied on the decision in *Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 921 S.W.2d 934 (1996), as authority for their position. In resisting the motions, appellant argued that appellees had assumed a duty of care, as shown by the hiring of a security guard and by restricting access to the treatment room. *See generally*

Haralson, Adm'x v. Jones Truck Lines, 223 Ark. 813, 270 S.W.2d 892 (1954). After hearing oral arguments of counsel at a hearing, the trial court granted appellees' motions for summary judgment; this appeal followed.

The law of negligence requires as an essential element that the plaintiff show that a duty of care was owed. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994). The issue of whether a duty exists is always a question of law, not to be decided by a trier of fact. *Hall v. Rental Management, Inc.*, 323 Ark. 143, 913 S.W.2d 293 (1996). If no duty of care is owed, summary judgment is appropriate. *Smith v. Hanson*, 323 Ark. 188, 914 S.W.2d 285 (1996).

As her sole point on appeal, appellant contends that she was owed a duty of care by virtue of the special relationship existing between a hospital and its patient. Appellees respond to that argument by contending, as a threshold matter, that this issue is being raised for the first time on appeal. From our review of the record, we must agree that appellees' point is well-taken. Below, appellant argued exclusively that, by their actions, appellees had voluntarily assumed a duty to protect her from the acts of third persons. She did not argue, as she does here, that appellees owed a duty based on the existence of a special relationship. In fact, appellant responded to the motions for summary judgment by stating that when she "walked into the emergency room . . . none of the defendants had any special responsibilities to provide for the security of the plaintiff." In her argument before the court, she further maintained that a duty of care did not rest on the existence of a special relationship. It is a basic rule of appellate procedure that a party cannot change arguments on appeal, *Ball v. Foehner*, 326 Ark. 409, 931 S.W.2d 142 (1996), and we do not address arguments that were not raised below. *Prudential Insurance Co. v. Frazier*, 323 Ark. 311, 914 S.W.2d 296 (1996). We consequently have no choice but to affirm the order of summary judgment without consideration of the issue advanced on appeal. While the question of whether appellees assumed a duty of care raises an interesting point, it is one that we do not reach because appellant has completely abandoned that argument on appeal.

Affirmed.

AREY and BIRD, JJ., agree.

Frankie IRVIN *v.* STATE of Arkansas

CA CR 97-1371 972 S.W.2d 948

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1998

J. Eric Hagler, for appellant.

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

JOHN F. STROUD, JR., Judge. Frankie Irvin was charged as a habitual offender with the offenses of aggravated robbery, theft of property, and attempted capital murder. The murder charge was apparently dropped, and a date was set for trial by jury on the remaining two charges. Mr. Irvin's retained counsel, A. Wayne Davis, failed to appear in Desha County Circuit Court on the trial date. At a hearing in chambers with Mr. Irvin and two prosecuting attorneys, the trial court stated that Mr. Davis was not excused even though the court had been told that he had been fired and he had faxed the court a motion to withdraw the night before trial. The court also stated that it would issue an order for Mr. Davis to show cause why he should not be held in contempt. Mr. Irvin

then told the court he needed "someone to represent me that will represent me in my best interest." The court treated his request as a motion for a continuance and denied the motion. Mr. Irvin's trial without counsel followed. He was convicted of aggravated robbery and theft of property, and was sentenced to a term of 240 months in the Arkansas Department of Correction.

On appeal Mr. Irvin contends that (1) he was denied his constitutional right to assistance of counsel at trial, and (2) his continued incarceration for a conviction based upon "clear error" constitutes a denial of due process. The State concedes that the trial court deprived appellant of his Sixth Amendment right to counsel. We agree and therefore reverse and remand for a new trial.

The Sixth Amendment to the United States Constitution, made obligatory upon the states by the Due Process Clause of the Fourteenth Amendment, guarantees an accused the right to have the assistance of counsel for his defense. *Beyer v. State*, 331 Ark. 197, 962 S.W.2d 751 (1998). Article 2, Section 10, of the Arkansas Constitution provides that an accused in a criminal prosecution has the right to be heard by himself and his counsel. *Id.* No sentence involving loss of liberty can be imposed where the right to counsel has been denied. *Id.*

Here, at the hearing in chambers, appellant told the trial court that he wanted to fire Mr. Davis because of the "dirty language" he used in a motion for the judge's recusal. The court told appellant that appellant had "some supervisory capacity" over his attorney and the filing of the motion. Appellant replied, "I don't know how to go about this, you know. I need — I need someone to represent me in this." Appellant also told the court that he was in pain and that he had records of his visits to the emergency room and a doctor's office. The court stated:

> Well, this Court had a, had a pretrial hearing the last time this was set for trial and the record will reflect that. And you and I had some discussions. I was concerned at that point in time with Mr. Davis' representation of you from the standpoint that the matter was set for trial that day. I did not grant a continuance

> until that day. Mr. Davis didn't show up that day and subpoenas had not been issued.
>
> . . . .
>
> I was concerned because it didn't look like Mr. Davis had prepared at least to the extent of requesting subpoenas, and I think I advised you of that on the record. I also advised you if you wanted another attorney to act diligently in changing an attorney. I don't think that you've done that.
>
> . . . .
>
> [Y]ou've had adequate opportunity to get another attorney in this case if you had wanted one before waiting until the day when this, or the day before this case was set for trial, which is — The first time I heard anything about any continuance or changing or firing attorneys was yesterday. That was long after a jury had been called. And I consider this a motion to continue and in the exercise of my discretion, I'm not going to grant the motion to continue.

The court then considered appellant's motion for recusal. During discussion of that motion, appellant referred to a paper he had brought that had been typed by Mr. Davis. The following colloquy occurred:

> THE COURT: I'm going to let you decide whether you want to offer these documents or not. It's up to you.
>
> THE DEFENDANT: I wished I had an attorney here with me.
>
> THE COURT: Well, I do, too, but apparently you made the decision to fire him, so — do you want to offer these?
>
> THE DEFENDANT: Well, I really had no choice.
>
> THE COURT: Well, I don't know about that. So do you want to offer this or not?
>
> . . . .
>
> THE COURT: Do you want to offer this?
>
> THE DEFENDANT: I don't know — I really need a, an attorney, sir.

THE COURT: Okay.

THE DEFENDANT: Please.

THE COURT: So you don't have anything else —

THE DEFENDANT: I'm begging you. Please —

THE COURT: — you want to offer?

THE DEFENDANT: — let me get — I talked to Mr. McArthur.

THE COURT: You — I've already said I hadn't, I've refused to grant the continuance to allow you to get another attorney because your request was not made with due diligence.

The court took further evidence on the motion to recuse, denied the motion, and then stated the following:

> I want to address you on an issue. Mr. Davis is not here. This court has not relieved him.
>
> Now, I personally believe the circumstantial evidence in this case is that Mr. Davis is not here for a reason. It's to protect Mr. Irvin who's still his client so that Mr. Irvin can claim, if we go forward with the trial without Mr. Davis absence [sic], that Mr. Irvin did not have, for appellate purposes, the benefit of the counsel that he had. I think that's why Mr. Davis isn't here today.
>
> I think, as I said, circumstantial evidence shows that. Now, if I force Mr. Irvin to trial without Mr. Davis here today, then Mr. Irvin can argue that on appeal. The case might be reversed for that. I don't know. You never know what an appellate case is going to do. I'm sufficiently convinced that Mr. Davis and Mr. Irvin have been attempting to delay this matter every time that it came up. Now, I have no way to verify their disagreement. All I can do is hear what Mr. Irvin says.

The judge further stated that he believed appellant, by his conduct at the last minute, had waived his constitutional right to counsel and could be required to go to trial *pro se*. Appellant replied, "Well, me and Mr. Davis, we're not in this together to prelong [*sic*] this."

The right to counsel may be waived, but the waiver must be made knowingly, voluntarily, and intelligently. *Smith v. State*, 329 Ark. 238, 947 S.W.2d 373 (1997). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights, and the burden is upon the State to show that an accused voluntarily and intelligently waived his fundamental right to the assistance of counsel. *Daniels v. State*, 322 Ark. 367, 908 S.W.2d 638 (1995). The *Daniels* court further explained:

> [W]e have stated that determining whether an intelligent waiver of the right to counsel has been made depends in each case upon the particular facts and circumstances, including the background, the experience and conduct of the accused. To establish a voluntary and intelligent waiver, the trial judge must explain to the accused that he is entitled as a matter of law to an attorney and question him to see if he can afford to hire counsel. The judge must also explain the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney. The last requirement is especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and receives no special consideration on appeal.

322 Ark. at 373, 908 S.W.2d at 640 (citations omitted). Furthermore, there are three requirements that must be met before a trial court can find that an accused has knowingly and intelligently waived counsel and allow the accused to proceed *pro se* in a criminal case. *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986), *overruled on other grounds, Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996). The requirements are that (1) the request to defend oneself is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues. *Id.* at 244, 704 S.W.2d at 611.

Here, as in *Philyaw*, appellant did not ask that he be allowed to represent himself, and the record reveals absolutely no waiver of that right, yet appellant was forced to represent himself. Therefore our inquiry becomes whether appellant's conduct prevented the fair and orderly exposition of the issues and amounted to a forfei-

ture of his right to counsel. *See Beyer v. State*, 331 Ark. 197, 962 S.W.2d 751 (1998).

The trial judge stated that he believed that circumstantial evidence showed that counsel's absence was deliberately planned to delay appellant's trial and for purposes of appeal if a trial proceeded without benefit of counsel. The State as appellee acknowledges that it finds no evidence in the record to support the trial court's suspicions that counsel's absence was deliberately planned to delay appellant's trial and for purposes of appeal. The State therefore concedes that it cannot in good faith argue that counsel and appellant concocted this scenario as a tactic for delay.

The record does show appellant's persistent pleas for an attorney after his retained counsel failed to appear, and it also shows the trial court's repeated refusal to postpone the trial until counsel could be obtained. It is within the trial court's discretion to grant a continuance so that a criminal defendant may obtain a new attorney, and this decision will not be reversed absent an abuse of discretion. *Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997). In making this determination, the trial court may consider the following factors: (1) the reasons for the change, (2) whether other counsel has already been identified, (3) whether the defendant has acted diligently in seeking the change, and (4) whether the denial is likely to result in any prejudice to defendant. *Id.* at 559, 953 S.W.2d at 35 (citations omitted).

In *Beyer v. State*, 331 Ark. 197, 962 S.W.2d 751 (1998), our supreme court reversed and remanded a case for a new trial where the trial court required the defendant to go to trial without an attorney. One month before trial, the trial court had dismissed the public defender from representing the defendant upon its finding that he could afford to hire his own attorney, and the defendant had sought a continuance one week before trial, claiming that he needed more time to find an attorney. The supreme court, noting the absence of convincing evidence to support the conclusion that the defendant's motion for a continuance was an attempt to postpone his trial date, held that the trial judge had abused his discretion by requiring him to be tried without counsel.

Here, Mr. Davis was appellant's counsel of record on the day of appellant's trial. As the trial court noted, the attorney

was required to be present the day of trial. Although the trial court announced that it would impose sanctions against the attorney, he was never excused from representing appellant. The court specifically noted that it had not issued an order allowing appellant's attorney to withdraw, and the court stated that the attorney could not withdraw without such an order. Thus, appellant had an attorney of record but was forced to trial without the benefit of having him present. The record clearly shows that the trial court abused its discretion in denying appellant a continuance so that he could obtain counsel before proceeding to trial. Therefore, we reverse and remand for a new trial.

For his second point on appeal, appellant contends that his continued incarceration is premised upon a conviction resulting from clear error, constituting a denial of due process. He asks that he be released and the charge dismissed or, alternatively, that he be allowed a reasonable bail until a determination of his direct appeal is made. Such relief can be sought by appellant once the case is within the jurisdiction of the trial court on remand.

Reversed and remanded for new trial.

GRIFFEN and CRABTREE, JJ., agree.

John Alvin LEWIS *v.* STATE of Arkansas

CA CR 97-1232 970 S.W.2d 299

Court of Appeals of Arkansas
Division IV
Opinion delivered May 27, 1998
[Petition for rehearing denied September 30, 1998.*]

* BIRD, J., concurs. ROBBINS, C.J., and ROAF, J., dissent.

Murphy & Carlisle, by: *Marshall N. Carlisle*, for appellant.

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

OLLY NEAL, Judge. Appellant pled guilty on September 20, 1993, to possession of methamphetamine in violation of Arkansas Code Annotated § 5-64-401 (Repl. 1993), and was sentenced to a three-year term of imprisonment. The imposition of appellant's

prison sentence was purportedly suspended upon certain conditions. The State filed its petition to revoke his probation on September 19, 1996, the final day of his probationary period, and appellant was arrested on September 23, 1996. After a hearing on the State's petition, appellant's probation was revoked, and he was sentenced to ten years in the Arkansas Department of Correction, with seven years suspended. He argues on appeal that his sentence was imposed illegally and that the evidence was insufficient to support the revocation of his probation. We agree that the trial court exceeded its statutory authority in setting appellant's sentence, and, therefore, we reverse and dismiss, based on the trial court's lack of jurisdiction.

Although appellant was arrested for violation of an order of protection, after his period of probation had already expired, the State filed its revocation petition within the probationary period.

During a hearing on the charge of violating the order of protection appellant responded to the prosecuting attorney's question: "Do you have any devices on [your ex-wife's] phones or on her phone lines at her residence that you have put there?" by replying "I did at one time." This testimony was made a part of the record of the revocation proceedings without objection from appellant. Appellant also admitted during the revocation hearing that he placed an electronic recording device on his ex-wife's telephone line and intercepted some of her private conversations, and stated that he did so "sometime between January 1996 and December 1996." Appellant's own testimony was clearly sufficient to establish a violation of Arkansas Code Annotated § 5-60-120 (Repl. 1993), *Interception and recording.*

Appellant's second argument is that his sentence is illegal in that the trial court acted in excess of its statutory authority when it sentenced him to a period of imprisonment greater than "the fixed term remaining on the suspended sentence." Appellant's argument, which is premised on Arkansas Code Annotated § 5-4-309(f) (Repl. 1993), assumes that he received an actual sentence to a term of imprisonment after his 1993 guilty plea. After reviewing the language the court used in the 1993 judgment that

was entered upon appellant's guilty plea, we must agree. The court's order states in relevant part:

> The defendant John Alvin Lewis, entered his plea of guilty pursuant to Act 346 of 1975 to the reduced charge of Possession of a Controlled Substance (C Felony) [Methamphetamine] and upon recommendation by the Prosecuting Attorney, punishment is *fixed* at three (3) years in the Department of Correction, with imposition of said sentence suspended . . . . [Emphasis added.]

Because the court used the term "fixed" in reference to appellant's sentence, and because it stated a specific time that appellant had to serve, we cannot say that the court effectively suspended the imposition of appellant's sentence. *See Lee v. State* 299 Ark. 187, 772 S.W.2d 324 (1989); and *Lyons v. State*, 35 Ark. App. 29, 813 S.W.2d 262 (1991). Our supreme court noted in *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980):

> There is a substantial difference between advising a defendant that he is sentenced to 5 years suspended subject to certain behavioral requirements and in advising a defendant that the imposition of sentence will be suspended or postponed for 5 years conditioned on the same behavioral requirements. If the appellant had been sentenced in compliance with Section 41-803 by the suspension of the *imposition* of sentence, rather than by the *execution* of sentence, the trial court could have sentenced him to 15 years imprisonment upon revocation of the suspension, as is authorized by Ark. Code Ann. § 41-1208(6) . . . . We should, however acknowledge that Section 41-1208(6) was partially repealed by implication in 1979. (Decision under prior law.)

Where a trial court imposes a definite sentence upon acceptance of a guilty plea or a finding of guilt, and orders that the *execution* of the sentence be suspended, Arkansas Code Annotated § 16-93-402(e)(5) (Repl. 1997) limits the court's sentencing authority to imposition of a sentence not exceeding the length of the sentence originally imposed. *Culpepper, supra.*

Based on the foregoing discussion, we find that the trial court was without authority to sentence appellant on the original charge of possession of a controlled substance to more than the time remaining on his original three-year fixed sentence. Because

appellant's original fixed sentence expired on September 20, 1996, three days before appellant was arrested, we reverse and dismiss.

Reversed and dismissed.

JENNINGS and STROUD, JJ., agree.

CONCURRING OPINION UPON DENIAL OF REHEARING

975 S.W.2d 445

September 30, 1998

SAM BIRD, Judge, concurring. I write for the purpose of expressing my agreement with the reasoning of the majority opinion handed down on May 27, 1998, by which this case was reversed and dismissed, and with the court's decision to deny the State's petition for rehearing.

The dissenting opinion suggests that this case should be affirmed by resorting to the remedy fashioned by the supreme court in *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). As observed by the dissent, in *Hoffman* the supreme court reviewed a revocation hearing that involved a defendant who had been given an "advisory sentence" that was clearly illegal, having been abolished with the adoption of the new criminal code. However, as also noted by the dissent, the defendant in *Hoffman* did not challenge the illegality of the sentence. As the supreme court noted, "the sentence was not objected to below or made a subject matter of this appeal." In fact, in *Hoffman* the appellant merely challenged the sufficiency of the sentence," but did not argue that the "advisory sentence" was illegal.

Thus, in *Hoffman*, the supreme court was in the unique position of having to decide whether there was sufficient evidence to support the revocation of an illegal "advisory sentence" that the appellant had not challenged, either in the trial court or on appeal. Obviously, the supreme court could not have found the evidence to be sufficient to support appellant's revocation and then have

affirmed the imposition of the trial court's illegal sentence. The court's solution was to "view the court's findings as though it intended to sentence the appellant to seven years, which was suspended conditioned upon payment of restitution."

Unlike the appellant in *Hoffman*, the appellant in the case at bar has specifically challenged the illegality of his sentence, and this court does not have the luxury of overlooking it and creating a fictional legal sentence that can then be imposed if the evidence is sufficient to support its revocation. Unlike the court in *Hoffman*, the illegality of appellant's sentence in the case at bar cannot be passed off as "the proper subject for a petition for Rule 37."

Contrary to the dissent's suggestion, there is nothing in the language of the *Hoffman* case that requires us to assume that, because the trial court imposed an illegal sentence, it intended for the sentence to be legal. That procedure was adopted by the supreme court in *Hoffman* only because the appellant had not raised the issue. The court in *Hoffman* even intimated that the sentence might be subject to a successful challenge by way of a Rule 37 petition.

Finally, I believe that the dissent's reliance on *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992), is erroneous. In the first place, the portion of *Bangs* that is quoted in the dissenting opinion is dictum. *Bangs* was affirmed upon the court's finding that the appellant was not prejudiced by his illegal sentence, not because the sentence was not illegal.

Secondly, *Bangs* stands only for the proposition that a petition to revoke will not be dismissed on appeal, with the result that appellant is released from prison, where appellant was revoked for the violation of *several* conditions of his probation, when only one of the conditions was illegal. While the court in *Bangs* did say, as noted by the dissent, that an appellant cannot be allowed "to benefit from his failure to seek the appropriate remedy" in the trial court, this statement was made only as a predicate to its conclusion that the appropriate remedy in that case was to modify the judgment of the trial court, just as the trial court could have done, by modifying the illegal condition of probation, rather than to dismiss the State's revocation petition altogether.

DISSENTING OPINION UPON DENIAL OF REHEARING

September 30, 1998 975 S.W.2d 445

ANDREE LAYTON ROAF, Judge, dissenting. I would grant rehearing and affirm this case. The majority has found that the trial court illegally sentenced appellant John Alvin Lewis in 1997 to ten years' imprisonment with seven years suspended, when his "probation" for a 1993 drug offense was revoked. Because the original judgment had stated that Lewis's sentence was "fixed" at a term of three years, the majority construed language suspending imposition of the sentence as, in effect, a suspended execution of the sentence. Consequently, the majority reasons that because the petition to revoke was filed on the final day of the three-year period, the trial court lacked the authority to sentence Lewis to any time whatsoever by the time the petition was heard several months later.

However, the majority fails to acknowledge that its construction of the initial judgment in fact renders it illegal, in that the trial court was not authorized to suspend execution of a fixed sentence when Lewis was originally sentenced on September 20, 1993. *See* Ark. Code Ann. § 5-4-104(e)(B)(I) (Repl. 1997) (prohibiting suspended execution of sentence effective March 16, 1993). Accordingly, I find the instant case analogous to *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). In *Hoffman*, the supreme court reviewed a revocation hearing that involved a defendant who had been given an "advisory sentence," a form of court probation that had been abolished by the adoption of the new criminal code. Noting that this was an illegal sentence that had not been challenged below on an appeal by the appellant, the supreme court treated the trial court's disposition as a suspended sentence, the option available under the criminal code that most closely matched what trial court intended to impose.

Here, the original 1993 judgment purported to sentence Lewis under Act 346 of 1975, the First Offenders Act, which

allows a defendant to be placed on probation, *see* Ark. Code Ann. § 16-93-303 (Supp. 1997), but also stated "imposition of sentence suspended" upon Lewis's fulfilling certain conditions, including a three-year supervised probation. However, suspended imposition of sentence involves release of the defendant without pronouncement of sentence and, unlike probation, without supervision by a probation officer. *See* Ark. Code Ann. § 5-5-101(1) (Repl. 1997). We should have followed *Hoffman v. State, supra,* and treated the trial court's judgment as placing Lewis on probation. I know of nothing in our criminal code that would compel a different disposition. Indeed, Ark. Code Ann. § 16-90-111 (Supp. 1991) specifically states that illegal sentences may be corrected at any time.

Finally, I find the majority's reliance on *Culpepper v. State,* 268 Ark. 263, 595 S.W.2d 220 (1980), to be misplaced. In *Bangs v. State,* the supreme court rejected the idea that the defendant should benefit from failing to act to correct an illegal sentence. The court said:

> Thus, had the appellant presented this argument to the trial court, the trial court could have easily corrected the alleged illegality in the original sentence. It is true that the appellant was not required to present his argument to the trial court in order to receive appellate review. However, on appeal, we cannot dismiss the petition to revoke and thereby allow appellant to benefit from his failure to seek the appropriate remedy by petitioning the trial court for correction pursuant to section 16-90-111. Where an error has nothing to do with the issue of guilt or innocence and relates to punishment, it may be corrected in lieu of reversing and remanding.

310 Ark. 235, 241, 835 S.W.2d 294, 297 (1992) (citations omitted); *see also Davis v. State,* 291 Ark. 191, 723 S.W.2d 366 (1987); *Basura v. City of Springdale,* 47 Ark. App. 66, 884 S.W.2d 629 (1994).

The majority has allowed Lewis to gain from his failure to seek correction of the original sentence by the trial court and to reap the benefits of both the First Offenders Act and a clearly ille-

gal suspended "execution" of sentence. I would affirm the revocation and ten-year sentence imposed by the trial court.

ROBBINS, C.J., joins.

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

CA 97-159 969 S.W.2d 203

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 27, 1998

Winston Bryant, Att'y Gen., by: *M. Shawn McMurray*, Deputy Att'y Gen., and *Ralph M. Spory, Jr.*, Asst. Att'y Gen., for appellant.

Beverly Hood Jones, for appellee Arkansas Public Service Commission.

Jeffrey L. Dangeau, for appellee Arkansas Western Gas Company.

WENDELL L. GRIFFEN, Judge. This appeal is brought by the Attorney General of the State of Arkansas from Order No. 11 entered by the Arkansas Public Service Commission (Commission). In Order No. 11, the Commission adopted a stipulation that provided for a rate increase to Arkansas Western Gas Company (AWG) and ordered an investigation into AWG's inter-company cost allocation procedures. On appeal to this court, appellant argues that Order No. 11 does not include sufficient detail and findings of fact to enable this court to determine how the Commission arrived at its decision; that the Commission's decision is

inconsistent, arbitrary, capricious, and not supported by substantial evidence; and that the Commission shifted the burden of proof in a rate case to the opponent. Because we agree with appellant's first argument, we reverse and remand.

On January 30, 1996, AWG filed an application with the Commission to increase its rates by $7,283,161. A hearing was set, and testimony was filed in response to AWG's application. Northwest Arkansas Gas Consumers (NWAGC) recommended a $3.4 million reduction in AWG's proposed revenue requirement. The Staff of the Commission (Staff) recommended a $3.9 million reduction in AWG's request but later revised its recommendation to $4.4 million. Appellant argued that AWG was collecting $1.184 million in excess revenue and recommended that the Commission freeze AWG's rates at present levels until a proper cost methodology system was in place.

In examining AWG's rate request, appellant questioned the procedures used by Southwestern Energy Company (SWN), AWG's parent company, to allocate costs to AWG.[1] Specifically, he contended that the three-factor method of allocation used by SWN to allocate common and overhead costs among its subsidiaries was not being properly applied. He pointed out that some of SWN's unregulated subsidiaries were shown as having no employees; whereas, AWG had an unusually high number of employees compared with other gas distribution companies of similar size and revenue. Appellant also questioned AWG's executive compensation levels. He contended that they were much greater than those of comparable utilities, further noting that the president/CEO of SWN is paid $760,000 in cash compensation and that $479,000 of that expense is allocated to AWG. He concluded that when the improper costs allocated to AWG are corrected, the figures demonstrate that AWG is earning revenue in excess of its expenses and is not entitled to a rate increase.

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[1] AWG is a subsidiary of Southwestern Energy Company. In 1988, AWG was merged with Associated Natural Gas Company (ANG), another regulated subsidiary of SWN, but AWG has continued to operate as a separate division with separate rates and tariffs, and its rate application includes rates and tariffs only for the AWG division. Southwestern Energy Production Company (SEPCO) and SEECO, Inc., are two unregulated subsidiaries of SWN that are involved in oil and gas production.

Prior to the scheduled hearing before the Commission, AWG, Staff, Southwestern Electric Power Company, NWAGC, and appellant began settlement negotiations, which resulted in a settlement agreement referred to as the Joint Proposed Stipulation (Stipulation). The Stipulation proposed that the Commission find a revenue deficiency of $5,071,064 but left the issues raised by appellant, concerning inter-company allocation methodology, executive compensation, and staffing levels, to be decided by the Commission. In this regard, the Stipulation provided:

> A. Subject to the resolution of the remaining issues by the Commission, the terms of this Stipulation are set out below.
>
> . . . .
>
> 14. All other issues have been resolved, ("the Settled Issues") with the exception of the differences between the Company and the AG regarding inter-company allocation methodology, executive compensation, and staffing levels.
>
> . . . .
>
> 17. Neither this Stipulation, nor any of the provisions hereof, shall become effective unless and until the Commission shall have entered an order approving all the terms and provisions of this Stipulation without modification of condition.
>
> . . . .
>
> 19. If this Stipulation is not accepted by the Commission in its entirety without any condition or modification, it shall be of no force and effect and will not be used in this or any other proceeding . . . .
>
> B. Left unresolved by this Stipulation are differences between the other parties and the AG over the issues of inter-company allocation methodology, executive compensation, and staffing levels. The AG has contended, and continues to contend, that if these issues are resolved in the AG's favor, then the Company will not be entitled to any rate increase. To the extent, therefore, that the Commission resolves any of these issues in favor of the AG, the parties understand that this settlement will not become effective pursuant to paragraph 19 hereof.

A hearing was then held by the Commission regarding whether it should adopt the Stipulation. The majority of the testimony the Commission heard concerned the three issues contested by appellant. Appellant argued that the approval of any rate increase should be delayed pending the result of an independent study of

the reasonableness of the staffing levels, compensation levels, and the methods of allocation of the common overhead costs.

In November 1996, the Commission entered Order No. 11, which approved the Stipulation; however, it also ordered an independent study of the contested issues raised by appellant. The Commission ordered AWG, Staff, and other interested parties to jointly select an independent consulting firm to investigate the reasonableness of AWG's inter-company costs allocations, staffing levels, and executive compensation. It also required the consulting firm's report to be filed contemporaneously with AWG division's or ANG division's next rate application. Appellant petitioned for rehearing of Order No. 11, but its petition was denied by Order No. 14.

Appellant, for his first point on appeal to this court, argues that Order No. 11 is unlawful because the order does not include sufficient detail and findings of fact to enable the reviewing court to determine how the Commission arrived at its decision. Specifically, he contends that, although approval of the Stipulation was subject to the Commission's resolution of the contested issues and the Commission heard lengthy testimony concerning the contested issues, Order No. 11 does not contain any findings of fact deciding these issues.

The Commission made the following findings in Order No. 11:

> The Stipulation proposed a settlement revenue deficiency of $5,071,064 and *resolved all issues* with the exception of the differences between [AWG] and [appellant] regarding inter-company allocation methodology, executive compensation, and staffing levels. To the extent that the Commission decides any of the unresolved issues in favor of [appellant], the Stipulation provides that the settlement will not become effective. On July 17, 1996, a public hearing was held to hear evidence on the Stipulation and the unresolved issues.
>
> At issue before the Commission is whether the Stipulation reflects a revenue deficiency and resolution of tariff and rate issues which, based on the evidence presented, is fair and reasonable and in the public interest; or, whether the evidence presented by the [appellant] with regard to executive compensation, staffing

levels, and inter-company cost allocation procedures sufficiently casts a large enough shadow over AWG's Application and testimony to disallow any rate increase. The Commission finds that, although Dr. Ileo [appellant's witness] has presented information which certainly brings into question the appropriateness of AWG's current executive compensation, staffing levels, and inter-company cost allocation procedures, [appellant] has not presented substantial evidence to justify rejection of the Stipulation. Further, the Commission finds that the evidence of record substantially supports a finding that the Stipulation represents a fair and reasonable settlement of the issues in this case and is, therefore, in the public interest.

In light of the information presented by Dr. Ileo, however, the Commission finds that further investigation should be made into AWG's inter-company cost allocation procedures. The Commission, therefore, orders AWG to cooperate with Staff and the other parties to this docket to cause to be filed with the Commission, contemporaneously with its next rate increase request for either the AWG division or the ANG division, an independent study of its inter-company cost allocation procedures, staffing levels, and executive compensation as they impact the AWG and ANG divisions . . . ."

Arkansas Code Annotated section 23-2-421(a) (1987) requires that: "[t]he Arkansas Public Service Commission's decision shall be in sufficient detail to enable any court in which any action of the commission is involved to determine the controverted question presented by the proceeding." On review, the appellate court must determine not whether the conclusions of the commission are supported by substantial evidence, but whether its findings of fact are so supported. *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 829, 561 S.W.2d 645 (1978). The commission's finding must be in sufficient detail to enable the courts to make an adequate meaningful review; courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings by the commission on all essential elements pertinent to a determination of a fair return. *Id.* As between conflicting statements, the commission must make findings to show which of the evidence it accepts as competent and worthy of belief and that which it rejects. *Aspen Airways, Inc. v. Public Util. Comm'n of Colo.*, 453 P.2d 789, 792

(Colo. 1969). This court must know what the findings of the commission are before they can be given conclusive weight. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 63, 871 S.W.2d 414, 418 (1994). As we explained in our decision:

> [I]t must be possible for the reviewing court to measure the findings against the evidence from which they were educed. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. 39, 386 P.2d 515, 524 (1963). In *Town of New Shoreham v. Rhode Island Public Utilities Commission*, 464 A.2d 730 (R.I. 1983), the Rhode Island Supreme Court stated:
>
>> This court does not sit as a factfinder; our role is "to determine whether the commission's decision and order are lawful and reasonable and whether its findings are fairly and substantially supported by legal evidence and substantially specific to enable us to ascertain if the facts upon which they are premised afford a reasonable basis for the result reached." *Rhode Island Consumers' Council v. Smith*, 111 R.I. at 277, [302 A.2d 757, 762 (1973)]. However, if the commission fails to set forth sufficiently the findings and the evidentiary basis upon which it rests its decision, we shall not speculate thereon or search the record for supporting evidence or reasons, nor shall we decide what is proper. Instead, we shall remand the case in order to provide the commission an opportunity to fulfill its obligations in a supplementary or additional decision. *Id.* at 278, 302 A.2d at 763.
>
> *Town of New Shoreham v. Rhode Island Pub. Util. Comm'n*, 464 A.2d at 732. See also *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494, 66 A.2d 135 (1949), in which the Supreme Court of Vermont held that the requirement that the public service commission make its findings of fact imposes upon the commission the duty to sift the evidence and state the facts, and when the essential findings have not been made, the court is unable to act as factfinder but must instead remand the case for such findings.

Bryant v. Arkansas Pub. Serv. Comm'n, 45 Ark. App. at 64, 871 S.W.2d at 418.

AWG responds that the findings made by the Commission in Order No. 11 were sufficient to resolve the material issues on appeal. It states that Order No. 11 made a specific finding that appellant did not present sufficient evidence to justify rejection of

the Stipulation. It cites *Bryant v. Arkansas Public Service Commission*, 54 Ark. App. 157, 182, 924 S.W.2d 472, 486 (1996), for this court's holding that an administrative agency is not required to make findings of fact upon all items of evidence or issues, nor necessarily answer each and every contention raised by the parties.

In that case, we also held that the findings made by the Commission should be sufficient to resolve the material issues or those raised by the evidence which are relevant to the decision. Here, the Stipulation makes it clear that there are three specific issues that the Commission must decide in AWG's favor in order for the Stipulation to be considered. AWG admits in its brief that, "[i]f the Commission had resolved any of the Contested Issues in the [appellant's] favor, the Stipulation would not become effective." Nevertheless, Order No. 11 contains no mention of a finding regarding executive compensation, staffing levels, and inter-company cost allocation procedures, much less any discussion of the evidence the Commission considered and rejected in resolving the disputed issues, although voluminous testimony and exhibits were presented to the Commission by appellant and AWG concerning the contested issues.

We are unable to determine from the order what the Commission found concerning the reasonableness of AWG's inter-company costs allocation, its staffing levels, as well as its executive compensation. Although the Commission ordered the parties to jointly select an independent consulting firm to investigate these issues, we cannot determine from the order what evidence even justified a finding to support that order in the context of a future rate increase when the parties were involved in a controversy about a pending rate increase. Although Order No. 11 contains the Commission's finding that appellant failed to present "substantial evidence to justify rejection of the Stipulation" and that "the evidence of record substantially supports a finding that the Stipulation represents a fair and reasonable settlement of the issues in this case and is, therefore, in the public interest," we are unable to review those findings given that the parties had stipulated that their settlement would not take effect if the Commission decided any of the remaining issues in controversy in favor of appellant. Simply put, the order does not recite any evidence supporting the findings that the Commission made, and we do not have findings on the very issues that the parties litigated or, for

that matter, why findings on those issues were not made before the parties were ordered to undertake an independent study of the issues that they were asking the Commission to adjudicate. Therefore, we cannot conduct a meaningful review of the Commission's decision.

Accordingly, we must reverse and remand Order No. 11 to the Commission with directions to render adequate findings of fact so that meaningful review of the Commission's decision can be made. Because we are remanding for adequate findings, we are unable to address the other arguments raised by appellant.

Reversed and remanded.

PITTMAN, AREY, ROGERS, CRABTREE, and MEADS, JJ., agree.

GEORGIA-PACIFIC CORPORATION *v.* Johnny CARTER

CA 97-836 969 S.W.2d 677

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered May 27, 1998

Rose Law Firm, A Professional Association, by: *James M. Gary*, for appellant.

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Norwood Phillips*, for appellee.

WENDELL L. GRIFFEN, Judge. Georgia-Pacific has appealed the decision of the Workers' Compensation Commission finding that the appellee, Johnny Carter, suffered an injury causally related to the work, and that he was entitled to temporary total disability benefits and payment of reasonable medical expenses. Appellant raises two issues on appeal: (1) that the Commission erred in finding that the appellee sustained an injury arising out of and in the course of his employment; and (2) alternatively, that the Commission erred in finding that the appellee's period of temporary total

disability and attendant expenses were causally related to the injury. We disagree and affirm the Commission's ruling.

Since 1964, appellee had worked for appellant as a "B-Operator," with duties that required him to perform work on boilers. On September 24, 1994, while obtaining a water sample from a boiler, appellee stepped in a puddle covered with algae, slipped, and turned his left knee. He reported the injury to his foreman the same day, but did not seek immediate medical attention because he thought the injury was a sprain and would heal on its own. Six weeks after the injury, appellee sought treatment for his left knee from Dr. D.L. Toon, his family physician, who prescribed medication for his injury. Appellee had seen Dr. Toon regarding knee problems in the past, which is a source of contention by the appellant. Appellee returned to light-duty work at the direction of his supervisors.

On April 27, 1995, appellee sought treatment from Dr. Toon again for an unrelated heart problem and underwent a treadmill stress test. As the speed of the treadmill increased, the condition of appellee's left knee worsened. As a result of appellee's problems with his knee, Dr. Toon determined that he was temporarily and totally disabled from April 27, 1995, through May 27, 1995. In an opinion filed April 8, 1997, the Commission affirmed the decision of the ALJ finding that the appellee proved by a preponderance of the evidence that his knee injury was causally related to his employment and that he was entitled to temporary total disability benefits.

Appellant first contends that the Commission erred in finding that the appellee sustained an injury arising out of and in the course of his employment. In reviewing the factual findings of the Commission, we view the evidence in the light most favorable to those findings, and must affirm if the findings are supported by substantial evidence. *Chamber Door Indus., Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion. *Roberson v. Waste Mgmt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

Appellee had the burden to prove the compensability of his claim by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(5)(E)(i) (Repl. 1996); *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995). The main issue of this case, whether appellee's left knee problems were causally related to his employment, hinges on credibility. Questions of credibility are matters within the province of the Workers' Compensation Commission. *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996). Appellee was the only witness at the hearing, and no one witnessed the September 24, 1994, accident. After the accident, appellee immediately notified his foreman. He waited for approximately six weeks before seeking medical attention because he thought he had only sprained his knee and that it would eventually heal. Appellee initially treated his pain with over-the-counter pain medications, but his pain continued to worsen over time. Appellee experienced increased pain while walking on a treadmill at a fast pace as part of a stress test to monitor his heart. Thereafter, Dr. Toon opined that appellee was temporarily and totally disabled from April 27, 1995, until May 27, 1995.

Appellant points to the entries found in Dr. Toon's medical notes that appellee sought medical treatment in 1980 for back pain that radiated down his left leg and into the knee. Other reports in November and December 1984 indicate that appellee sought treatment for pain in his left knee. Appellee explained that he never had left knee problems prior to the September 1994 accident, but that he had seen Dr. Toon in 1991 for right knee pain after a cow ran into him. Appellee explained that Dr. Toon must have made a mistake in documenting left knee pain.

We cannot undertake a *de novo* review of the evidence and are limited by the standard of review in workers' compensation cases. Although there are contradictions in the evidence, it is within the province of the Workers' Compensation Commission to reconcile conflicting evidence and to determine the true facts. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). The issue is not whether this court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds

could reach the conclusion of the Workers' Compensation Commission, its decision must be affirmed. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996). The Commission's decision on this issue is supported by substantial evidence.

For its second assignment of error, appellant argues, alternatively, that the Commission erred in finding that appellee was entitled to temporary total disability and medical benefits, contending that they are not causally related to his injury. Appellant raises the fact that appellee continued to perform his regular job duties for a period of approximately seven months following his September 1994 injury. Appellant suggests that appellee did not begin experiencing problems with his left knee until he took the treadmill stress test, and that this incident could not trigger disability benefits because the injury was not related to his work. Appellant alternatively argues that appellee's disability, if any, resulted from an independent intervening cause.

Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Stafford v. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. *Roberson, supra.* There is evidence in the record that supports the conclusion that appellee's healing period had not ended. He testified that his knee had been painful since the September 1994 injury and remained painful before he took the treadmill stress test, but that the pain worsened in intensity during the test. The Commission believed his testimony, and we do not second-guess its credibility judgments. Because appellee was unable to perform his work duties until his knee had healed, Dr. Toon determined that appellee was temporarily totally disabled for a month.

Turning to appellant's argument that appellee's disability resulted from an independent intervening cause, the Commission determined that the increased pain appellee suffered after the stress test was a recurrence of the September 1994 injury. The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a

natural and probable result of the first injury or if it was precipitated by an independent intervening cause. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Guidry v. J & R Eads Constr. Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984). The Commission found appellee's testimony that he did not reinjure his left knee during the treadmill stress test to be credible. Appellee's knee was already causing him pain, which intensified during the stress test. Taking the stress test was not an activity that was unreasonable under the circumstances.

Affirmed.

PITTMAN, NEAL, MEADS, and ROAF, JJ., agree.

AREY, J., dissents.

D. FRANKLIN AREY, III, Judge, dissenting. I do not think the Commission's opinion contains adequate findings of fact on the issue of the causal relationship between appellee's injury and his employment. *See Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 918 S.W.2d 206 (1996). Therefore, I dissent.

Rebecca THOMAS *v.* STATE of Arkansas

CA CR 97-1084 973 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1998

Chester Baugus, for appellant.

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

WENDELL L. GRIFFEN, Judge. Rebecca Thomas was convicted following a jury trial in Madison County Circuit Court of first-degree murder after shooting and killing her husband, Delmer Thomas. The trial court sentenced her to a twenty-year prison term. She contends on appeal that the trial court abused its discretion by admitting hearsay testimony from the decedent's ex-wife concerning her phone conversation with the decedent the

evening of the shooting, and that the trial court erred by refusing to instruct the jury concerning self-defense. We hold that although the trial court was mistaken in overruling appellant's objection under the dying declaration exception to the hearsay rule found at Rule 804(b)(2) of the Arkansas Rules of Evidence, the trial court's ruling that the alleged hearsay testimony by the decedent's ex-wife concerning the decedent's statements during their phone call was admissible is affirmable based upon the exceptions to the hearsay rule found at Rule 803(1) — present sense impression — and (3) — then existing mental, emotional, or physical condition. We further hold that appellant's allegation of error concerning the trial court's refusal to instruct the jury about self-defense is procedurally barred because appellant's counsel failed to submit a written jury instruction. Therefore, we affirm appellant's conviction and sentence.

On February 16, 1997, appellant shot and killed Delmer Thomas at their home in the Georgetown area of Madison County. They arrived home at approximately 3:30 p.m. after a day of drinking and visiting at the home of another couple, and had been quarreling about a child that Delmer Thomas had supposedly fathered out of wedlock. Appellant contended at trial and argues in her appeal that the decedent had a history of being physically abusive by pushing her, slapping her, and yelling at her. Appellant testified at trial that during their argument on February 16, 1997, the decedent placed a gun in her hands, cocked it, but told her that it was unloaded. Appellant testified that the decedent lunged toward her while she was trying to reset the hammer of the gun, and that it discharged.

During the case in chief for the prosecution, the State called Marilyn Thomas, the ex-wife of Delmer Thomas, to testify about a phone conversation that she had with the decedent immediately before he was shot. Appellant objected to her testifying about that phone conversation based on the rule against admitting hearsay, and the trial court initially sustained appellant's objection. After the State requested a bench conference, the trial court excused the jury and allowed the State to proffer the proposed testimony from Marilyn Thomas. The trial court then ruled that the challenged testimony about the phone conversation could be admitted into

evidence as an exception to the hearsay rule. Marilyn Thomas then testified as follows during direct examination by the prosecution:

Q At around 5:30 on the 15th of February, you received —

A Sixteenth.

Q Oh, the 16th? You received a phone call from Delmer Thomas, is that correct?

A (Nods head.)

Q What did he tell you?

A He said, "Becky wanted me —"

Q I can't hear you.

A "Becky wanted me to call and tell you what she's about to do. She's going — she has a gun pointed at me. She wanted me to call and tell you what she's going to do. She's going to shoot me." He said, "Talk to her."

Q What happened after that?

A Becky got on the phone and she said, "I have a gun pointed at Delmer," and she called him some names.

Q What names did she call him?

A She said, "I have a gun pointed at Delmer. He's a f'ing son-of-a-bitch and I'm going to shoot him." I said, "Becky, that's not funny." I said, "Is the gun loaded?" And she said, "Yeah, it's loaded" — no, I said, "Somebody is going to get hurt." She said, "Yeah, Delmer, and I'm going to shoot him."

Q Did this conversation go on for a period of time?

A It seemed like an hour.

Q Do you know how long it actually was?

A No, I know what time I got off the phone.

Q What was the conversation about after that? I mean, that seems kind of like the pinnacle of my phone conversations. What did you talk about for the rest of the time?

A He said, "She's sitting on the couch. She has two guns pointed at me. She has a loaded .22." I said, "Delmer, hang up so I can call the cops." He said, "No, because then she will shoot me. If I try to get the gun, she'll shoot me. If I hang up, she's going to shoot me." I said, "Is it really loaded?" And at one time, he did hang up and then he called me back. I said, "Is the gun loaded?" He said, "Yeah, she just shot past my head through the roof." And then she was yelling at him.

Q What was she yelling?

A He said, "She's sitting on the couch with a loaded .22, cocking it and she has it pointed at my head." She said, "No, Delmer, it's pointed at your feet." At one time, he said, "Now she wants me to call the neighbors, Carl and Mary Lou, and tell them what she's going to do to me." It was crazy.

Q When you hung up, what did you do?

A Well, he started — before that, he was very calm and scared. He said, "Becky, please just leave and take your guns with you." Then he started yelling, "Don't touch that hammer, don't." Then he said, "I'll call you right back." And I said, "You better." And he said, "Don't call the cops." That was it.

Q He hung up or did you hang up?

A He hung up.

Rule 801(c) of the Arkansas Rules of Evidence defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A declarant is a person who makes a statement. Ark. R. Evid. 801(b). Hearsay is not admissible except as provided by law or by the rules of evidence. Ark. R. Evid. 802. However, Rules 803 and 804 of the Arkansas Rules of Evidence provide for exceptions to the general rule against the admissibility of hearsay.

At trial, counsel for the State argued that the testimony by Marilyn Thomas about her phone conversation with Delmer Thomas was admissible based upon the exception to the general

rule against admitting hearsay stated at Rule 804(b). Rule 804 lists several situations whereby statements that would otherwise be nonadmissible as hearsay may nevertheless be admitted because the declarant is unavailable as a witness, such as when the declarant is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statements; or when a declarant persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or when a declarant testifies to a lack of memory of the subject matter of his or her statement; or is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or is absent from the hearing and the proponent of the statement has been unable to procure his or her attendance (or in specified instances, attendance or testimony) by process or other reasonable means. *See* Rule 804(a), Arkansas Rules of Evidence. Rule 804(b) states:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> (2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

This exception to the general hearsay rule is known in our case law as the dying declaration exception. The Arkansas Supreme Court has stated that in order to qualify as a dying declaration, the statement must be made by a witness who believed at the time of the statement that his death was imminent and whose declaration referred to the cause of his death. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984). This fact need not be shown by the declarant's express words alone, but can be supplied by inferences fairly drawn from his condition. *Id.* It is the declarant's belief in the nearness of death when he makes the statement, not the swiftness with which death actually ensues, that is most important. *Bargery v. State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992). The appellate court will reverse the determination of the trial court that evidence is admissible as a dying declaration only if there is an abuse of discretion. *Id.*

In this case, we do not find evidence that Delmer Thomas was possessed of a sense of imminent and inevitable death. Neither the words reported during the trial testimony of Marilyn Thomas, nor other circumstances surrounding his situation, indicated that Delmer Thomas believed that he was going to die, although they certainly indicate his belief that he was in danger of being shot. We are unable to extend the dying declaration exception to the hearsay rule to situations involving people who are not dying or who do not believe that they are dying when they make statements that are later offered into evidence.

However, this does not mean that we must reverse the trial court's ruling concerning the admissibility of Marilyn Thomas's testimony. Rule 103(a) of the Arkansas Rules of Evidence states that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in the case of a ruling admitting evidence, a timely objection or motion to strike appears of record which states the specific ground of objection if the specific ground is not apparent from the context. This is simply another acknowledgment of the harmless-error rule found at Rule 61 of the Arkansas Rules of Civil Procedure.

It is well settled that we will affirm a trial court if it reaches the right result, although for a different reason. *See Crowder v. Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990). This case presents such a situation. Although the trial court was mistaken when it admitted the testimony from Marilyn Thomas about her phone conversation with Delmer Thomas based upon the State's reliance upon the dying declaration exception to the hearsay rule, the challenged testimony was admissible under either or both of two other hearsay exceptions. Rule 803 of the Arkansas Rules of Evidence lists a number of exceptions to the hearsay rule whereby statements may be admitted into evidence regardless of the availability of the declarant. Rule 803(1), regarding present sense impression, and 803(3) regarding then existing mental, emotional, or physical condition, are applicable to this case. They read as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> . . .
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Marilyn Thomas's testimony about what Delmer Thomas said during their phone conversation shortly before he was shot meets both exceptions. She testified about Delmer Thomas's statements describing being held by appellant at gunpoint during their phone conversation. He plainly was relating his present sense impression of the event and his condition. He was also communicating his then existing state of mind, emotion, and physical condition when he told Marilyn Thomas that appellant was pointing a .22 at his head, that she had shot past his head, and that she had threatened to shoot him.

Finally, we can affirm the trial court's ruling to admit this testimony on another basis. Marilyn Thomas testified that appellant told her that she was going to shoot Delmer Thomas, and that she had a loaded gun, and that the loaded gun was pointed at Delmer Thomas. Thus, the hearsay testimony can be considered admissible for the reasons already stated, and because appellant's statements to Marilyn Thomas established its relevancy. *See* Ark. R. Evid. 402.

The other point raised by appellant is that the trial court erred by refusing to instruct the jury concerning self-defense. At the close of the trial, counsel for appellant requested that the trial court instruct the jury regarding self defense in connection with the shooting based on what she terms in her brief as "a continuous and systematic pattern of physical abuse." Appellant argues that the only reason the trial court refused to give the self-defense instruction was because the prosecutor forced the appellant to choose between accident and self-defense.

We are unable to review appellant's allegation of error, however, because neither the abstracted record nor the trial transcript contains the requested instruction. Instead, counsel for appellant has appended to the appellant's brief what he argues was the requested instruction on self-defense. Our supreme court has held that where an appellant was denied a jury instruction, her failure to proffer or abstract the desired instruction as part of her appeal was fatal to her appellate argument. *Kelley v. Medlin*, 309 Ark. 146, 827 S.W.2d 655 (1992). Moreover, it is well settled that where a requested instruction does not appear in either the abstract or the transcript, the appellate court will not consider it error to refuse to give the instruction. *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

Affirmed.

PITTMAN and AREY, JJ., agree.

Laurie CLEEK *v.* GREAT SOUTHERN METALS

CA 97-1138 970 S.W.2d 304

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 27, 1998
[Petition for rehearing denied July 1, 1998.*]

* ROGERS, NEAL, and CRABTREE, JJ., would grant.

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

Bassett Law Firm, by: *Angela M. Doss*, for appellee.

MARGARET MEADS, Judge. Appellant, Laurie Cleek, suffered an admittedly compensable injury on March 22, 1994, when she slipped and fell on a staircase at work, landing on her buttocks and her lower back. She was seen at the Medi-Quick Clinic on March 24, 1994. She was seen by Drs. Lundeen and Kendrick after her initial Medi-Quick visit, and she continued to see Dr. Kendrick through February 1996.

Appellee paid all of appellant's medical expenses after her March 24, 1994, visit to Medi-Quick, with the exception of her last visit to Dr. Kendrick in February 1996; however, it contended that all expenses paid after March 24, 1994, approximately $2,339.25, were paid in error because the medical treatment rendered by Drs. Lundeen and Kendrick was not reasonable and necessary. Appellee did not request reimbursement from appellant of these monies but asked that if it were determined that appellee

owed the amounts already paid, the administrative law judge (ALJ) allow a credit to appellee for such payments.

The ALJ found that the medical treatment rendered to appellant was reasonable and necessary, and that appellee was responsible for such expenses, including the $35.00 expense of appellant's last visit to Dr. Kendrick in February 1996. The ALJ also awarded appellant's attorney a one-half fee based on a recovery of $35.00, reasoning that appellant had previously been paid for all other expenses and "there was no gain to the claimant with the exception of an unpaid bill in the amount of $35.00." The Commission affirmed and adopted the ALJ's opinion and awarded appellant's attorney an additional $250.00 fee pursuant to Ark. Code Ann. § 11-9-715(b) (Repl. 1996). It is from this decision that appellant brings her appeal, arguing that there is not substantial evidence to support the Commission's award of an attorney's fee based only on $35.00.

On appeal to this court, the evidence regarding a workers' compensation claim is viewed in the light most favorable to the findings of the Commission. *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997). The question of whether a claim is controverted is one of fact to be determined from the circumstances of each particular case, and the Commission's finding will not be disturbed if there is substantial evidence to support it. *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). There may be substantial evidence to support the Commission's decision although we might have reached a different conclusion from the one found by the Commission if we were sitting as the trier of fact or reviewing the case *de novo*. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

Arkansas Code Annotated section 11-9-715(a)(2)(B)(ii) (Repl. 1996) provides that "the [attorney's] fees shall be allowed *only* on the amount of compensation *controverted and awarded*." (Emphasis added.) The *American Heritage Dictionary* (3rd Ed.)

defines "and" as "together with or along with; in addition to; as well as." Thus, it is not enough that only one component or the other be present, i.e., either controverted or awarded; rather, both components must be present. Here, although the ALJ found that appellee had controverted over $2,300.00 in medical treatment, he awarded appellant $35.00, which was the only medical expense that appellee had not paid. Our legislature's use of the word "and" between "controverted" and "awarded" in Ark. Code Ann. § 11-9-715(a)(2)(B)(ii) clearly and unambiguously means that attorney's fees in workers' compensation cases are contingent upon not only the amount controverted but also the amount awarded, and we cannot hold otherwise. *See Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996) (words in a statute must be given their usual and ordinary meaning and if there is no ambiguity a statute is given effect just as it reads); *Life Ins. Co. v. Ashley*, 308 Ark. 335, 824 S.W.2d 393 (1992) (when the wording of a statute is clear and unambiguous, it will be given its plain meaning); and *Hatcher v. Hatcher*, 265 Ark. 681, 580 S.W.2d 475 (1979) (when the will of the General Assembly is clearly expressed, the appellate court is required to adhere to it without regard to consequences).

Appellant contends that *Aluminum Co. of Am. v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976), is controlling and mandates that an attorney's fee be awarded based on the entire amount controverted. We disagree. In *Henning*, appellant-employer had notified appellee that it considered his heart attack to be "personal" and not causally related to his employment duties, and declined to pay any workers' compensation benefits. Only after appellee had consulted an attorney and a workers' compensation claim had been filed did appellant accept responsibility for the claim and begin to pay benefits. Our supreme court ruled that appellee's attorney was entitled to the statutory attorney's fee authorized by Ark. Stat. Ann. § 81-1332 (Repl. 1960) (the predecessor to Ark. Code Ann. § 11-9-715), finding that appellant had denied liability and clearly refused to pay any benefits. Here, with the exception of the one $35.00 bill, all medical expenses which appellee incurred had been paid by her employer, and appellee sought legal counsel solely to recover the $35.00.

For these reasons, we affirm the award of attorney's fees based upon the controverted and awarded amount of $35.00.

Affirmed.

JENNINGS and STROUD, JJ., agree.

CRABTREE, ROGERS, and NEAL, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I agree with the majority opinion's recitation of facts but disagree with its analysis that culminates in denying attorney fees for the full amount controverted. The appellees in this case admittedly controverted the entire amount of the claim because of a $35.00 bill. The appellees asserted to the Administrative Law Judge (ALJ) that they were not asking for reimbursement of the amount they paid, but wanted credit for the amount paid if the ALJ found in favor of the appellees.

The majority opinion cites Ark. Code Ann. section 11-9-715(a)(2)(B)(ii) (Repl. 1996) as authority for denying the amount of fees on the entire amount controverted. That section provides in part: "the [attorney's] fees shall be allowed only on the amount of compensation *controverted and awarded.*" (Emphasis added.) The majority places great emphasis on the conjunction "and," and goes further into the analysis that the fee must be both controverted, which is admitted in this case, and awarded. Though the majority opinion defines the conjunction "and," it does not define the words "controverted and awarded." Controvert is defined in the Oxford Dictionary as "dispute, deny," and award is defined as "give or order to be given as payment, compensation, or prize. Grant, assign."

There is no question but that the payment of benefits by the employer was controverted. The question is whether or not there was an award. The majority opinion holds that the only award made in this case was for the $35.00 medical bill. I cannot agree. The appellee stated to the ALJ that it did not seek reimbursement but a set-off for the amount of medical expenses already paid if the ALJ found that the injury was compensable. Under the plain meaning of the word "award," the appellant was granted workers' compensation benefits in a specific amount, including the $35.00

medical expense. The amount of the medical expenses was then set off against the amount already paid by the appellee in the amount of several thousand dollars. In effect, the appellant was "awarded" her workers' compensation benefits in the full amount. To find to the contrary would allow employers to controvert the last medical expense, have a full trial on the merits, and attempt to bar any future medical expenses or disability benefits without paying the cost associated with controverting the claim in the beginning. In my opinion, the majority opinion does not fulfill the intent of the legislature and has a chilling effect on the ability of claimants to obtain legal counsel when the employer controverts a small medical bill at the end of the claimant's healing period. The majority opinion goes beyond what is fair and reasonable and potentially could open the floodgates to litigation at the expense of claimant and emasculate the ability of the worker to obtain adequate legal counsel to insure that future benefits remain intact.

I dissent.

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

HOME MUTUAL FIRE INSURANCE COMPANY *v.*
Charles JONES and Lavonne Jones

CA 97-1457 969 S.W.2d 675

Court of Appeals of Arkansas
En Banc
Opinion delivered May 27, 1998

Smith Law Firm, by: *Truman H. Smith*, for appellant.

Donald B. Kendall, for appellees.

PER CURIAM. Home Mutual Fire Insurance Company has appealed from a judgment entered in the circuit court of Benton County on July 17, 1997, that awarded Charles Jones and Lavonne Jones, appellees, $183,000 plus interest at the rate of ten percent (10%) per year. Appellant has filed a motion to stay enforcement of the judgment pending its appeal and requests that we accept an irrevocable letter of credit issued by NationsBank of Texas, N.A., in the amount of $183,000 as a supersedeas bond pursuant to Rule 8 of the Arkansas Rules of Appellate Procedure. A copy of the irrevocable standby letter of credit has been submitted with the motion. Appellees have filed a response stating that they have no objection to a stay being issued upon the posting of a proper letter of credit, but they object to the letter of credit submitted by appellant because it is only for $183,000, the principal amount of the judgment at the time of its entry.

A supersedeas is a written order commanding an appellee to stay proceedings on a judgment, decree, or order being appealed from and is necessary in order to stay those proceedings. Ark. R. App. P. 8(a). When the record has been lodged with an appellate court, Rule 8(b) provides that the supersedeas shall be issued by the clerk of that court. Rule 8(c) provides that when a party desires a stay on appeal, it must present to the court for its approval a supersedeas bond sufficient in amount to guarantee that the appealing party will pay the appellee "all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the trial court."

We have stated that costs and damages include interest on the judgment and all costs and damages for delay that may be adjudged against appellant on appeal or which may result from dismissal or affirmance of the decision appealed. *Schramm v. Piazza*, 53 Ark. App. 99, 918 S.W.2d 733 (1996).

Appellant's motion presents two questions: (1) whether an irrevocable letter of credit is an acceptable surety so as to be approved for purposes of a supersedeas bond; and, if so, then (2)

whether the irrevocable letter of credit submitted with its motion satisfies the requirements of Rule 8. We conclude that although an irrevocable letter of credit is an acceptable surety for purposes of a supersedeas bond, appellants have failed to submit an acceptable letter in this instance because the issuer, NationsBank of Texas, N.A., has stated that the maximum payout on the letter of credit is $183,000.

A letter of credit means a definite undertaking that satisfies the requirements of Arkansas Code Annotated § 4-5-104 (Supp. 1997) by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value. Ark. Code Ann. § 4-5-102(a)(10) (Supp. 1997). By "honor" of a letter of credit is meant performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Ark. Code Ann. § 4-5-102(a)(8). Inasmuch as the issuer of a letter of credit makes "a definite undertaking" to a beneficiary to honor a documentary presentation payment or delivery of an item of value, we see no reason why a letter of credit cannot constitute an acceptable surety for purposes of a supersedeas bond.

However, the definite undertaking by NationsBank of Texas in the irrevocable letter of credit submitted by appellant to obtain a supersedeas in this case is for $183,000. As appellees correctly observe in their response to appellant's motion, this amount is less than what would presently be owed on the judgment if it is affirmed, if the appeal is dismissed, or if appellant fails to prosecute the appeal on some other ground. If appellant desires to obtain a stay of the judgment pending the appeal, it is directed to file with the clerk of the court a supersedeas bond in proper form binding appellant together with a certificate of deposit, certified check, cash, bank money order, corporate surety, or an irrevocable letter of credit in an amount sufficient to pay all costs and damages that might be affirmed against appellant on appeal, in case of dismissal, or for failure to prosecute the appeal and then request approval of the bond and an order staying proceedings on the judgment.

Alice M. ANDERSON *v.* SEWARD LUGGAGE COMPANY

CA 98-408 969 S.W.2d 683

Court of Appeals of Arkansas
En Banc
Opinion delivered June 3, 1998

Appellant, pro se.

JOHN B. ROBBINS, Chief Judge. Appellant Alice Anderson has filed her motion for rule on our clerk, requesting us to require our clerk to accept and file an appeal record. By letter and opinion dated March 13, 1997, appellant was notified by the Workers' Compensation Commission that her claim for benefits was denied and dismissed. She then filed her notice of appeal on October 2, 1997. While the tendered record does not reflect when appellant received her copy of the Commission's decision, appellant explains the delay in filing her notice of appeal by stating that she was out

of town when the Commission's certified letter arrived and someone else signed for her.

Appellant tendered the record of the Commission's proceeding on February 6, 1998, but filing was rejected by the clerk because it was untimely. Rule 5 of the Arkansas Rules of Appellate Procedure—Civil requires the record to be filed with the clerk within ninety days from the filing of the notice of appeal. Appellant's motion for rule on clerk offers no explanation as to why she was thirty-seven days out of time in tendering the record.

■ ■ Even if we consider appellant's notice of appeal as timely, notwithstanding the fact that it was not filed until almost seven months after the Commission's decision, appellant's motion for rule on clerk must be denied because she tendered the record one hundred and twenty-seven days after filing her notice of appeal. We placed the public on notice on May 6, 1987, when we handed down *Evans v. Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987), that the appellate rules had been harmonized and no longer would any variance from the ninety-day rule be permitted. We have consistently followed *Evans* ever since. *See Novak v. B.J. Hunt Transport*, 48 Ark. App. 165, 892 S.W.2d 526 (1995).

The concurring judges express concern about the ninety-day requirement in Rule 5 in light of the supreme court's per curiam in *D.B. Griffin Warehouse, Inc. v. Sanders*, 332 Ark. 510, 965 S.W.2d 784 (1998). In that case, the ninety days for filing the appeal record was to expire on December 31, 1997. The appellant tendered the record five days earlier on December 26; however, the record lacked a certificate by the circuit clerk, and no filing fee was paid. By January 2, 1998, these two deficiencies were corrected, and the clerk stamped the record as being filed on December 26, 1997, the date it was originally tendered. In its per curiam denying the appellee's motion to dismiss the appeal, the supreme court noted that it has long been the practice of the clerk's office to allow appellants seven days to correct the record as to errors in form, provided that the record was actually tendered timely, i.e., within Rule 5's ninety days or extensions properly granted thereto.

While the concurring judges question the seven-day grace period within which an appellant's deficiencies in complying with all the form requirements of an appeal record may be corrected, the supreme court obviously approves of this practice; and apart from the appellee in *D.B. Griffin Warehouse, Inc.*, it does not appear that anyone else has ever complained about such an act of grace. There are no cases cited, and certainly there is no evidence before us, that suggest that the clerk has not consistently permitted the seven-day grace period when the record was tendered timely, and denied grace when it was not. We are obliged to apply the interpretation that our supreme court has given to its own rules. We may not always agree, but we must always comply.

Motion denied.

PITTMAN, JENNINGS, BIRD, ROGERS, STROUD, CRABTREE, and MEADS, JJ., agree.

AREY, NEAL, GRIFFEN, and ROAF, JJ., concur.

WENDELL L. GRIFFEN, Judge, concurring. In previous instances involving far less egregious violations of the filing requirements, I have joined decisions to deny motions for rule on the clerk based upon the belief that the requirements are jurisdictional and are uniformly applied to all litigants, except for the special treatment accorded criminal defendants whose constitutional rights to appellate review would be lost if their appeals were dismissed because of mistakes by counsel to meet the filing requirements. I continue to do so in this instance, but not without concerns about the glaring inconsistency between the result reached in this case and that reached by our supreme court last month in an analogous situation that involved an allegedly untimely filing.

On April 9, 1998, the supreme court issued a per curiam opinion that denied a motion to dismiss an appeal in *D.B. Griffin Warehouse, Inc. v. Sanders*, 332 Ark. 510, 965 S.W.2d 784 (1998). The motion to dismiss alleged, and was supported by three affidavits, that the appellant's record was due for filing in the supreme court clerk's office on December 31, 1997; that it was tendered on December 26, 1997, but was not filed due to lack of a circuit

court's certificate, nonpayment of the filing fee, and failure to present the original record; that the defects were not corrected until after the filing deadline, and apparently on January 2, 1998; and that the filing of the record was back-dated to show that it had been filed on December 26, 1997. The supreme court denied the motion to dismiss the appeal upon what the per curiam opinion observed

> has long been the practice of the Supreme Court clerk's office to accept records which are tendered on time and to allow seven days for any errors in form to be corrected. Those errors may include subsequent payment of the filing fee and certification of the record by the circuit clerk. When the defects are corrected, the date of filing is the date the record was tendered — in this case, December 26, 1997.

D.B. Griffin Warehouse, Inc. v. Sanders, 332 Ark. at 511, 965 S.W.2d at 785 (1998).

For as long as anyone can recall in Arkansas, the timely filing of a notice of appeal, lodging of the record from the proceeding appealed, and payment of the filing fee before the record is filed have been deemed jurisdictional requirements to perfecting an appeal. *See Novak v. J. B. Hunt Transport*, 48 Ark. App. 165, 892 S.W.2d 526 (1995), (workers' compensation appeal dismissed for claimant's failure to timely file record on appeal within ninety days after filing notice of appeal from the Commission decision where claimant waited to mail check for filing fee until a point in time so late that it was not received by the Commission until the last day on which the record could have been filed with the clerk of the Court of Appeals); *Mangiapane v. State*, 43 Ark. App. 19, 858 S.W.2d 128 (1993), (timely filing of notice of appeal is, and always has been, jurisdictional); *Williams v. Luft Constr. Co.*, 31 Ark. App. 198, 790 S.W.2d 921 (1990), (holding that Court of Appeals did not have jurisdiction over appeal from Workers' Compensation Commission because the Commission did not receive claimant's notice of appeal until after thirty days following the Commission's order); and *Lloyd v. Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986), (the timely filing of a notice of appeal in a workers' compensation case is jurisdictional and should be raised by the court even if the parties do not raise it).

I have previously operated under the belief that these requirements were what our case decisions have said them to be, *i.e.*, jurisdictional, meaning that failure to comply with them was not a matter to be excused by the court clerk or the appellate courts as a matter of discretion. In fact, we have consistently denied motions for rule on the clerk brought by workers' compensation and unemployment compensation claimants whose filings were one day beyond the filing deadline, despite valiant efforts and arguments to permit a grace period. Our refusal to adopt a different position has always been based upon the view that jurisdictional requirements are not waivable by the parties or the court. We have never operated as if there is a seven-day grace period for deficiencies to be cured concerning the timeliness of appeals. Our rules say nothing about such a grace period. I have found no decisions that mention it, notwithstanding that the *D.B. Griffin Warehouse* per curiam states that it has been the "longstanding practice" of the clerk's office. Had we known that the clerk's office had been engaged in that practice it is at least conceivable that some of the motions for rule on the clerk that we have denied might have been granted.

Thus, I am perplexed by the per curiam decision in *D.B. Griffin Warehouse v. Sanders*. Although it cites Arkansas Code Annotated § 21-6-401 (Repl. 1996), acknowledges that the statute "contemplates payment of a filing fee before the record is filed," and adds that "our caselaw makes the payment of the fee a condition of the filing, which is jurisdictional" (citing *In Re Smith*, 183 Ark. 1025, 39 S.W.2d 703 (1931)), the opinion adroitly reports that the fee was paid and the record was marked "filed" as of the date it was tendered despite the fact that the filing fee was not paid and other defects were not corrected until two days past the filing deadline.

I do not understand how the clerk's office may institute a "longstanding practice" that contravenes court decisions holding the timely filing of notices of appeals, payment of filing fees, and lodging of records on appeals to be jurisdictional requirements not subject to waiver by the parties or disregard by the appellate courts. Be that as it may, I am very uncomfortable with a rule that applies to some litigants one way, and to other similarly situated

litigants in an altogether different way. It is even more disquieting to observe that this unevenhanded application of what has been previously deemed a jurisdictional requirement appears to rest within the discretion of employees in the clerk's office, and that one can find no written rule, regulation, judicial opinion (until the *D.B. Griffin Warehouse* per curiam), or other documentation of the factor(s) — one does not know whether there is one factor or several — that will govern when a facially untimely notice of appeal or court record will be deemed jurisdictionally barred or when it will fall within the benevolence of "the longstanding practice of the clerk's office." Regardless of one's position on whether timeliness should or should not be a jurisdictional issue for appeals, fundamental respect for fairness would seem to demand that courts let the public know what the rules are, when they will not be applied, and why they will be applied in different ways to litigants in the same situation.

One wonders how appellants come to learn that the grace period exists. One wonders how *pro se* litigants such as this workers' compensation claimant and the many claimants for unemployment benefits who prosecute their own appeals from adverse decisions by the Board of Review learn about it. One wonders whether the grace period is known throughout the bar, or is only known by favored members of the bar. Who decides, and based on what factors, whether people get their otherwise untimely filings back-dated so that they survive motions to dismiss by opposing parties or *sua sponte* dismissal by the appellate courts? Why is this fair?

In the case at hand, the Workers' Compensation Commission issued a decision on March 13, 1997, and the notice of appeal was not filed until October 2, 1997, well beyond the thirty days prescribed by Arkansas Code Annotated § 11-9-711(b)(1)(A) (Repl. 1996). The appeal record was not tendered to the clerk's office until February 6, 1998, well beyond the ninety-day period prescribed by our court rules and previously held in our decisions to constitute a jurisdictional requirement for lodging the record.

I now understand, thanks to the per curiam in *D.B. Griffin Warehouse v. Sanders*, that the requirements may not always be

jurisdictional, or that if they are jurisdictional they may be waived by the clerk's office according to a "longstanding practice" previously unreported in our decisions and unwritten in the rules that are supposed to apply to all litigants and their attorneys. Given this new reality, and the fact that the notice of appeal and record are so flagrantly late, I join in the decision to deny the motion by this workers' compensation claimant for rule on the clerk, but do so with serious discomfort. For if it is true that what is sauce for the goose is sauce for the gander; if it is true that a miss of an inch is as good as a mile; if the law is supposed to mean the same for each person and all persons so that neither the rich nor beggars are permitted to sleep under bridges; then *pro se* litigants should be entitled to the same opportunity for grace from the clerk's office (and through it, the appellate courts of Arkansas) that the *D.B. Griffin Warehouse* per curiam indicates has been enjoyed by other unnamed parties and their attorneys "in accordance with the longstanding practice of the clerk's office."

Otherwise, the law is not fair. Otherwise, we are violating one of the oldest principles of justice, namely, that no partiality be shown to any person or class of litigants.[1] The fact that we cannot be perfect does not justify being unfair. Public respect for the law and the judicial process can survive ordinary imperfection; it cannot, and will not, and should not tolerate what it perceives to be favoritism, partiality, and discrimination.

ANDREE LAYTON ROAF, Judge, concurring. I would prefer to deny this motion for rule on the clerk without commenting on *D.B. Griffin Warehouse, Inc. v. Sanders*, 332 Ark. 510, 965 S.W.2d 784 (1998). Like the majority, I agree that the existence of a seven-day "grace period" has no relevance to a record tendered thirty-seven days out of time. I also agree that we have no "evidence" before us that this unwritten policy of the supreme court clerk has been unfairly or inconsistently administered. However, I cannot join the majority because I think they have missed the

[1] *See* Leviticus 19:15: "You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly." (New American Standard Version).

point, and so I will add my own two cents worth to this discussion.

Any rule affecting the ability of litigants to exercise their right to appeal should be known to all the world, not just the clerk of the supreme court. Certainly this court should be aware of the rule, for we are frequently called upon to decide motions for rule on the clerk where a record is untimely lodged in workers' compensation cases. Additionally, the Workers' Compensation Commission often files the records of its proceedings on behalf of persons appealing from its decisions, although the responsibility for timely filing the record remains with the appellants. *See Evans v. Northwest Tire Service*, 21 Ark. App. 75, 728 S.W.2d 523 (1987). Surely the Commission should be aware of this rule.

Perhaps if the Commission's office had known of the seven-day grace period in 1995, there would have been a different outcome in *Novak v. J. B. Hunt Transp.*, 48 Ark. App. 165, 892 S.W.2d 526 (1995), in which the Commission delayed tendering a transcript for several days while waiting for the filing fee to be received in the mail, and then tendered the transcript and fee one day late. Perhaps the Commission would have handled the matter differently, but if it had not done so, perhaps four rather than three members of this court could have been persuaded to grant Ms. Novak's motion for rule on the clerk. Unfortunately, there are probably others like Ms. Novak whose names do not appear in the annals of Arkansas jurisprudence.

As for the grace period itself, I'm all in favor of it — for it surely allows a few more of our citizens to preserve their right to appeal. Now that all the world knows about this rule, we may well be able to save even more of them. However, in the present circumstances we cannot grant any relief to Ms. Anderson, and I would also deny her motion.

AREY and NEAL, JJ., join.

SECOND INJURY FUND *v.* Ronnie FURMAN

CA 97-906 972 S.W.2d 255

Court of Appeals of Arkansas
En Banc
Opinion delivered June 3, 1998

David L. Pake, for appellant.

James R. Filyaw, for appellee.

JOHN B. ROBBINS, Chief Judge. In this workers' compensation case, appellee Ronnie Furman prevailed on an appeal by appellant Second Injury Fund, and now seeks an award of an attorney's fee against the fund. His motion must be denied.

The general rule in Arkansas is well settled that attorneys' fees are not awarded unless expressly provided by statute or rule. *Ark. Okla. Gas Corp. v. Waelder Oil & Gas, Inc.*, 332 Ark. 548, 966 S.W.2d 259 (1998); *City of Ozark v. Nicholas*, 56 Ark. App. 85, 937 S.W.2d 686 (1997).

As authority for granting his request, appellee cites Ark. Code Ann. section 11-9-715(b)(1) (Repl. 1996), which provides:

> (1) In addition to the fees provided in subdivision (a)(1) of this section, if the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependents of a deceased employee, as provided above and set by the commission or appellate court.

However, this subsection does not mention the Second Injury Fund. It cannot reasonably be contended that the terms "employer or carrier" include the Second Injury Trust Fund, because the legislature specifically names the Second Injury Trust Fund when it speaks of that entity. The best example of such is in this same code section 11-9-715(a)(2)(A) that addresses proceedings before an administrative law judge. It directs the Commission to award an attorney's fee from the Second Injury Trust Fund when it finds that a claim against the fund has been controverted but compensation is awarded. The attorney fee provision of section 11-9-715(b)(1) pertaining to appeals from the administrative law judge to the full Commission and appellate courts simply does not similarly provide for a fee to be paid from the Second Injury Fund.

We believe this motion only requires an application of the law. However, if we perceived an ambiguity in these statutory provisions and undertook to construe them, we would be obliged to construe section 11-9-715(b)(1) strictly. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). Consequently, a strict construction would likewise require us to deny an award of an attorney's fee against the fund.

Although we might think it unfair that appellee is not entitled to an award from the Second Injury Fund for attorney fees he

has incurred on this appeal, it our duty to apply the law. The law does not permit such an award and we deny appellee's motion.

PITTMAN, AREY, JENNINGS, STROUD, and MEADS, JJ., agree.

BIRD, ROGERS, NEAL, GRIFFEN, CRABTREE, and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I disagree with our decision to deny an additional attorney's fee to the appellee for prevailing in this appeal, and fail to understand why the Second Injury Fund will be deemed, for all practical purposes, immune from liability for attorney's fees when it has caused those expenses to be incurred by the lawyer representing an injured worker in a case that we have decided in favor of the worker. It is fundamental workers' compensation law that when a case has been controverted, in whole or in part, the Workers' Compensation Commission shall direct the payment of legal fees by the employer or carrier in addition to the compensation awarded. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Arkansas Code Annotated section 11-9-715(a)(2)(A) (Repl. 1996) provides that whenever the Commission finds that a claim against the State Treasurer, as custodian of the Second Injury Fund, has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid from the Fund, in addition to compensation awarded, and that the fees shall be allowed only on the amount of compensation controverted and awarded from the Fund. Subsection (b) of the statute states:

> (1) In addition to the fees provided in subdivision (a)(1) of this section, if the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependents of a deceased employee, as provided above and set by the commission or appellate court.
>
> (2) The maximum fees allowable pursuant to this subsection shall be the sum of two hundred fifty dollars ($250) on appeals to the full Commission from a decision of the administrative law judge, and the sum of five hundred dollars ($500) on appeals to the Arkansas Court of Appeals or Supreme Court from a decision of the commission.

Attorney's fees in workers' compensation cases are provided by statute in Arkansas as a matter of public policy to enable injured workers to obtain the services of an attorney in settlement of controverted claims. *Aluminum Co. of Amer. v. Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982). We have stated that one of the purposes of § 11-9-715 is to place the burden of litigation expense on the party that makes litigation necessary by controverting the claim. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

The Second Injury Fund is not responsible for an attorney's fee when it does not controvert a worker's entitlement to compensation. *See Buckner v. Sparks Regional Med. Ctr.*, 32 Ark. App. 5, 794 S.W.2d 623 (1990). But in this case, the Fund has controverted the claim, lost at the Commission level, and taken an unsuccessful appeal to the Court of Appeals. The worker's attorney was required, consistent with the duty to provide zealous representation for his client, to prepare a brief that responded to the Fund's appeal.

The upshot of our decision today is that the Fund will escape liability for the fee that the worker's attorney would otherwise be due, leaving the worker's attorney uncompensated. That result is inconsistent with the public policy in favor of enabling injured workers to obtain legal services. It flies in the face of our own assertion that the purpose of the statute authorizing attorney's fees in workers' compensation cases is to place the expense of litigation on the party that makes it necessary. Our decision rewards the Fund for controverting this claim without merit, and, will likely discourage attorneys who might accept cases by injured workers against the Fund from fulfilling their ethical and moral duty to continue the representation during appeals by the Fund.

I respectfully dissent.

BIRD, ROGERS, NEAL, CRABTREE, and ROAF, JJ., join in this dissent.

Randall WILLIFORD (Deceased) *v.* CITY OF NORTH LITTLE ROCK

CA 97-1496 969 S.W.2d 687

Court of Appeals of Arkansas
Division IV
Opinion delivered June 3, 1998
[Petition for rehearing denied July 1, 1998.]

Law Offices of James F. Swindoll, by: *James F. Swindoll*, for appellant.

J. Chris Bradley, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove that the deceased employee's work activity was the major cause of his fatal heart attack. On appeal, appellant argues that there is no substantial evidence to support the Commission's denial of benefits. We agree and reverse and remand for an award of benefits not inconsistent with this opinion.

The record reveals that Randy Williford had been a firefighter for the City of North Little Rock for twenty-two years. On July 6, 1995, he was taking the Firefighters Encounter and Agility Test (FEAT). The test required firefighters to unroll and roll up a fifty-foot section of hose, drag a hundred-foot section of hose weighing fifty pounds one-hundred feet, climb a ladder, and crawl through an attic space. While in the attic, the firefighter is required to use a sledgehammer to vent the roof. The firefighter must then put on an air pack that weighs thirty-five to forty pounds, carry an additional section of hose, and climb up and down three flights of stairs. Finally, the firefighter is required to drag a dummy that weighs 165 pounds a distance of sixty-five feet. All of the above listed activities have to be completed by the

firefighter within twelve minutes. Also, part of the test has to be performed in a rubberized coat, pants, boots, and helmet.

At the time that Mr. Williford performed the test, it was July and extremely hot and humid. After performing this test, Mr. Williford began experiencing severe back pain and nausea. His wife found him at home lying on the floor in pain and incoherent. Mr. Williford was taken to St. Vincent Hospital and admitted. Within forty-eight hours, Mr. Williford had a heart attack and died in the hospital at the age of 43. Mr. Williford's body was exhumed and an autopsy was performed to determine the cause of death. Subsequently, Mr. Williford's wife presented this claim asserting that the FEAT test on July 6 was the major cause of her husband's heart attack. The administrative law judge found that Mr. Williford's activity on July 6 was the major cause of his heart attack. The Commission reversed the ALJ's decision, denying benefits because it found that appellant failed to prove that his activity on July 6 was the major cause of his heart attack.

On appeal, appellant argues that there is no substantial evidence to support the Commission's denial of benefits. We agree.

When reviewing decisions from the Workers' Compensation Commission, the court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms if supported by substantial evidence. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996) (citing *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992)). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Crawford, supra* (citing *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992)); *see also, Couch v. First Nat'l Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Crawford, supra* (citing *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983)). Where the Workers' Compensation Commission has denied a claim, "substantial evidence" requires the appellate court to affirm if the Commission's opinion displays

a substantial basis for the denial of relief. *Bussell v. Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995). Despite this stringent standard of review, we have recognized:

> Those standards must not totally insulate the Commission from judicial review and render this court's function in these cases meaningless. We will reverse a decision of the Commission where convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission.

Wade v. Mr. C. Cavenaugh's, 25 Ark. App. 237, 242, 756 S.W.2d 923, 925 (1988) (citing *Boyd v. General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987)). With the above standard of review in mind, this court assesses the evidence to see if reasonable persons could reach the same conclusion.

Arkansas Code Annotated section 11-9-102(5)(A)(iv) (Supp. 1997) provides that a compensable injury means a heart, cardiovascular injury, accident, or disease as set out in section 11-9-114. Arkansas Code Annotated section 11-9-114(a) provides:

> (a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

In denying benefits, the Commission interpreted Dr. Michael L. Bierle's deposition testimony as concluding that the deceased's initial laboratory test data did not support a diagnosis of a myocardial infarction on admission. It also found that Dr. Bierle's testimony raised serious doubt as to whether the deceased's heart attack was in any way related to the physical exertion on July 6. The Commission placed great weight on the admission records and Dr. Bierle's testimony.

However, when we review Dr. Bierle's deposition, it is apparent that the Commission ignored crucial portions of his testimony concerning the precise issue of the major cause of the deceased's heart attack. The record reveals that Dr. Bierle was unaware of the deceased's activities on the day of his admission. Thus, he could not say whether the activities that Mr. Williford

had engaged in on the day he was admitted were the major cause of the heart attack. He also could not say that the deceased's pre-existing physical condition was the major cause of his heart attack. In short, he offered no opinion on the issue of the major cause of the deceased's heart attack. The laboratory data relied on by the Commission only indicated what Mr. Williford's condition was at the time he arrived at the hospital; it did not indicate whether Mr. Williford's activities earlier that day were the major cause of his subsequent heart attack. Also, Mr. Williford's admission record dated July 6, 1995, indicated that when he arrived at the hospital there was evidence of congestive heart failure on his chest x-rays.

The Commission also noted that Dr. Frank J. Peretti (the pathologist who performed the autopsy) found several physical problems with the deceased's heart. The record does reveal that Dr. Peretti found chronic pulmonary disease, hypertension, chronic renal insufficiency, and he noted the deceased's history of insulin dependency. The Commission opined:

> As we interpret Dr. Peretti's deposition testimony in its entirety, we understand Dr. Peretti's autopsy to have indicated that Mr. Williford's health in general (and the condition of his heart and his coronary arteries specifically) was so far compromised by pre-existing medical conditions by July 6, 1995, that Mr. Williford was likely to experience a myocardial infarction at any time with no precipitating event, and that his condition was so far compromised even the slightest exertion could induce an infarction.

While giving credence to Dr. Peretti, the Commission apparently, however, failed to consider Dr. Peretti's entire report. In the autopsy report Dr. Peretti concluded:

> In summary, this individual had evidence of severe pre-existing cardiovascular disease and a 20 year history of insulin dependent diabetes mellitus. He was undergoing rigorous physical exercise which was required to maintain his position as a North Little Rock Fireman. These exercises are responsible for putting excessive stress on his already compromised heart. It is my opinion based on reasonable medical certainty that he sustained his myocardial infarction during the physical workout as documented by his initial clinical presentation and autopsy findings. It is clear

> that the strenuous workout was the major cause in precipitating the myocardial infarction.

In Dr. Peretti's deposition testimony, he said:

> Well, you have to take the whole situation in perspective. Here you have a man before he began his testing allegedly had no cardiovascular complaints, such as chest pains, okay? He goes in there, he's under the stress doing all these exercises for the agility test, and then develops all the symptomology.
>
> The heart attack is clearly within twenty-four hours, it's an evolving heart attack. And I think, you know, my opinion is, with a reasonable degree of medical certainty, is that the strenuous workout was about ninety-five to a hundred percent (95%-100%) contributed to it, because he was fine beforehand. He was fine. He was walking around, no chest pains, no complaints.

After reviewing the entire record, we do not believe that reasonable minds could reach the same conclusion as the Commission with this persuasive evidence before them. Thus, we find that there is no substantial basis for the Commission's decision that Mr. Williford's activity on July 6, 1995, was not the major cause of his heart attack.

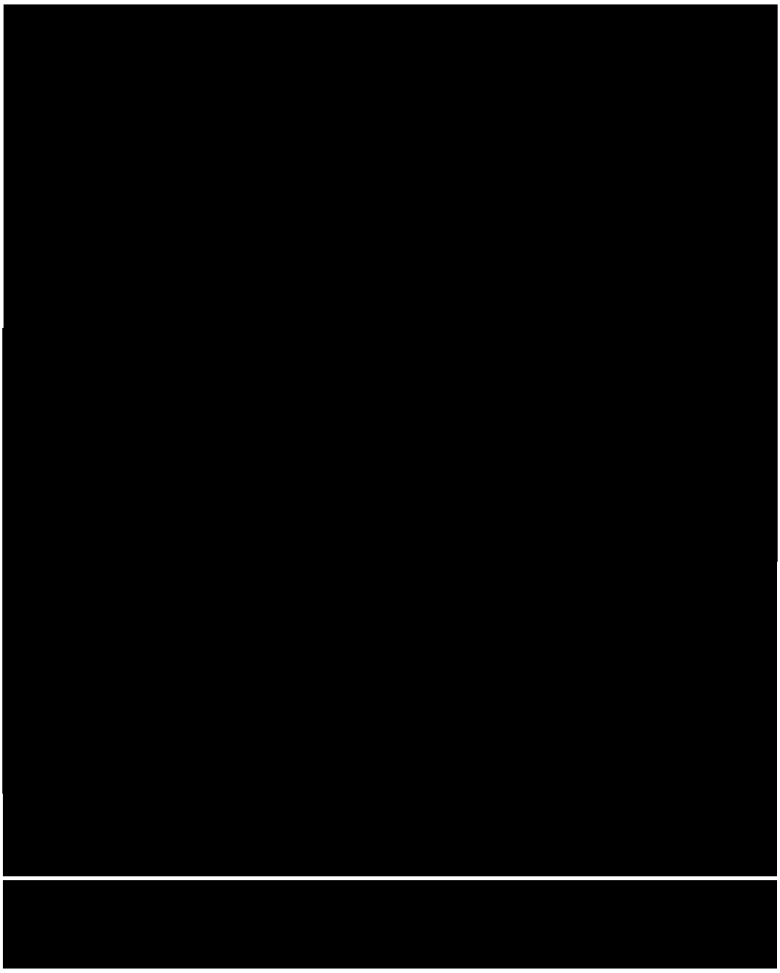
Reversed and remanded for an award of benefits not inconsistent with this opinion.

AREY and BIRD, JJ., agree.

Joseph RAMEY *v.* STATE of Arkansas

CA CR 97-1205 972 S.W.2d 952

Court of Appeals of Arkansas
Division II
Opinion delivered June 3, 1998



Ben Seay, for appellant.

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

TERRY CRABTREE, Judge. This is a criminal appeal from the Columbia County Circuit Court dealing with the second revocation of appellant Joseph Ramey's probation. Appellant was convicted on November 21, 1991, of burglary and sentenced to five years' probation.

On November 13, 1995, a petition to revoke probation was filed alleging that appellant violated his probation by committing the offense of possession of marijuana on October 7, 1995. The hearing on that petition was held on November 18, 1996. Six days prior to the hearing, an amended petition to revoke probation was filed alleging that appellant had violated his probation by possessing cocaine and marijuana on November 8, 1996. At the hearing on November 18, 1996, appellant objected to the State presenting any evidence concerning the cocaine and marijuana possession charge of November 8, 1996. The court prohibited the State from introducing any evidence concerning that alleged violation of November 8, and set an additional hearing for December 16, 1996.

On the November 18 hearing, the court heard testimony and evidence concerning the October 7, 1995, alleged marijuana possession. At the conclusion of the hearing, the Court revoked the appellant's probation and sentenced him to ninety (90) days in jail and costs. On December 16, 1996, the hearing was held on the

amended petition for revocation of probation. The court heard evidence on the allegations that appellant possessed marijuana and cocaine on November 8, 1996. The court again revoked appellant's probation and sentenced appellant to five (5) years in the Arkansas Department of Correction. Appellant argues that the second sentence of five (5) years should be reversed because the trial court erred by sentencing appellant twice for revocation of probation. We agree that there was error and, therefore, reverse.

To revoke probation, the burden is on the State to prove the violation of a condition of probation by a preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Repl. 1993); *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Id.* Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. Thus, the burden on the State is not as great in a revocation hearing. Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge's superior position. *Id.*

The trial court erred in sentencing the appellant twice on a revocation of probation. Probation is a procedure whereby a defendant who pleads or is found guilty of an offense is released without pronouncement of a sentence, subject to the supervision of a probation officer. Ark. Code Ann. § 5-4-101(2) (Repl. 1997). The appellant was placed on probation on November 13, 1995. That probation was revoked on November 18, 1996, and because a sentence had yet to be pronounced for the burglary charge, the court pronounced a sentence of ninety (90) days. Upon revocation, a court may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty. Ark. Code Ann. § 5-4-309(f) (Repl. 1997). In this case, the court could have imposed any sentence allowed for burglary. It imposed 90 days. There was no need to hold a second revocation hearing since the probation was revoked pursuant to the first hearing. Appellant was no longer on

probation at the time of the second hearing. Furthermore, a trial court cannot modify or amend an original sentence once it is put into execution. *Jones v. State*, 54 Ark. App. 150, 924 S.W.2d 470 (1996). The State argues that the trial court asserted that appellant had been revoked on the possession of marijuana offense, but that the ninety-day commitment to the Columbia County jail was intended as an additional term of the appellant's original probation. However, the State misstates the record. On page 80 of the transcript, appellant's attorney, Mr. Woods, states:

> MR. WOODS: Was there not a finding of violation of his—I'm sorry. Was there not a revocation of his probation on [November 18, 1996]?
>
> THE COURT: For that offense, yes.

The judgment and commitment order also note that the sentence of ninety days was imposed for burglary upon a revocation of probation. There is nothing in the transcript, other than statements by the attorney for the State, that the ninety-day sentence was for possession of marijuana. The court goes on to state, "And whether [the second allegation] will, if he's found to have committed [possession of marijuana and cocaine on November 8, 1996], whether that will affect the sentence that he got or whether it would extend it, it seems to me it is entirely proper." Such a statement by the court clearly indicates its intent to modify a sentence already executed. This is contrary to *Jones* and, therefore, must be reversed.

Reversed and dismissed.

STROUD and GRIFFEN, JJ., agree.

Allen W. LAMMEY and Melodia L. Lammey, Husband and Wife *v.* Elmer H. ECKEL and Elsie E. Eckel, Husband and Wife; and Gary Eckel

CA 97-1400 970 S.W.2d 307

Court of Appeals of Arkansas
Division I
Opinion delivered June 3, 1998

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: *Craig A. Campbell*, for appellants.

Keith & Miller, P.A., by: *Sean T. Keith*, for appellees.

ANDREE LAYTON ROAF, Judge. This case involves a boundary dispute between adjoining landowners. Appellants claim that two boundaries between their property and appellees' were established through either adverse possession, boundary by agreement, or the doctrine of boundary by acquiescence. The chancellor found that appellants had failed to establish boundary line by acquiescence or adverse possession and that a 1996 survey com-

missioned by appellees accurately established the boundary lines. We find no error and affirm.

Appellants and appellees are next-door neighbors in the town of Garfield. Appellants acquired their property from the Lawson family on January 14, 1994. Mrs. Reba Lawson had lived on the property since 1985. Appellees purchased their land from the estate of Ruth Carter on July 28, 1995. The Carters had resided on the property since at least 1951. Appellants' property bordered appellees' property on both the east and the north.

The controversy that gave rise to this case began when appellees procured a survey of their property in October 1996. Upon receipt of the survey, appellee Gary Eckel began construction of a fence along his eastern and northern borders. Appellants immediately filed a petition in Benton County Chancery Court to stop the construction. They alleged that the predecessors in title to both pieces of property — Mrs. Carter and Mrs. Lawson — had agreed upon boundary lines that differed from those shown on the survey. Specifically, appellants claimed that a small ridge running between the properties had been "acquiesced" in as the east/west boundary and that a stone wall had been acknowledged as the north/south boundary for more than seven years. They stated further that they had adversely possessed the disputed area along the north/south border. Appellees generally denied appellants' allegations. The case went to trial, and the chancellor made the following findings:

> 2. That the plaintiffs have failed to prove by a preponderance of the evidence that a boundary line dividing the parties [sic] property has been established by acquiescence or that the plaintiffs have adversely possessed the defendants property.
>
> 3. This court further finds that the survey which was stipulated as exhibit "4" and which has been filed for record in November of 1996 is the accurate boundary which divides the parties [sic] property.

It is from this order that appellants bring their appeal.

Chancery cases are reviewed *de novo* on appeal. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993). We will not reverse a chancellor's finding of fact in a boundary dispute case

unless the finding is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* Location of a boundary line is a question of fact. *Kittler v. Phillips*, 246 Ark. 233, 437 S.W.2d 455 (1969); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Appellants' first argument on appeal is styled as follows: THE TRIAL COURT WAS IN ERROR IN HOLDING THAT THE APPELLANTS FAILED TO MEET THEIR BURDEN OF PROOF IN ESTABLISHING THE NORTHERN AND EASTERN BOUNDARIES BY ACQUIESCENCE. Our review of this case is complicated by appellants' use of the terms "boundary by agreement" and "boundary by acquiescence" as though they were one and the same. They are not. *See Seidenstricker v. Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836 (1949). In the case of a boundary by agreement, the landowners have made a parol agreement as to the location of the boundary. *See, e.g., Nunley v. Orsburn*, 312 Ark. 147, 847 S.W.2d 702 (1993); *Moeller v. Graves*, 236 Ark. 583, 367 S.W.2d 426 (1963). For a valid oral boundary line agreement to exist, four factors must be present: (1) there must be an uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed by the agreement must be definite and certain; and (4) there must be possession following the agreement. *Nunley v. Orsburn, supra*; *Fields v. Griffen*, 60 Ark. App. 186, 959 S.W.2d 759 (1998). The agreement is binding even if the parties entering into possession pursuant to it do not occupy the land for the full statutory period of seven years. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972).

By contrast, a boundary by acquiescence arises not by a parol agreement but from the actions of the parties. *See Jennings v. Burford, supra.* It is more in the nature of an implied agreement presumed to exist by the long acquiescence of adjoining landowners who apparently consent to a dividing line between their properties. *Raborn v. Buffalo*, 260 Ark. 531, 542 S.W.2d 507 (1976). The concept is based upon the landowners' tacit acceptance of a fence line or other monument as the visible evidence of

their dividing line. *Walker v. Walker*, 8 Ark. App. 297, 651 S.W.2d 116 (1983). The acquiescence need not occur over a specific length of time, although it must be for "many years" or a "long period of time." *Jennings v. Burford, supra. But see Rabjohn v. Ashcraft, supra*, holding that the acquiescence must exist for a period of seven years. Most boundary by acquiescence cases involve time periods of at least twenty years. *See Kitler v. Phillips, supra* (over fifty years); *Clay v. Dodd*, 238 Ark. 604, 383 S.W.2d 504 (1964) (fifty years); *Gregory v. Jones*, 212 Ark. 443, 206 S.W.2d 18 (1947) (thirty-four years); *Jennings v. Burford, supra* (twenty years); *Summers v. Dietsch, supra* (twenty years).

The caption of appellants' argument refers to boundary by acquiescence, as does the chancellor's decree. However, the majority of appellants' proof below and their argument on appeal are directed to the theory of boundary by agreement. Because appellants and the chancellor treated the theories of boundary by agreement and boundary by acquiescence interchangeably, we consider the merits of the appeal as to both theories.

Appellants' first argument focuses on two matters: (1) whether a boundary agreement actually existed between appellants' and appellees' predecessors in title, and (2) if an agreement did exist, whether it fixed a definite and certain boundary line. The chancellor made no specific finding regarding the existence of an agreement. But at the close of the evidence at trial, he found that the proof was not sufficient to allow him to establish a definite, agreed-upon boundary line. We cannot say that the chancellor's finding was clearly erroneous.

Appellant Allen Lammey testified that the east/west boundary between the properties was agreed upon by Mrs. Lawson and Mrs. Carter as follows: The southern point of the boundary line began at a maple tree. It extended northward along a ridge that ran part of the length of the property. The boundary was "aimed down" by a lilac bush that was in line with an iris garden, other flower gardens (some of which were no longer in existence), and three elm trees. The northernmost corner was represented by the corner of a rock wall that was no longer there. Lammey had marked the spot with a rock. Rick Lawson, the son of Reba Law-

son, testified that the maple tree at the southern point of the line was "close to the boundary." On cross-examination, he marked the southernmost point on a photograph at a location other than the maple tree. He testified that the line went through the lilac bush, through the flower beds, and to a group of elm trees. He further testified that the northernmost point of the east/west boundary was marked by a pin in the ground about a foot from a walnut stump. Appellee Gary Eckel testified that there had been a lilac bush on the property other than the one referred to by Lammey and Lawson and that he had torn it down.

Regarding the north/south border between the properties, Lammey testified that a rock wall, since torn down, represented the border line. He said that the wall extended from the easternmost point westward to some remnants of an old fence. The remnants were located about four feet behind a barn that was no longer there. On cross-examination, Lammey admitted that the rock wall he referred to was actually a large rock pile. Lawson testified that the easternmost point of the border began at the pin near the walnut stump and ran westward to a point about three feet behind where the barn had been. He acknowledged that the "rock wall" was treated as a boundary, although he could not say if Mrs. Carter had considered it a boundary.

It is essential to the validity of a binding boundary line agreement that the boundary line fixed by agreement be definite, certain, and clearly marked. *Walters v. Meador*, 211 Ark. 505, 201 S.W.2d 24 (1947). Appellants cite *Disney v. Kendrick*, 249 Ark. 248, 458 S.W.2d 731 (1970), in which the chancellor's finding of boundary by agreement was affirmed, in support of their argument that their proof was sufficient to establish a boundary line. The *Disney* case involved a boundary dispute between the Disneys and the Kendricks, who shared one common boundary between them. The chancellor found that, even though at one point no specific marker or monument plainly marked the boundary line, a boundary by agreement was established when the Disneys and Mr. Fink, the Kendricks' predecessor in title, installed concrete stobs at the southern and northern border points of their properties.

The proof in this case regarding the location of the boundary, or at least the end points of the boundaries, is not as conclusive as that in *Disney*. Approximate points are not sufficient. *See DeClerk v. Johnson*, 268 Ark. 868, 596 S.W.2d 359 (Ark. App. 1980). Appellants' evidence may have provided a general idea regarding the location of what they contended was the agreed boundary. But we cannot say that, given the conflicts in Lammey's and Lawson's testimony and the destruction of certain landmarks relied upon by appellants, that the chancellor's decision should be reversed.

Appellants' next argument on appeal is that the chancellor erred in holding that they were required to establish open and notorious possession for a period of seven years to prove "boundary by acquiescence." Appellants are referring to the following remarks made by the court at the close of the evidence:

> I mean there has to be an exact definitive location. It can't just be out there somewhere. It has got to be exact. There are no monuments out there. I mean this rock wall was the best, but that turned out to be — I believe the general consensus now is it was probably more of a berm of rocks thrown out of a garden plot. Somebody mowed up to it on one side, and of course you couldn't mow the rocks, so then somebody trimmed the rocks on the top, but that is not a definite marker. Of course, the other thing you have too is that case law has consistently said it requires a long period of time, and the case law has consistently used the term seven years which is for adverse possession. Also, as we are well aware, adverse possession requires more then [sic] just occupancy. That's part of it, but then it has to be adverse, hostile, continuous possession for over a period of seven years. Here your people can only state for certainty their occupancy on the property, which was less than four years.

The court's remarks again reflect the confusion both appellants and the chancellor were under in this case regarding the difference between boundary by acquiescence and boundary by agreement. Appellants are correct that possession for a period of seven years is not necessary to prove a boundary *by agreement. Rabjohn v. Ashcraft, supra.* However, a boundary may be established by acquiescence in a "*clearly established line* as the boundary over a period *in excess of seven years*" (emphasis added), and without

the necessity of a prior dispute or adverse usage up to the line. *Id.* When the court's remarks are viewed as a whole, it was the lack of certainty regarding the boundary line that made up the court's mind to rule against appellants, and the remarks regarding adverse possession were offered as merely an additional reason to deny appellants' petition. On *de novo* review, we cannot say that the trial court's finding of uncertainty about the location of the line, which precludes appellants from prevailing on either a theory of boundary by agreement or boundary by acquiescence, is clearly erroneous.

Affirmed.

NEAL and MEADS, JJ., agree.

ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* John STRICKLAND

CA 97-1217 970 S.W.2d 311

Court of Appeals of Arkansas
Division IV
Opinion delivered June 17, 1998

Mary Helen Mitchell, Office of Chief Counsel, for appellant.

SAM BIRD, Judge. John Strickland, age sixteen, was charged in juvenile court with several counts of residential burglary, criminal trespass, and possession of a handgun. Prior to his court date, his family left Arkansas and moved to the state of Washington. When the juvenile failed to attend his first appearance hearing, a pick-up order was issued for him. He was eventually arrested in Washington and returned to Arkansas. His mother did not come with him.

At a June 2, 1997, detention hearing the juvenile judge held that Strickland was abandoned and ordered him placed in the custody of the Arkansas Department of Human Services (DHS), pending a June 25 adjudication hearing when Strickland's mother was to be in court. DHS's attorney, who happened to be present in the courtroom during the detention hearing, objected, arguing that there was no provision in the law for DHS to take custody of a criminal juvenile whose family lived out of state. The judge ordered DHS to take custody anyway.

On June 25, 1997, Strickland's mother failed to appear. Strickland pled "true" to the charges, was placed on two years probation, and was again ordered to be placed in the custody of

DHS pending further orders of the court. Again, DHS's attorney objected. She argued that Strickland had a felony criminal record and properly belonged in the Division of Youth Services because he did not meet the criteria of Ark. Code Ann. § 9-27-328 (Supp. 1997). The judge said Strickland was abandoned, neglected, or abused, and ordered DHS to take custody of him.

DHS now appeals arguing that the trial court erred in placing custody of Strickland with DHS because (1) such placement is forbidden by Ark. Code Ann. § 9-27-326 (Supp. 1997); (2) no emergency existed under the definition in Ark. Code Ann. § 9-27-314 (Supp. 1997); (3) the juvenile was not dependent/neglected, abused or abandoned; and (4) there were no written findings made prior to the removal of the juvenile from the custody of his mother as required by Ark. Code Ann. § 9-27-328 (Supp. 1997). We do not reach the merits of appellant's arguments because appellant lacks standing to appeal the order of the juvenile court.

■ We find this case to be controlled by *Arkansas Dep't of Human Servs. v. Bailey*, 318 Ark. 374, 885 S.W.2d 677 (1994). In that case DHS had been ordered to pay for treatment of the juvenile at a treatment facility. On appeal brought by DHS, the Arkansas Supreme Court relied upon *Dep't of Human Servs. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990), and *Quattlebaum and CBM, Inc. v. Gray*, 252 Ark. 610, 480 S.W.2d 339 (1972), and dismissed the appeal. It held, "[A]ny relief to which DHS may be entitled must be afforded in the trial court because our general rule is that this court cannot act upon an appeal taken by one not a party to the action below."

■ In the case at bar, just as in *Arkansas Dep't. Of Human Servs. v. Bailey*, *supra*, DHS's name never appeared in the style of the case until this appeal was filed, and DHS never attempted to intervene or take any other action to become a party to the case. Furthermore, until such time as DHS filed its notice of appeal, this case was styled, "State of Arkansas v. John Strickland," just as is the court reporter's certified transcript of proceedings. In fact, the first and only time that the style of this case appears to have become known as, "Arkansas Department of Human Services v. John Strickland" is on the cover sheet that was created by the clerk

of this court and attached as the front cover of the record when the record was lodged in connection with this appeal.

In reaching this conclusion, we have not overlooked *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990), in which our supreme court noted that the general rule (that it could not act upon an appeal taken by one not a party to the action below) is subject to an exception for a nonparty who is pecuniarily affected by the judgment. However, we find *In the Matter of Allen, supra,* to be distinguishable from the case at bar.

The *Allen* case was an action on a petition for the involuntary commitment of a mentally ill patient. The executive director and the medical director for Western Arkansas Counseling and Guidance Center, Inc. (Western Arkansas), which was not a party to the suit, were called to testify at a commitment hearing. They testified that the patient needed to be hospitalized but that there was no space available for her at the State Hospital. Upon finding that the patient required hospitalization, the trial court, on its own motion, ordered Western Arkansas to pay $10,000 into the registry of the court to be used to pay the expenses for private hospitalization of the patient. Western Arkansas appealed from that order and the supreme court, after first observing that Western Arkansas had not been a party to the action in the trial court, declined to dismiss the appeal because of the "long recognized exception to the general rule for one pecuniarily affected by a judgment." 304 Ark. at 223, 800 S.W.2d at 717.

In the case at bar, there is no indication from the record, nor is it argued, that DHS is pecuniarily affected by the order of the trial court placing custody of the juvenile with DHS.

If DHS contends that the juvenile court is without jurisdiction to place the juvenile in its custody or has exercised a power not authorized by law, its remedy is to seek relief by way of a collateral attack upon the judgment through a petition for writ of prohibition, *see Juvenile H. v. Crabtree*, 310 Ark. 208, 833 S.W.2d 766 (1992), or a petition for writ of certiorari, *see Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993).

Appeal dismissed.

AREY and ROGERS, JJ., agree.

Roy O. BREEDLOVE *v.* STATE of Arkansas

CA CR 97-1053 970 S.W.2d 313

Court of Appeals of Arkansas
Division II
Opinion delivered June 17, 1998

Beverly C. Claunch, for appellant.

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

WENDELL L. GRIFFEN, Judge. Roy O. Breedlove has appealed from his conviction of sexual abuse in the first degree. For reversal, appellant argues that the trial court erred by denying his motion for a directed verdict and his motions for mistrial. We disagree and, therefore, affirm.

Breedlove was convicted of first-degree sexual abuse pursuant to Arkansas Code Annotated § 5-14-108(a)(4) (Repl. 1997). At the close of the State's evidence, Breedlove moved for a directed verdict on the ground that the State failed to prove that there was sexual gratification by sexual contact with the victim. The trial

court denied Breedlove's motion. Breedlove renewed his motion at the close of all the evidence. This motion was also denied.

On appeal, Breedlove argues that the trial court erred by denying his motion for a directed verdict because there was insufficient evidence to support a conviction of first-degree sexual abuse. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *See Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). On appeal, this court reviews the evidence in a light most favorable to the appellee, and affirms if substantial evidence supports the jury verdict, and only evidence supporting the guilty verdict need be considered. *Martin v. State*, 316 Ark. 715, 875 S.W.2d 81 (1994). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other with reasonable certainty beyond mere suspicion or conjecture. *Kennedy v. State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995).

As mentioned earlier, Breedlove moved for a directed verdict on the ground that the State failed to prove sexual gratification by sexual contact pursuant to Ark. Code Ann. § 5-14-108(a)(4) (Repl. 1997). Breedlove based this motion on the fact that there was no testimony presented by the State as to Breedlove's demeanor or actions. However, on appeal, Breedlove argues that his motion should have been granted because the witnesses, particularly the six-year-old victim, were not credible and their testimony was insufficient to support the charge of first-degree sexual abuse. In fact, Breedlove has not raised the issue concerning sexual gratification by sexual contact on appeal. The issues appellant raises on appeal were not properly preserved for review because he did not present those arguments to the trial court, and we do not consider arguments raised for the first time on appeal. *See Weaver v. State*, 56 Ark. App. 104, 939 S.W.2d 316 (1997).

Next, Breedlove argues that the trial court erred by denying his motion for a mistrial because he was brought into the courtroom in view of the jury panel in handcuffs. Prior to jury selection, Breedlove moved for a mistrial on the ground that he was prejudiced because he was brought into the courtroom in cuffs in front of the jury panel. This argument, however, is unpersuasive.

A mistrial is a drastic remedy to which the court should resort only when there has been an error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994). The trial court has wide discretion in granting or denying a motion for a mistrial, and its discretion will not be disturbed except where there is an abuse of discretion or manifest prejudice to the complaining party. *Id.*

It is not prejudicial per se for a defendant to be brought into court handcuffed, and the defendant must affirmatively demonstrate prejudice. *Williams v. State*, 304 Ark. 218, 800 S.W.2d 713 (1990). In the present case, Breedlove was briefly brought into the courtroom with cuffs during the jury-selection process. There was no verification that any of the potential jurors saw the cuffs on Breedlove. The trial court also granted Breedlove's counsel the opportunity to ask the jury panel whether they made any kind of observation when appellant stepped in the room and whether anything they saw would affect their decision or affect their ability to be fair and impartial. Breedlove's counsel, however, chose not to ask any questions and did not pursue the matter any further. Thus, Breedlove has failed to affirmatively demonstrate prejudice.

Last, Breedlove contends that the trial court erred by denying his second motion for a mistrial because a news report made references to his prior conviction by a military tribunal that had been found to be inadmissible by the trial court after a suppression hearing. This contention is unpersuasive.

Before the jury was sworn in, the judge recessed court for the evening. That evening, Channel 4 News reported on the case and made inaccurate statements concerning Breedlove's prior conviction. The news report indicated that Breedlove had previously been convicted of raping and sodomizing his own children and that he received a twenty-two-year sentence and served six or seven years when Breedlove had, instead, been convicted of attempted rape and indecent acts, and sodomy, but not rape. He received a ten-year prison sentence and served six years.

The next morning, Breedlove's counsel again moved for mistrial and argued that the jury was tainted because the news report,

which was likely seen by members of the jury, mentioned his prior conviction, which was inadmissible during trial, and the news report misstated certain other facts about appellant.

In response to Breedlove's second motion for a mistrial, the trial judge asked the jurors if any of them had seen the news report. Seven jurors acknowledged that they had seen some or all of the report. The trial judge then interviewed each juror individually, and excused one juror who indicated that the news report would affect his ability to consider the evidence impartially.

After returning to the courtroom, the trial judge verified that, with the exception of the one excused juror, the other jurors, who had seen the report or some of it, could disregard what they saw or heard and consider the evidence as presented. After adding an alternate juror to the panel, the judge then stated:

> And let me again admonish each of you, if you have seen the report or a portion of it, you're admonished to disregard that report and not consider that, but to consider only the evidence that is presented here at this trial in arriving at your verdict. And you are also admonished not to discuss anything that may have been seen or heard in that report or broadcast during your deliberations in the jury room. But to consider and deliberate only on the evidence that's presented here and can each and will each of you do that? Okay, thank you.

The proper test that the court must employ when sorting through juror-bias issues is whether the prospective juror can lay aside his impression or opinion and render a verdict based upon the evidence in court; because the qualification of a juror is within the sound discretion of the court, we will not reverse the trial court unless the appellant demonstrates an abuse of discretion. *See Randolph v. ER Arkansas, P.A.*, 325 Ark. 373, 925 S.W.2d 160 (1996). By questioning each juror who had seen the news report, individually, and then admonishing the panel as a whole, the trial judge followed the proper procedure for dealing with this issue. Breedlove was not prejudiced. Therefore, the trial court did not err in denying Breedlove's second motion for a mistrial.

Affirmed.

STROUD and CRABTREE, JJ., agree.

Virgil ECKHARDT *v.* WILLIS SHAW EXPRESS, INC.

CA 97-1543 976 S.W.2d 393

Court of Appeals of Arkansas
Division I
Opinion delivered June 17, 1998

[redacted]

[redacted]

Conrad T. Odom, for appellant.

Davis, Cox & Wright, by: *Constance G. Clark*, for appellees.

ANDREE LAYTON ROAF, Judge. Virgil Eckhardt appeals the amount of workers' compensation benefits awarded to him as a result of two admittedly compensable injuries he sustained while working as a truck driver for Willis Shaw Express, Inc. On appeal, Eckhardt argues: 1) the Commission's decision to exclude from its calculation of his weekly wages certain per diem payments that he received in lieu of salary is not supported by substantial evidence and is in error as a matter of law; and 2) the Commission's opinion that he suffered only a three percent wage-loss disability as a result of his compensable injuries is against the weight of the substantial evidence and is in error as a matter of law. We agree that the Commission erred, and we reverse and remand for a proper award of benefits.

Eckhardt is sixty-two years old and has a high-school education. In addition to being a truck driver, his work history includes time as an airplane mechanic and district delivery manager for a regional newspaper. He was employed as a "short-haul" truck driver for Willis Shaw Express, Inc., and he was compensated at a

rate of $425 per week instead of by the miles he drove. If he drove more than 1,700 miles in a work week, however, he received a bonus, and if he was required to be away from home over night, $35 of his salary was paid as per diem or a "subsistence" allowance for each such night. These per diem payments were not subject to either state or federal withholding, and accordingly, boosted his take-home pay.

On June 19, 1994, Eckhardt suffered the first of two compensable injuries that he sustained while working for Willis Shaw Express, when he struck his head on the roof of the cab of the truck he was driving, injuring his head and neck. Following this incident, Eckhardt's driving duties were restricted to "local shuttling" within the Springdale, Rogers, and Fayetteville area. Eventually, he returned to his regular duties.

On August 10, 1995, Eckhardt sustained his second compensable injury when he was involved in a motor-vehicle accident. Following that accident, he was restricted to light duty, and after he was found to be medically maximized, his release included significant lifting and work restrictions. His duties were reduced to local shuttling and detailing trucks. In March of 1996, Eckhardt's pay was reduced to $8.00 per hour.

Willis Shaw Express had accepted both injuries as compensable and paid benefits to Eckhardt, including medical expenses, temporary total disability benefits, and a five percent permanent anatomical impairment rating. However, Eckhardt sought additional compensation, which Willis Shaw Express denied. On August 27, 1996, Eckhardt's claim was heard by an administrative law judge (ALJ) on his request for an additional two weeks temporary total disability, reimbursement for prescription expenses, wage-loss disability payments over and above the five percent anatomical impairment rating, and attorney fees.

The salary upon which Eckhardt's compensation was to be calculated was also contested at the hearing. Willis Shaw Express claimed that his temporary total disability should have been calculated based on his salary exclusive of per diem payments. The ALJ essentially accepted Willis Shaw Express's calculations, and awarded benefits based only on Eckhardt's "taxable income." The

ALJ also awarded a three percent wage-loss disability to the body as a whole, over and above the five percent permanent impairment rating.

Both Eckhardt and Willis Shaw Express appealed, and the Commission affirmed the ALJ's decision with regard to the award of three percent wage-loss disability, but slightly modified the calculation of Eckhardt's weekly wage. Regarding the calculation of Eckhardt's weekly wage, the Commission stated that his per diem payments did not constitute "real economic gain" over and above his expenses on the road. Asserting that this issue was addressed in *Employers Ins. v. Polar Express, Inc.*, 780 F. Supp. 610 (W.D. Ark. 1991), the Commission found it proper to exclude the per diem payments from its calculation of Eckhardt's average weekly wage. To calculate his weekly wage, it took Eckhardt's gross salary for the year preceding his injury, exclusive of the per diem payments, and divided by fifty-two. This calculation yielded an average weekly wage of $329.02 prior to his 1994 injury, and $362.42 prior to his 1995 injury.

In sustaining the ALJ's award of a three percent wage-loss disability, the Commission found that Eckhardt's current salary of $8.00 per hour gave him a gross wage of $320 per week, which was very close to what he earned at the time of his 1994 injury and only slightly lower than what he was earning at the time of his 1995 injury. The Commission also made a finding, based upon his "excellent" work history, that Eckhardt possessed "numerous" transferable skills. Nonetheless, it found that Eckhardt did have the potential to earn a higher salary when he was physically able to drive trucks and that a wage-loss award was thus appropriate.

Eckhardt first argues that the exclusion of his per diem payments from the calculation of his wages for the purpose of temporary total disability benefits is not supported by substantial evidence and is in error as a matter of law. Eckhardt asserts that the Commission erred in relying on *Employers Ins. v. Polar Express, Inc., supra*, to make this determination. He contends that: 1) the cases are factually distinguishable because the per diem at issue in *Polar Express* was calculated differently and for different purposes; 2) *Polar Express* has no value as precedent for his case because it

was decided in federal district court, and the Commission ignored its own precedent in making this ruling; and most importantly, 3) the issue in *Polar Express* involved the interpretation of National Council on Compensation Insurance (NCCI) guidelines for determining Polar Express's workers' compensation insurance premiums, and not the interpretation of Ark. Code Ann. § 11-9-102(19) (Supp. 1997), that section of Arkansas's workers' compensation law in which wages are defined. Regarding this last point, Eckhardt argues that this court should look to that code section for guidance in resolving this issue. Eckhardt's argument has merit.

Arkansas's workers' compensation law defines "wages" in pertinent part as:

> the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging, or similar advantage received from the employer.

Ark. Code Ann. § 11-9-102(19). In contrast, the NCCI guidelines, as referenced in *Polar Express*, treat reimbursement for expenses incurred by employees, except for power tools, as "remuneration" properly excluded from the calculation of workers' compensation policy premiums. While certain forms of wages, as set forth in Ark. Code Ann. § 11-9-102(19) would also qualify as "remuneration" under the NCCI guidelines, the statute embraces a much more inclusive concept of what constitutes compensation. Moreover, whereas the company and its workers' compensation carrier in *Polar Express* agreed that the NCCI guidelines applied to that case, the guidelines are not applicable in Eckhardt's case.

Reviewing Eckhardt's pay records makes it clear that the Commission's decision is not supported by substantial evidence. Eckhardt testified, and it was confirmed by Alan Roller, vice-president for human resources and safety at Willis Shaw Express, that he received a $35 subsistence allowance *in lieu of* $35 of his $425 per week salary, for each night that his job required him to be away from home. These payments were clearly compensation. One need look no further than the payroll record for January 22,

1992, to understand the true nature of these payments. That week, Eckhardt received $400 in per diem and only $25 in salary. It is absurd to conclude that he would receive the least amount of compensation in the weeks in which he worked the most.

Calling this salary per diem was simply a legal way under the federal and state tax codes whereby Willis Shaw Express could boost Eckhardt's take-home pay, and coincidentally, avoid reimbursing him for his expenses. For example, for the week of January 22, 1992, only $1.91 was withheld from Eckhardt's pay. By comparison, for the week of October 7, 1992, when Eckhardt received no per diem, which presumably means that he was home every night, $32.51 was withheld for FICA, $40.74 withheld for federal income tax, and $11.06 for state income tax.

On appellate review, the duty of this court is to review questions of law, and we may modify, reverse, remand for rehearing, or set aside an order, if the facts found by the Commission do not support it. Ark. Code Ann. § 11-9-711(b)(4) (Repl. 1996); *See Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). Because we find the Commission's decision to be based on an erroneous interpretation of the law, we reverse and remand for calculation and award of benefits consistent with this opinion.

Eckhardt next argues that the finding that he suffered only a three percent wage-loss disability as a result of his compensable injuries is "against the weight of the substantial evidence" and is in error as a matter of law. He contends that the award of only a three percent wage-loss disability was grossly inadequate. Eckhardt cites his age, education, work experience, and his medical restrictions as reasons for an award of a greater wage-loss disability.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. Ark. Code Ann. § 11-9-522(c)(1) (Supp. 1997); *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

Here, the Commission found, in addition to what they perceived as a situation where Eckhardt was earning a wage comparable to what he received before his injury, that transferable skills gained from other jobs, his excellent employment record, and his high-school education all militated in favor of a minimal award of wage-loss disability. Nonetheless, it awarded wage-loss disability because it found that he was physically able to make more money when he was able to perform the duties of a truck driver. Because the Commission erred in calculating Eckhardt's weekly wage, it failed to recognize the full amount by which his earning capacity was reduced. Based on its miscalculation of Eckhardt's wages as a truck driver, the Commission erroneously concluded that he was making nearly the same wage detailing and shuttling equipment. Accordingly, this case must be reversed and remanded for reconsideration of the amount of wage-loss disability. Ark. Code Ann. § 11-9-711(b)(4).

Reversed and remanded.

NEAL and MEADS, JJ., agree.

William Logan KNIGHT *v.* STATE of Arkansas

CA CR 97-845 971 S.W.2d 272

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 24, 1998

James E. Davis, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in the case at bar admitted that he raped a five-year-old girl. After he was charged with that offense, he contended that his confession was illegally obtained and moved to suppress it. The trial court denied the motion. Pursuant to Ark. R. Crim. P. 24.3(b), appellant entered a conditional guilty plea and was sentenced to twenty-five years' imprisonment. He now appeals from the trial court's denial of his motion to suppress his confession. We affirm.

Rule 24.3(b) presents an exception to the rule prohibiting appeal from a guilty plea, but only for the purpose of determining on appeal whether an appellant should be allowed to withdraw his plea if it is concluded that evidence should have been, but was not, suppressed as having been illegally obtained. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

A custodial statement is presumptively involuntary; it is the State's burden to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997); *Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996). When reviewing the voluntariness of confessions, we make an independent determination based on the totality of the circumstances, and reverse the trial court only if its decision was clearly erroneous. *Humphrey v. State, supra.* In determining whether a confession was voluntary, we consider the age, education, intelligence, and vulnerability of the accused; lack of advice as to his constitutional rights; statements made by the interrogating officer; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment. *Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997). The credibility of the witnesses who testified concerning the circumstances surrounding the defendant's custodial statement is for the trial court to determine. *Williams v. State*, 55 Ark. App. 156, 934 S.W.2d 931 (1996).

In the case at bar, appellant was not arrested and brought to the police station, but instead surrendered voluntarily. The interview at the police station took less than two hours, and there is no suggestion that he was physically threatened. Appellant was thirty-eight years old, of average intelligence, and had three years of college education.

Appellant's argument for reversal centers on three statements made by the interrogating officer during the interview: that probation was a possibility, that she could recommend a bond amount ranging from $50,000 to $1,000,000, and that appellant would receive a lesser sentence if he cooperated.

A statement induced by a false promise of reward or leniency is not a voluntary statement. *Clark v. State*, 328 Ark. 501, 944 S.W.2d 533 (1997). From our careful review of the record in light of this principle, we conclude there is no evidence that appellant's confession was obtained in exchange for a false promise. *See id.*

> Some police statements are so clearly false promises of rewards that we do not find it necessary to look beyond the statement and

> the police action to decide that the confession was involuntary. Examples of such statements are found in *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975), in which the prosecutor told a defendant, who later received a life sentence, that a confession "would not result in more than 21 years incarceration," and in *Teas v. State*, 266 Ark. 572, 587 S.W.2d 28 (1979), in which the defendant received the maximum sentence after being promised a recommendation of leniency and perhaps even dismissal of the charge. Such false promises of rewards constitute prosecutorial misconduct, and the confessions induced by them are to be automatically excluded.

Hamm v. State, 296 Ark. 385, 757 S.W.2d 932 (1988).

Focusing, then, on the police statement and subsequent action, the record shows that the following transpired with respect to the possibility of probation:

> [APPELLANT]: Is there any way I can get, get this brought down to a, like a misdemeanor so that I can be on probation so I can take care of my family?
>
> [OFFICER WYATT]: It won't be brought down to a misdemeanor, but you . . . you can uh, end up getting lesser time and get on probation or something.
>
> [APPELLANT]: If . . . do you think I could have probation?
>
> [OFFICER WYATT]: It's a possibility.
>
> [APPELLANT]: My concern is that, if I were sent to a penitentiary, there would be no money to take care of my family.
>
> [OFFICER WYATT]: That's why, uh, federal aid's out there. And your wife is capable of getting a job.
>
> [APPELLANT]: Okay. But the, the lifestyle and the money that she's accustomed to would not be . . .
>
> [OFFICER WYATT]: Well, she'd just have to get used to another lifestyle.

Appellant contends that this constituted a false promise of probation. We disagree. Viewed in context, this exchange clearly shows that appellant was told to expect to serve a term of imprisonment and could not hope to be sentenced to probation in lieu of imprisonment. Although it is true that probation is no longer

available as an alternative to imprisonment for a class Y felony, Ark. Code Ann. § 5-4-301(a)(1)(C) (Repl. 1997), any additional term of imprisonment may properly be suspended under § 5-4-104(c), the result being, in effect, unsupervised probation. Although the interrogating officer was technically incorrect in stating that probation *per se* could follow a term of imprisonment, a misstatement of fact by the officer, standing alone, does not invalidate a subsequent confession. *Pyles v. State*, 329 Ark. 73, 947 S.W.2d 754 (1997). Viewing the officer's statements in context, we do not think appellant could reasonably have believed that he was being offered probation in lieu of imprisonment.

Nor do we find a false promise of reward in the police officer's statement that she could recommend a bond amount ranging from $50,000 to $1,000,000. The court set bond at $100,000, at the lower end of the range mentioned by the officer and, in fact, the record reflects that appellant was released on bond soon after undergoing a court-ordered psychiatric examination. On this record, we cannot say that the officer's statement regarding bond amount constituted a false promise or inducement.

Next, appellant contends that his confession was invalidated by the officer's statement, following a discussion of the possibility of life imprisonment for a class Y felony, that: "[T]he more cooperative you are, the less your sentence gonna be. And I guarantee you that." Comparing the police statement with the subsequent action, the record shows that appellant received a sentence of twenty-five years. The authorized range of punishment for a class Y felony is not less than ten years and not more than forty years, or life. Ark. Code Ann. § 5-4-401 (Repl. 1997). Furthermore, the prosecuting attorney stated, without objection, that appellant was offered a reduced sentence because of his cooperation, and that, in three specific cases involving similar facts where the defendants did not cooperate, the State sought and obtained life sentences. Finally, we note that the interrogating officer testified that, during a break in the interview, she informed appellant that she had no control over giving him probation or reducing the charges against him because these matters were in the hands of the judge, jury, and prosecuting attorney. Ultimately, the question is one of credibility regarding the circumstances sur-

rounding appellant's custodial statement, and that question is for the trial court to determine. *Williams v. State, supra.* Considering the totality of the circumstances, it appears that any promise of a lesser sentence that could be inferred from the officer's statement was kept by the State, and we find no prejudicial error. *Tippitt v. State*, 285 Ark. 294, 686 S.W.2d 420 (1985).

Affirmed.

AREY, CRABTREE, and MEADS, JJ., agree.

ROGERS and GRIFFEN, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. In this case, a police officer exacted a confession from the appellant after guaranteeing him that "the more cooperative you are, the less your sentence gonna be," by giving him the impression that probation was a possibility, and by hinting that she could make things either difficult or easy for him by recommending bond "from $50,000 on up to $200,000 or to a million." I must respectfully dissent to an affirmance of the denial of appellant's motion to suppress.

A statement induced by a false promise of reward is not a voluntary statement. *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). The supreme court has explained that some statements are clearly a promise of reward, and where so, the confession is deemed involuntary. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). In other cases, the promise is more ambiguous. In those instances, the reviewing court must also look to the vulnerability of the defendant to aid in the determination. *Id.*

In my opinion, two promises of reward were made that were so clearly false that it is not necessary to consider the vulnerability of the appellant. *See Stone v. State*, 43 Ark. App. 203, 863 S.W.2d 319 (1993). Before confessing, appellant expressed concern about the financial welfare of his family should he be imprisoned. In this atmosphere, the officer stated a deliberate falsehood that probation was a possibility. The majority glosses over this lie by saying that, while probation was not an available sentence, it was possible for a portion of a sentence to be suspended. With all due respect, a sentence of probation, with no jail time, does not equate with serving a term of imprisonment followed by a period of suspen-

sion or "unsupervised probation." That there was some discussion of altering lifestyles should imprisonment occur, it remains that the officer's statements gave appellant the false hope that probation was a possibility. This false statement does invalidate the confession.

As a second false promise of reward, the officer offered appellant an unqualified guarantee of leniency in exchange for his cooperation. In truth, the officer was in no position of authority to make such an assurance. And, the only testimony she gave to support this statement was that in her eighteen years of experience she was "aware of cases where defendants who cooperated received lesser sentences." This falls short of establishing a foundation upon which to make a guarantee. While the majority relies on the statements of the prosecutor to buttress the officer's testimony on this point, the law is clear that statements and arguments of counsel are not evidence. *Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991); *Burkett v. State*, 32 Ark. App. 60, 796 S.W.2d 355 (1990). Regardless of whether there was an objection, the statements of the prosecutor do not qualify as competent evidence upon which to base an affirmance. At the end of the day, appellant received a lengthy twenty-five-year term of imprisonment. This is by no means a light sentence.

Whether a confession was made pursuant to a promise of leniency is an issue which is decided on a case-by-case basis. *Stone v. State*, 43 Ark. App. 203, 863 S.W.2d 319 (1993). In the case at bar, credibility is not a factor, as the record speaks for itself. The officer admitted that she made a guarantee of leniency and that she lied when she told appellant that probation was possible. The officer's testimony, that she informed appellant during a break in the interview that the question of probation and "reduced charges" were matters not within her control, does not improve the State's predicament. Even then, the officer was still leading appellant to believe that probation was a possible sentencing alternative. And, any question of reduced *charges* does not speak to the guarantee of a lighter *sentence*. Besides, it was the officer's testimony that "I told him that the charge could not be reduced to a misdemeanor, but that he could get less time or probation if he

cooperated." Thus, the testimony concerning lack of control does not stand as a disclaimer.

The officer's statements were misleading and were intended to deceive. Since a confession resulted, we have no choice but to reverse the trial court's decision. While I share the prevailing judges' abhorrence of this offense, I cannot allow this sentiment to cloud my legal analysis of the issue presented.

I am authorized to state that Judge GRIFFEN also joins in this dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Like the members of our court who vote to affirm appellant's conviction for raping his five-year-old daughter, I consider that crime reprehensible. Yet, I am convinced that the trial court erred in refusing to suppress appellant's confession after a police officer knowingly, purposely, and deliberately lied by telling appellant that probation was possible for the crime he was accused of committing, and then purported to guarantee that appellant's sentence would be lowered if he cooperated with the police. Therefore, I would reverse appellant's conviction and sentence and remand his case for a new trial.

It is undisputed that Officer Joyce Wyatt lied to appellant during interrogation when she told him that by confessing to raping his daughter he could "end up gettin' lesser time an' get on probation or somethin'." Wyatt testified at the suppression hearing that she knew probation is not possible for a Class Y felony such as rape. The State argues that her comment was not a false promise of reward or false statement meant to deceive appellant so as to procure an untrue statement from him, and that appellant was not misled or deceived.

It is well settled law in Arkansas that statements made while in police custody are presumed to be involuntary, and place the State under the burden to show that they were made voluntarily, freely, and understandingly, *without hope of reward or fear of punishment.* In determining whether a statement is voluntary, we must make an independent review of the totality of the circumstances, and will not reverse unless the trial court's findings are clearly against the preponderance of the evidence. However, all doubts

are resolved in favor of individual rights and safeguards. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997).

It is equally beyond question that the prospect of probation is attractive for most persons charged with breaking the law, whether they are charged with speeding, rape, or murder. It should come as no surprise to anyone, therefore, that the notion of probation is very attractive for someone facing prosecution for raping a five-year-old. There is absolutely no basis in this record for concluding that appellant had any objective reason to doubt Wyatt's assertion that he might be placed on probation if he cooperated, nor is there any reason to doubt that the fear of punishment for rape, if not the hope of reward through probation, was a strong factor influencing appellant's decision to confess to the crime.

The State's claim — that Wyatt's false statement about the possibility of appellant being placed on probation was not meant to deceive appellant — is unpersuasive. By definition, lies are untruths designed to be believed; otherwise there is no point in lying. When a police officer knows that there is no possibility for probation in a rape case, yet tells a rape suspect the lie that probation might be possible if the suspect cooperates with the investigating effort, the officer certainly hopes the suspect will believe the lie and waive the right against self-incrimination at the very least, if not the right to counsel and other rights that protect persons accused of criminal conduct. After all, the police know the difficulties involved in prosecuting rape charges, especially when the accused and victim belong to the same family. The police know that conviction can only occur after the prosecution carries the heavy burden of proving the accused's guilt beyond a reasonable doubt. The police know that a confession greatly eases the difficulties faced by the prosecution, while simultaneously raising the chances of obtaining a conviction or guilty plea. Therefore, judges should not believe that the police do not mean to deceive a rape suspect when they tell him that cooperating with their investigation may enable him to be placed on probation.

In the same conversation when she lied to appellant and told him that probation might be possible for his rape charge, Wyatt also told appellant "the more cooperative you are, the less your sentence gonna be. An' I guarantee you that." Wyatt had no

power to dictate or influence any sentence that appellant would have received in any event. The record contains nothing to show that she, or the police department generally, had any role in sentencing.

We are conditioned to expect lies from people accused of committing crimes. We should not be surprised that the police are, understandably, eager to bring lawbreakers to justice. But we should not expect the public to trust a criminal justice process that essentially gives police what I have termed a "free-lie zone" during criminal interrogations when they try to out-lie the people they accuse of breaking the law. I stated my concerns on this subject in my concurring opinion in *Williams v. State*, 56 Ark. App. 156, 940 S.W.2d 500 (1997). We should call a legal system just if it works to find the truth while respecting and protecting the constitutional rights of those accused of committing crimes, not if it merely works to manufacture the most cunning lie that will support a popular result. It is hard enough to find the truth; we do not need the police to help hide it.

JOE BRENNAN GENERAL CONTRACTING and United States Fidelity & Guaranty Insurance Company *v.* Randy ADAIR

CA 97-1431 971 S.W.2d 798

Court of Appeals of Arkansas
Division IV
Opinion delivered June 24, 1998

Warner, Smith & Harris, PLC, by: *Jeol D. Johnson,* for appellants.

McKinnon Law Firm, by: *Laura J. McKinnon,* for appellee.

D. FRANKLIN AREY, III, Judge. Appellants, Joe Brennan General Contracting and United States Fidelity & Guaranty Insurance Company, appeal from a Workers' Compensation Commission decision finding that the appellee, Randy Adair, is entitled to further benefits for an injury that occurred in 1979. Appellants raise five points: (1) that the Commission erred in finding that the claim did not constitute a claim for additional benefits within the meaning of Arkansas Code Annotated § 11-9-702(b) (1987); (2) that the Commission erred in finding that this was a claim to enforce the provisions of a prior opinion and award dated July 10, 1981; (3) that the Commission erred in finding that the case was not controlled by any provisions of § 11-9-702; (4) that the Commission erred in finding that the provisions of § 11-9-702(b) were suspended by a prior filing of a claim for additional benefits; and (5) that the Commission erred in finding that the treatment rendered to appellee on or after November 22, 1995, constituted reasonably necessary medical treatment for the compensable injury of November 20, 1979. For the reasons given below, we reverse the Commission's decision.

Appellee sustained a left knee injury on November 20, 1979. His initial claim was accepted as compensable, but a dispute subsequently arose over his entitlement to benefits in excess of those voluntarily paid by appellants. A claim for additional compensation was filed on July 10, 1980. An opinion awarding benefits was issued by an administrative law judge on July 10, 1981; this decision was not appealed. Among other provisions, the opinion ordered appellants to continue paying all medical expenses reasonably necessary for the compensable injury.

All of the indemnity benefits allowed by the July 10, 1981 opinion had been paid prior to the opinion's entry. The last payment of indemnity benefits was on May 13, 1981, and the last payment of compensation for medical expenses was on April 14, 1981. Appellee neither sought nor required any further medical treatment between his last visit to Dr. William Kendrick on April 10, 1981, and his visit to Dr. James Arnold on November 22, 1995.

Appellee filed a claim for benefits on January 23, 1996; his left knee had begun hurting in 1995. Dr. Arnold treated appellee's left knee; this treatment included surgical intervention and repair of torn ligaments. It was Dr. Arnold's opinion that appellee's difficulties and need for medical treatment beginning in November 1995 were attributable to normal and anticipated degenerative changes to the structure of appellee's left knee, which were produced by the initial compensable injury, and to some extent by the initial surgical intervention. The evidence failed to reveal any injuries to appellee's left knee subsequent to 1979.

The administrative law judge first discussed whether the statute of limitations barred appellee's claim for additional compensation, in the form of payment of medical expenses incurred beginning on November 22, 1995. The ALJ began his analysis with section 11-9-702(b), as it existed prior to the effective date of Act 796 of 1993. This was appropriate, because appellee's injury occurred in 1979; Act 796 limits its application to injuries occurring on and after July 1, 1993. *See Atkins Nursing Home v. Gary*, 54 Ark. App. 125, 923 S.W.2d 897 (1996).

Section 11-9-702(b), in its pre-Act 796 form, reads as follows:

> (b) TIME FOR FILING FOR ADDITIONAL COMPENSATION. 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 (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater.

Appellee's claim filed on January 23, 1996, was not within one year from the last payment of benefits or two years from the date of injury. Rather, it was not filed until approximately sixteen years following the "date of injury" and over fourteen years following the last payment of compensation.

The ALJ determined that appellee's claim for medical benefits was not barred by § 11-9-702(b) on two grounds. The ALJ viewed appellee's claim as a request for the Commission to enforce the provisions of its July 10, 1981 opinion; the ALJ did not believe the claim constituted a claim for additional compensation. In the alternative, if the claim was considered to be one for additional compensation, then the ALJ was of the opinion that the statute of limitations was tolled by the prior filing of a claim for additional compensation on July 10, 1980.

Having disposed of the statute of limitations as a bar to appellee's claim, the ALJ proceeded to determine whether appellee's medical expenses were incurred for reasonably necessary medical treatment of his compensable injury of 1979. The ALJ gave Dr. Arnold's opinion great weight and credit. The ALJ concluded that the treatment provided by Dr. Arnold on or after November 22, 1995, was reasonable for and necessitated by degenerative changes that were the result of the natural progression or deterioration of the initial compensable injury of November 20, 1979. Appellants were held liable for the reasonable expenses incurred as a result of this treatment. The Commission affirmed and adopted the decision of the administrative law judge.

■ We think the Commission erroneously concluded that appellee's January 23, 1996 claim merely sought to enforce the provisions of the July 10, 1981 opinion. All of the benefits and compensation awarded in the July 10, 1981 opinion were paid *prior* to the issuance of that opinion. Appellee neither sought nor required any further medical treatment between April 10, 1981 (prior to the date of the opinion), and November 22, 1995. There is no indication that the appellants refused to continue payment of benefits previously awarded in the interim between these two visits. In short, this was a claim for additional compensation.

Helena Contracting Co. v. Williams, 45 Ark. App. 137, 872 S.W.2d 423 (1994), is distinguishable. In that case, the claimant continued to receive medical treatment for his compensable injury *after* the Commission's order of February 4, 1986. Treatment was received at least once each year, until the respondents discontinued payment of disability benefits and payment for medical treatment provided after July 26, 1988. The claimant sought the resumption of these benefits by a claim filed on January 31, 1990. We held that section 11-9-702(b) did not bar the claimant's January 31, 1990 claim.

> [W]e do not think that the claim filed on January 31, 1990, constituted a claim for "additional compensation" so as to be subject to the limitations period stated in . . . § 11-9-702(b). There is nothing in the record before us to show that the award of compensation made pursuant to the Commission's order of February 4, 1986, had expired, or that the cessation of benefits by the [respondents] was sanctioned in any form. Instead, it is clear from the record that the [respondents] simply refused to continue the payment of benefits previously awarded by the Commission pursuant to its order of February 1986.

Helena Contracting Co., 45 Ark. App. at 139, 872 S.W.2d at 424. We treated the claimant's "claim as one for enforcement of the Commission's previous order, rather than a request for additional compensation," so that it was not barred by § 11-9-702(b). *Id.*

In the case before us, appellants have not refused to continue payment of benefits previously awarded by the Commission. Instead, appellants paid all of the benefits awarded *prior* to the July 10, 1981 opinion. In *Helena Contracting Co.*, the claimant continued to receive medical treatment for his compensable injury after the February 4, 1986 order; here, appellee neither sought nor required any further medical treatment from April 10, 1981, until November 22, 1995. Unlike the order in *Helena Contracting Co.*, the July 10, 1981 opinion *also* awarded permanent and partial disability benefits. The instant case does not involve the refusal to comply with an ongoing award of temporary total and medical benefits alone.

Likewise, we do not believe that § 11-9-702(b) was tolled, as it was in *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675

S.W.2d 849 (1984), and its progeny. *See Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987); *Sisney v. Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986). In these cases, a timely claim for additional compensation that was not acted on tolled the statute of limitations, so that a hearing on a subsequent or second claim for additional compensation was proper. *See Giles*, 20 Ark. App. at 156-57, 725 S.W.2d at 584-85; *Sisney*, 17 Ark. App. at 99-100, 704 S.W.2d at 175; *Bledsoe*, 12 Ark. App. at 295, 675 S.W.2d at 850.

In this case, appellee did not file a timely claim for additional compensation following the July 10, 1981 opinion. The claim relied on by the Commission to toll the statute, filed on July 10, 1980, was disposed of by the opinion dated July 10, 1981. Appellee sought no benefits after the July 10, 1981 opinion, until over fourteen years later; no additional medical treatment was requested, and all benefits were paid prior to the July 10, 1981 opinion. Thus, the July 10, 1980 claim for additional compensation was acted on, unlike the original tolling claims in *Giles*, *Sisney*, and *Bledsoe*.

Since appellee's January 23, 1996 claim is one for additional compensation, and since the statute of limitations was not tolled, then appellee's claim is barred. *See* § 11-9-702(b). As the ALJ acknowledged, appellee's January 23, 1996 claim was not filed until approximately sixteen years following the "date of injury" and over fourteen years following the last payment of compensation. The claim is clearly barred. Therefore, any argument concerning the reasonable necessity of appellee's medical treatment rendered on or after November 22, 1995, is moot.

Reversed and dismissed.

BIRD and ROGERS, JJ., agree.

Lawrence ADKINSON *v.* John C. KILGORE

CA 97-1108 970 S.W.2d 327

Court of Appeals of Arkansas
Division III
Opinion delivered June 24, 1998

Wilson, Walker & Short, by: *Charles M. Walker*, for appellant.

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

JUDITH ROGERS, Judge. This appeal is brought from an order of the Lafayette County Chancery Court decreeing that appellant should recover nothing on his complaint against appellee for the breach of two lease contracts. We reverse.

On August 30, 1988, appellee executed two contracts whereby he leased certain parcels of land from Mrs. Lanie Adkinson, appellant's mother. The first contract (hereafter "the pasture lease") encompassed 510 acres of pasture land. It called for an annual rental payment of $3,000 and was to run from January 1989 to December 1998. The second contract (hereafter "the crop lease") encompassed 250 acres of farm land and called for an annual rental payment of $17,500. It is disputed whether this contract was to run through 1992 or 1998.

Appellee paid all rentals required by the contracts through 1990. In May of that year, the Red River flooded, and the lands leased by appellee sustained considerable damage. Only one acre of the pasture land and twenty-five acres of the farm land escaped the ravages of the flood. The damage consisted of fences being washed away, debris and sand being deposited on the property, scouring of the land, and large sinkholes being left in the ground.

After the flood, appellee contacted Mrs. Adkinson and informed her that he could not rebuild the fences and make other necessary repairs while still paying $3,000 per year on the pasture lease. He orally renegotiated his lease with Mrs. Adkinson to pay $1,500 per year on the pasture land. When the pasture's grass began to grow back faster than expected, appellee decided to pay Mrs. Adkinson $2,000 per year rather than $1,500. Accordingly,

he paid $2,000 per year on the pasture lease from 1991 through 1995. As far as the repair expenses incurred by appellee, he testified that he spent between $6,000 and $7,000 on fencing material, between $10,000 and $12,000 to level the land, and between $4,000 and $6,000 for grass fertilizer. With reference to the land covered by the crop lease, appellee testified that he rebuilt a road that led to the land and that he made efforts to get organic matter back into the soil. He did not testify that he renegotiated his lease with Mrs. Adkinson as to this particular property. Consequently, he continued to pay $17,500 per year on the crop lease through 1993.

Shortly after the flood occurred in 1990, Mrs. Adkinson deeded the leased property to appellant; however, Mrs. Adkinson continued to deal with all matters concerning the leases until 1994.[1] In that year, appellant and appellee spoke for the first time regarding the leases. Appellee informed appellant that he could no longer afford to pay $17,500 for the crop lease. He proposed instead a rental of $12,000, with $6,000 to be paid up front and $6,000 to be paid later. Appellee paid $6,000 on May 7, 1994, but made no further payments on the 1994 crop lease. In early 1995, appellee contacted appellant again and asked for a reduction on the crop lease payment. According to appellee, a figure of $35 per acre was agreed upon, which would have amounted to a yearly rental of $8,750 for the 1995 crop lease. When no money was received from appellee by mid-1995, appellant's attorney sent correspondence to appellee seeking payments due on the lease contracts. According to appellant, he was owed $6,000 on the 1994 crop lease and $12,000 on the 1995 crop lease. No mention was made of the agreement to reduce the 1995 rental payment to $8,750. Further, appellant sought payment of an additional $1,000 per year for 1994 and 1995 on the pasture lease. No mention was made of the renegotiated payment of $2,000 per year.

On July 10, 1995, appellee received another letter from appellant's counsel, wherein counsel stated that appellant "advises me that he will accept your $11,000.00 payment on the past due

[1] Mrs. Adkinson died in 1996 and was thus unavailable to testify at the trial held on March 7, 1997.

rental together with your note for $9,000.00 plus an additional $1,000.00 for attorney's fees making the note for $10,000.00." The note was to bear a 9% interest rate payable on December 1, 1995. On July 21, 1995, appellee wrote two checks which totaled $11,000, but there is no evidence that a note was drawn up to cover the remaining $10,000 referred to in the letter. Later in 1995, appellee vacated the property.

On November 3, 1995, appellant filed suit against appellee, seeking past-due rents for 1994 and 1995. In his complaint, appellant sought $12,500 for 1994 (figured as the original $17,500 contract price on the crop lease, plus an additional $1,000 owed on the pasture lease, less the $6,000 already paid by appellee) and $7,500 for 1995 (figured as the $17,500 original contract price, plus an additional $1,000 on the pasture lease, less $11,000 already paid by appellee). Appellee answered by alleging as set-off the value of improvements and repairs made by him and further claimed that appellant's retention of the improved land without such a set-off would unjustly enrich appellant.

A trial was held on March 7, 1997, during which the chancellor heard the testimony of appellant, appellee, and other witnesses. In his seven-page letter opinion dated May 7, 1997, the chancellor found that appellee and Mrs. Adkinson had modified the pasture lease rental from $3,000 per year to $2,000 per year; that there was an agreement between appellee and Mrs. Adkinson that appellee would be compensated for the cost of improvements to the property; and that it would unjustly enrich appellant to keep all improvements made by appellee and still recover $20,000 for unpaid rent. Finally, the chancellor noted that, based upon the evidence at trial, the value of the improvements made by appellee, whether measured by their cost or by the difference in the value of the land before and after improvements, exceeded any amount of rent claimed by appellant. Therefore, the chancellor ordered that appellant take nothing by his complaint. This appeal followed.

■ We begin by noting that chancery cases are reviewed *de novo*. *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997). However, a chancellor's findings will not be reversed unless they are clearly erroneous. *Brown v. Cole*, 27 Ark. App.

213, 768 S.W.2d 549 (1989). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997).

Appellant argues first that the chancellor erred in finding that there was an agreement between his mother and appellee to reduce the rental payment on the pasture lease until appellee could recoup the cost of his improvements. He cites *E.E. Terry, Inc. v. Cities of Helena and West Helena*, 256 Ark. 226, 506 S.W.2d 573 (1974), and *Jones v. Felker*, 72 Ark. 405, 80 S.W. 1088 (1904), for the proposition that a landlord is not liable for repairs made by a tenant where there was no agreement by the landlord to pay for repairs. According to appellant, there was no evidence of such an agreement with regard to the pasture lease other than appellee's testimony as to the $1,000.00 per year reduction of the pasture rental, and appellant's and his mother's acceptance of such an amount for 1991, 1992 and 1993. Appellee's testimony coupled with appellant's and Mrs. Adkinson's acceptance of the $2,000 payments obviously convinced the chancellor that Mrs. Adkinson had agreed to allow appellee to reduce the amount paid on the pasture lease to recoup the cost of his improvements. Further, there was no testimony to the contrary by appellant. In fact, appellant admitted that his mother had handled all matters regarding the leases prior to 1994 and that, if she had renegotiated a lease, he probably would not have known about it. Giving due regard to the chancellor's ability to observe the witnesses, we cannot say that the chancellor's finding on this point is clearly erroneous. *See Ballentine v. Ballentine*, 275 Ark. 212, 628 S.W.2d 327 (1982).

Appellant's next argument is the same as the first but concerns the crop lease rather than the pasture lease. According to appellant, there is no evidence that his mother and appellee agreed to reduce the rental on the crop lease in exchange for appellee's improvements to the land. Appellant is correct. Appellee never testified that he renegotiated the crop lease with Mrs. Adkinson with an eye toward recouping the cost of his improvements. His testimony mentions only a renegotiation of the pasture lease in

that regard. In fact, appellee paid the original rental price on the crop lease during the years 1991, 1992, and 1993 and renegotiated the 1994 and 1995 leases without reference to cost of improvements. Therefore, the chancellor erred in determining that appellee was entitled, by virtue of an agreement, to set off the value of improvements against money owed by him on the crop lease.

Appellant's final argument concerns the amount that remains due and owing in rent for the years 1994 and 1995. Appellant contends that the amount should be calculated based on the July 10, 1995, letter written by his counsel to appellee. As evidenced by this letter, appellant agreed to accept for all past-due rent an immediate payment of $11,000 to be followed by a note in the amount of $10,000. The record does reflect that appellee made a payment of $11,000 shortly thereafter, on July 21st. If appellant's contention is correct, then appellee owes $10,000.

On the other hand, the record discloses that the parties negotiated a rental price of $12,000 for 1994, of which only $6,000 was paid. The record also contains appellee's testimony that the 1995 rent for the crop land was to be $35 an acre, for a total of $8,750. Based on this evidence, appellee would have owed a total of $20,750 for both years ($12,000 for 1994 and $8,750 for 1995). The record shows that appellee paid $6,000 in 1994 and $11,000 in 1995, thus leaving a balance due of $3,750.

Upon *de novo* review of a fully developed chancery record, where we can plainly see where the equities lie, we may enter the order that the chancellor should have entered. *Mathews v. Oglesby*, 59 Ark. App. 127, 952 S.W.2d 684 (1997). While the chancellor noted the conflicting proof, he made no finding as to which version was to be believed, finding instead that the cost of improvements made by appellee greatly exceeded any claim of past-due rent. Given the conflicting evidence in the record, we cannot plainly see where the equities lie, and we believe that the interests of justice will best be served by remanding the case for the chancellor to determine the amount of past-due rent.

Before leaving this issue, however, we must address appellee's contention that appellant would be unjustly enriched by the receipt of rental payments and retention of improvements to

the property. The doctrine of unjust enrichment is applied in cases in which services have been performed, whether requested or not, which have benefitted a party. *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986). It has been said that, in the case of consensual contracts, the agreement defines the duty, while in the case of quasi-contracts, the duty defines the contract. *Sparks Regional Med. Ctr. v. Blatt*, 55 Ark. App. 311, 935 S.W.2d 304 (1996). The duty that forms the foundation of a quasi-contractual obligation is frequently based upon the doctrine of unjust enrichment. *Id.* Unjust enrichment is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Id.* To be unjustly enriched, a party must have received something of value to which he was not entitled and which he should restore. *Id.* However, there must also be some operative act, intent, or situation to make the enrichment unjust and compensable. *Dews v. Halliburton Indus., Inc., supra.* Courts will only imply a promise to pay for services where the services were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of payment. *Id.*

■ ■ In this case, there is no question that appellee was authorized to expect reimbursement for his improvements by reduction of the rentals on the pasture lease. However, there is no evidence that he could rightfully expect any such reimbursements to come from a reduction in the crop lease payments. The doctrine of *caveat lessee*, which states that unless a landlord agrees with his tenant to repair leased premises he cannot, in the absence of a statute, be compelled to do so, is firmly established law in this state. *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996). Appellee should not be permitted to frustrate this law in circumstances where he had no basis to expect recoupment of his costs of improvement. Further, one who officiously confers a benefit upon another is not entitled to restitution therefor. *Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995). Finally, where

there is an express contract in existence, the law will not imply a quasi-contract. *Coleman's Serv. Ctr. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). The law never accommodates a party with an implied contract where there has been a specific one on the same subject matter. *Id.* By appellee's own testimony, the parties herein agreed to certain rental amounts on the crop lease for 1994 and 1995 without reference to appellee's expenses incurred for improvements.

In light of the foregoing, we hold that appellant is entitled to the payment of rent for the 1994 and 1995 crop leases and that he is not unjustly enriched by retention of the improvements on the property that is the subject of the leases. We reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

CRABTREE and MEADS, JJ., agree.

SECOND INJURY FUND *v.* Billy STEPHENS, Trailmobile, Inc., and Home Indemnity Company

CA 97-1528 970 S.W.2d 331

Court of Appeals of Arkansas
Division II
Opinion delivered June 24, 1998

Terry Pence, for appellant.

Curtis L. Nebben, for appellees.

Snellgrove, Laser, Langley, Lovett, & Culpepper, by: *Todd Williams*, for appellee Billy Stephens.

JOHN F. STROUD, JR., Judge. The Second Injury Fund appeals a decision of the Workers' Compensation Commission holding it liable for a twenty percent wage-loss disability awarded to Billy Stephens, a thirty-four-year-old welder with an eighth-grade education. We affirm the Commission's decision.

The parties do not dispute the facts in this case. Mr. Stephens was assigned a ten percent permanent physical impairment rating as a result of a 1987 compensable back injury and two 1988 surgeries related to the injury. In 1993 he began working for Trailmobile, Inc., where he suffered another compensable back injury in April 1995 while pulling a coupler section onto a welding table. This injury resulted in surgery the next month. Trailmobile and its insurance carrier, Home Indemnity Company, accepted and paid a two percent permanent impairment rating following the 1995 surgery. Mr. Stephens returned to work for Trailmobile in a light-duty capacity and continued working until January 1996, when he sustained a noncompensable back injury that also required surgery.

A hearing before the administrative law judge was held in October 1996 on the issues of wage-loss benefits and Second Injury Fund liability. Mr. Stephens testified that after his 1995

return to work he had difficulty with the physical demands of various job assignments. The law judge awarded him wage-loss benefits in the amount of twenty percent, and apportioned the sum to be paid equally by Trailmobile and the Second Injury Fund. The Workers' Compensation Commission reversed the decision regarding apportionment, finding that all wage loss should be borne by the Second Injury Fund. In doing so, the Commission rejected the Fund's argument that Mr. Stephens had failed to prove that the major cause of his wage-loss disability was his last compensable injury. On appeal, the Second Injury Fund does not challenge the finding that Mr. Stephens's wage-earning capacity has been reduced by twenty percent. It contends, however, that the wage-loss disability award is contrary to our workers' compensation statutes.

The requirements that must be met in order for the Second Injury Fund to have liability are as follows:

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

Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988). In *Second Injury Fund v. Furman*, 60 Ark. App. 237, 242, 961 S.W.2d 787, 790 (1998), we addressed the Fund's liability under Act 796 of 1993, which has mandated strict construction of our workers' compensation laws. We stated that the new Workers' Compensation Act did not change the following guidelines for Second Injury Fund liability, now codified as Ark. Code Ann. § 11-9-525(b)(3) and (4) (Repl. 1996):

> (3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of

> combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment.
>
> (4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an administrative law judge or the Workers' Compensation Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the commission, and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the fund provided for in § 11-9-301.

The Second Injury Fund raises three points regarding the twenty percent wage-loss disability award. First, it alleges that the Commission erred in finding that Mr. Stephens's compensable injury and two percent impairment rating was the "major cause" of his disability because it failed to consider his prior and subsequent injuries. Second, it contends that under the proposed "proper analysis" of the first point, the Commission's finding that the 1995 compensable injury was the major cause of the disability is not supported by substantial evidence. Third, it contends that the Commission erred in awarding permanent disability benefits because Mr. Stephens waived his right to pursue rehabilitation benefits.

When reviewing a decision of the Workers' Compensation Commission, we must decide whether it is supported by substantial evidence. *City of Fouke v. Buttrum*, 59 Ark. App. 219, 956 S.W.2d 193 (1997). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* The Commission's decision will be affirmed unless fair-minded persons presented with the same facts could not have arrived at the conclusion reached by the Commission. *Id.*

I. Whether the Commission erred in not considering appellee's prior and subsequent injuries in finding that appellee's compensable injury and two percent impairment rating was the "major cause" of his wage-loss disability.

The Second Injury Fund relies upon Arkansas Code Annotated section 11-9-102 and *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996), where we stated that a claimant seeking permanent disability benefits must prove that the compensable injury is the major cause of his permanent disability. The argument is without merit: section 11-9-102 does not refer to a disability or impairment resulting from the combination of a compensable work injury and a previous permanent disability or impairment, nor was *DuBois* a second injury case. We will not extend the statute or caselaw to require a claimant to prove that his compensable injury is the major cause of disability or impairment status that resulted from combining his last compensable injury and a prior disability or impairment.

Arkansas Code Annotated section 11-9-102 (Supp. 1997) reads in pertinent part as follows:

> (5)(F) *Benefits.*
>
> (i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.
>
> (ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.
>
> (iii) Under this subdivision (5)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A

> nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.
>
> . . . .
>
> 14(A) "Major cause" means more than fifty percent (50%) of the cause.
>
> (B) A finding of major cause shall be established according to the preponderance of the evidence;

The Second Injury Fund contends that section 11-9-102(5)(F)(ii) required Mr. Stephens to prove that his 1995 injury was the major cause of his twenty percent wage-loss disability. Pointing to certain testimony and medical records from 1988 through 1996, and characterizing the 1996 injury and surgery as an independent intervening cause, it argues that the Commission erred in ignoring prior and subsequent factors that contributed to the disability.

The Commission rejected this argument with the following reasoning:

> We are not persuaded by the Second Injury Fund argument that claimant has failed to prove by a preponderance of the evidence that the major cause of claimant's wage loss disability is his 1995 injury. Arkansas Code Ann. § 11-9-102(5)(F)(ii)(a) states "permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." In this case, the record clearly shows that claimant sustained a two percent (2%) physical impairment as a result of the 1995 compensable injury. Thus, the major cause requirement has been satisfied and permanent partial disability benefits have been paid for this physical impairment.

We, too, reject the argument that the statute required claimant to prove that his compensable 1995 injury was the major cause of his wage-loss disability. Rather, the statute required only that he prove that his 1995 compensable injury was the major cause of the two percent impairment rating.

Dr. Kenneth Tonymon, a neurosurgeon who performed the first surgery in 1988 and the 1995 surgery, testified that Mr. Stephens's permanent partial impairment rating for the first two surgeries was ten percent. He stated that an additional two percent rating is indicated for an operation at the site of a

previous one, and that the May 1995 surgery was Mr. Stephens's second at the L4-5 level. He stated that Mr. Stephens's on-the-job injury at Trailmobile was the major cause of the surgery, specifying that a soft piece of ruptured disc material was "not what I would consider a chronic herniation, so I feel like the history was certainly compatible . . . . That surgery was the sole cause of the additional [two percent] rating I gave." Clearly, the "major cause" requirement of Arkansas Code Annotated section 11-9-102(5)(F) was satisfied by Dr. Tonymon's testimony that the 1995 injury necessitated performance of a surgery and that this surgery, at the site of a previous one, was the reason for the two percent impairment rating.

Our review of the evidence also shows that *Mid-State*'s three-pronged test has been met. There was evidence before the Commission first, that Mr. Stephens sustained a compensable injury in 1995 while employed by Trailmobile; second, that he had a prior ten percent impairment rating resulting from his 1987 compensable injury and related surgeries in 1988; and third, that the 1988 impairment combined with the 1995 injury and resulting surgery to produce his twenty percent wage-loss disability.

II. Whether the Commission's finding that the 1995 compensable injury is the major cause of the disability or impairment is supported by substantial evidence.

The Second Injury Fund argues that under the "proper analysis" proposed in the first point, less than fifty percent of the claimant's disability or impairment is attributable to the 1995 compensable injury, and that injuries and surgeries before and after the 1995 injury clearly created as much as, or more, disability or impairment than did the 1995 injury. The argument is meritless. In our discussion under Point I, we rejected reading *Farmland Ins. Co. v. DuBois* to create a new analysis of major cause in Second Injury Fund cases. Again, we will not expand Arkansas Code Annotated section 11-9-102(5)(F)(ii)(a) (Supp. 1997) to say something that it does not purport to say.

We note the Fund's final argument under this point:

> In finding Appellee's 1995 injury is the major cause of his disability, for the purpose of awarding permanent benefits, but is not

> the major cause of his disability, for the purpose of finding Second Injury Fund liability, reveals completely diametric conclusions arising from the same set of facts within the body of the same opinion. [*Sic.*] Application of the proper construction of § 11-9-102(F)(5)(ii) would prevent such a result in this case.

We reject this argument. If the Commission cannot find that an injury is the major cause of a claimant's disability and still find the Second Injury Fund liable for additional benefits, there can be no scenario in which the Second Injury Fund is liable.

III. Whether the Commission erred in awarding permanent disability benefits because Mr. Stephens waived his right to pursue rehabilitation benefits.

The Second Injury Fund contends that because Mr. Stephens did not request a program of rehabilitation or pursue one on his own, he is not entitled to an award of permanent disability benefits in excess of two percent. This argument fails.

The Fund relies upon Arkansas Code Annotated section 11-9-505(b) (Repl. 1996), which addresses rehabilitation. The statute provides in part:

> (b)(3) [N]o employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

In *Second Injury Fund v. Furman*, 60 Ark. App. 237, 961 S.W.2d 787 (1998), we rejected an identical argument by the Fund that a claimant had a duty to pursue rehabilitation and that he failed to do so. Here, as in *Furman*, there was no evidence that either the Second Injury Fund or the employer suggested a plan of rehabilitation. Furthermore, Mr. Stephens testified at the hearing about his efforts to earn his GED and his hope to be trained in the computer field.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

David BARNETT *v.* NATURAL GAS PIPELINE COMPANY

CA 97-1464 970 S.W.2d 319

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 24, 1998

[Petition for rehearing denied August 19, 1998.]

Lane, Muse, Arman & Pullen, by: *Richard S. Muse,* for appellant.

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

WENDELL L. GRIFFEN, Judge. David Barnett has appealed the decision of the Workers' Compensation Commission that denied his workers' compensation claim upon a finding that he failed to prove by a preponderance of the evidence that his back injury occurred as the result of a specific incident identifiable in time and place of occurrence. On appeal, Barnett asserts that: 1) the Commission erred in failing to find that he was excused from providing notice of his injury to his employer; 2) he has shown with substantial evidence that he sustained a compensable injury identifiable by time and place of occurrence while working for appellee; 3) he has shown by substantial evidence that his back problems were directly and causally related to his employment; and 4) he has shown by substantial evidence that he is entitled to temporary total disability benefits from May 28, 1996, through August 2, 1996. We find no merit in these points and affirm.

Appellant had been employed by appellee for eighteen years as a maintenance worker. On May 28, 1996, appellant was pulling on a water pump when he felt what he termed a "glitch" in his lower back. He claimed that he told a co-worker, Myron Watts, that he had hurt his back earlier that day, and told his foreman, Doyle Hunter, that he was "down in his back" the following morning. However, appellant did not indicate to the foreman or to anyone else in management that he had sustained a work-related injury. Because of past prostate difficulties, appellant testified that he was not sure whether he had experienced a flare-up of that problem, so he went to the emergency room of a local hospi-

tal to see his urologist, Dr. Philip Woodward, who admitted him for testing. The urologist later had appellant undergo prostate surgery, but the back pain did not subside. Dr. Woodward decided that the pain was not due to urological problems and requested an orthopedic consultation from Dr. Bruce Smith, an orthopedic surgeon. Dr. Smith diagnosed appellant with a left lateral bulging disc at the L3-4 levels. Appellant continued to see Dr. Smith until he was released to return to work on August 2, 1996.

Appellant filed a workers' compensation claim on June 24, 1996, seeking disability and medical benefits. Appellee and the insurance carrier controverted the claim in its entirety, contending that appellant did not sustain an injury arising out of and in the course of the employment, alleging that they were not liable for medical treatment obtained before June 24, 1996, due to lack of notice, and contending that appellant was not entitled to temporary total disability payments because he continued receiving his pay during the entire time that he was off work. The administrative law judge (ALJ) found that appellant did not sustain an injury identifiable in time and place of occurrence while working for the respondent, and that he failed to prove, by a preponderance of the credible evidence, that his back problems were directly and causally related to his employment. Barnett appealed to the Commission, which affirmed and adopted the opinion of the ALJ.

Appellant's first argument on appeal is that the Commission erred in failing to find that appellant was excused from providing notice of his injury to his employer under Arkansas Code Annotated § 11-9-701(b)(1)(B) (Repl. 1996). Appellee correctly points out that it raised this issue below as an alternative argument in the event that the Commission found that appellant's injury was compensable. Because the Commission found that appellant's injury was not compensable, it did not address this argument. Where appellant's abstract has failed to include any arguments made on these issues before the Commission or any portion of the Commission's order dealing with these issues, we will not address this issue on appeal. *Chambers v. International Paper Co.*, 56 Ark. App. 90, 938 S.W.2d 861 (1997).

Appellant's second and third assignments of error regarding substantial evidence will be addressed together. Appellant contends that there is substantial evidence showing that he sustained a compensable injury identifiable in time and place of occurrence, and that his back problems were causally related to his employment. The applicable standard of review is whether there is substantial evidence supporting the Commission's decision.

When reviewing the sufficiency of the evidence to support a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the Commission's decision if it is supported by substantial evidence. *Stafford v. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Cagle Fabricating & Steel, Inc. v. Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993).

A compensable injury is defined as

> an accidental injury causing internal or external harm to the body . . . arising out of and in the course of employment which requires medical services which results in disability or death. An injury is accidental only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996). Appellant did not report a work-related injury to either his urologist, Dr. Woodward, or the orthopedist, Dr. Smith. Appellant also waited from May 28 until June 24, 1996, to file a workers' compensation claim, contending that during that time he was at home in severe pain. Appellant contended that he had told a co-worker, Myron Watts, of his injury the same date that it occurred, but when questioned, Watts could not recall a specific date of the injury. Instead, Watts testified that he recalled appellant telling him that he felt stinging in his back as they were putting a cap on a blow-down stack. In response to questions from the ALJ, Watts testified that

the injury occurred while appellant was working with another employee, Otto Crutch, and that after the alleged incident, appellant worked for several weeks.

The foreman, Doyle Hunter, had visited appellant in the hospital while he was recovering from prostate surgery and before he filed a claim for workers' compensation benefits. Hunter testified that although he visited appellant in the hospital and had spoken with appellant "on several occasions during his recovery," no work-related incident was ever mentioned by appellant as the possible source of his back problems. Hunter also testified regarding the events that occurred when appellant indicated that he wanted to file a workers' compensation claim:

> He came in and was recovering from the prostate surgery. Said that he needed to go ahead and file a workmen's comp claim for injuring his back. I asked him then if he wanted to fill it out or wait until the following day, and he said he'd bring it back the next day. But we talked about it and Ms. Barnett was with him. I asked how he had hurt his back, and he said he thought it was pulling on the pump that morning. I had visited him in the hospital and talked to his wife and talked to him on several occasions during his recovery, and it wasn't brought up. I asked about it then, and he said that Dr. Woodward had, in conversation, had asked him if there's a possibility he might have hurt his back on the job. And David [appellant] said, "Well, I don't know." And David told me that Dr. Woodward told him that, "If you don't report it as a workmen's comp claim, you'll just be hanging out there," was [sic] David's words. And I asked David then, I said, "Well, was anybody with you when you hurt, injured your back?" He said no. Later in the day, he had worked with Myron, and I asked David to go ahead and fill out the paperwork. It was that afternoon that I had talked to Otto Crutch and Myron and asked them if they remembered anything at all about David reporting the injury. Both of them, Myron or pardon me, Otto didn't know anything about it. He wasn't with him at the time of the — when he was working on the pump. It was afterwards that he was with — when Otto went over there. Myron told me that the only thing that David had told him was that he had the stinging sensation in his back.

[redacted] Based on the conflicting testimony, the Commission found that it would require "speculation and conjecture to

attribute the Claimant's back problems with a specific incident identifiable in time and place of occurrence as alleged." This case hinged on credibility, and it is within the province of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). We cannot say that the Commission erred in finding that appellant failed to prove that he suffered a compensable injury. Appellant's fourth issue addresses temporary total disability, and need not be addressed, since the Commission's decision was correct. Therefore, we affirm.

Affirmed.

ROGERS and CRABTREE, JJ., agree.

PITTMAN, AREY, and MEADS, JJ., dissent.

D. FRANKLIN AREY, III, Judge, dissenting. I respectfully dissent from the majority's affirmance of the Commission's decision. Because we cannot determine the facts upon which the Commission relied in reaching its conclusion, we should reverse and remand this case for the Commission to make specific findings of fact.

The Commission affirmed and adopted the ALJ's opinion. The opinion consists of an accurate recitation of the testimony, followed by numbered conclusions. These conclusions are followed by a section headed "Discussion." The first two paragraphs of the Discussion section are abstracted as follows:

> Rather than conduct a further analysis of the record in this cause, suffice it to say it would require speculation and conjecture to attribute the Claimant's back problems with a specific incident identifiable in time and place of occurrence as alleged.
>
> After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that Claimant has simply failed to prove a compensable injury within the meaning of our Workers' Compensation Laws.

When the Commission denies compensation, it is required to make findings of fact sufficient to justify that denial. *Lowe v. Car Care Marketing*, 53 Ark. App. 100, 919 S.W.2d 520 (1996). A

satisfactory, sufficient finding of fact must contain all of the specific facts relevant to the contested issue or issues so the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 918 S.W.2d 206 (1996). A finding of fact sufficient to permit meaningful review is a simple, straight-forward statement of what happened. *Id.* Neither a statement that a witness, or witnesses, testified thus and so, nor language that is merely conclusory and does not detail or analyze the facts upon which it is based, will suffice. *Lowe, supra.* Our supreme court provided this example of what might constitute an insufficient finding of fact:

> We think that appellant might have been in position to complain had the commission merely stated its conclusion that appellant had failed to meet her burden of proof or that the evidence was insufficient to show that [appellant's decedent] had suffered an accidental injury arising out of and in the course of his employment.

Clark v. Peabody Testing Serv., 265 Ark. 489, 507, 579 S.W.2d 360, 369 (1979).

In this instance, we are presented with a summary of the testimony and certain conclusions. Unfortunately, we do not have those findings of fact upon which the Commission relied in support of its decision. Maybe "it would require speculation and conjecture to attribute the [appellant's] back problems with a specific incident . . . ." But, what finding of fact supports that conclusion? Was the appellant not credible? If so, the opinion should have stated as much. *See Lowe, supra.* Can one element of the definition of compensable injury only be supplied by "speculation and conjecture," or did appellant altogether fail to meet the definition of compensable injury contained in Ark. Code Ann. § 11-9-102(5)(A)(i)? There are no findings of fact to supply the answers to these questions.

Likewise, the second quoted paragraph of the Discussion section does not constitute a finding of fact. It is in the nature of a conclusion, which does not allow us to make a meaningful review of the case. *See Lowe, supra; Wright v. American Transp.*, 18 Ark. App. 18, 22, 709 S.W.2d 107, 110 (1986).

When the Commission fails to make specific findings upon which it relies to support its decision, reversal and remand of the case is appropriate. *Hardin v. Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991). Because I believe this would be the appropriate disposition of this case on appeal, I respectfully dissent.

PITTMAN and MEADS, JJ., join in this dissent.

Oscar ADAWAY, Jr. *v.* STATE of Arkansas

CA CR 97-1022 972 S.W.2d 257

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1998

James R. Marschewski, for appellant.

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

TERRY CRABTREE, Judge. The appellant, Oscar Adaway, Jr., was convicted by a jury of two counts of battery in the second degree and one count of fleeing. He was sentenced to three years in the Arkansas Department of Correction for fleeing and a two-year sentence and $2,000 fine for each of the two counts of battery.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(j), his counsel has filed a motion to be relieved and a brief stating there is no merit to the appeal. Appellant was notified of his right to file a *pro se* brief within thirty days. He filed a brief alleging three reasons why his conviction should be overturned: that he was not tried by a jury of his peers; that he had poor representation by his attorney; and that the judgment against him was not justified. The State responded to appellant's *pro se* brief pointing out that a *pro se* litigant is held to the same standards as one who is represented by legal counsel, and that the appellant has failed to abstract any of the pleadings or the record in the instant case. However, Rule 4-3(j)(2) only requires an appellant "to raise any points that he or she chooses." Therefore, a *pro se* brief filed by an indigent appellant upon receiving notice that a no-merit brief has been filed on his or her behalf is supplemental to the brief filed by the representing attorney. The Attorney General must then brief the points raised by the appellant.

A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions, and requests made by either party with an explanation as to why each adverse ruling is

not a meritorious ground for reversal. *Skiver v. State*, 330 Ark. 432, 954 S.W.2d 913 (1997). Counsel has not adequately explained any of the adverse rulings nor why each of the adverse rulings is not a meritorious ground for reversal. Also omitted are citations to any authority that would support counsel's belief that an argument on appeal would not have merit. In a case where such a clearly inadequate no-merit brief has been filed, our only option is to direct counsel to rebrief the case according to the standards set forth in *Anders*, *supra*, and Rule 4-3(j). As we do so, we are reminded of the Supreme Court's rationale for requiring the filing of a no-merit brief rather than a simple statement that the appeal has no merit:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished by counsel.

Anders, 386 U.S. at 745. The brief filed in this case, because it lacks a full discussion of each adverse ruling, amounts to nothing more than a statement that the appeal has no merit. Accordingly, we also direct appellant's counsel to discuss the points raised by appellant in his *pro se* brief, and discuss whether such points have merit.

Rebriefing ordered.

AREY and NEAL, JJ., agree.

James HUNTER *v.* STATE of Arkansas

CA CR 97-1092 970 S.W.2d 323

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 24, 1998

Mike Connealy Marshall, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Appellant James Hunter was convicted by a jury of driving while intoxicated, possession of a controlled substance, and resisting arrest. He was thereafter sentenced to a total of three years in the Mississippi County Detention Center. Appellant now appeals, raising three points for reversal. We affirm.

The events that led to appellant's convictions occurred on October 5, 1995, when Blytheville police officer Danny Lackey was ordered to investigate a complaint about a pickup truck blocking the entrance to an apartment complex. When Officer Lackey arrived, he found appellant sitting in the truck with the engine running. As the officer approached, appellant turned off the truck, exited, and began cursing the officer. Appellant then removed a small off-white item about the size of a pencil eraser from his pocket and put it in his mouth. Officer Lackey testified

that the substance resembled a piece of crack cocaine. The officer told appellant to spit it out, but appellant refused and the two began to struggle. The officer testified that he could smell intoxicants on appellant's breath during the altercation.

After subduing and handcuffing appellant, Officer Lackey picked him up and saw a bag of what he thought was marijuana lying on the ground underneath appellant. The unidentified off-white substance that appellant had ingested was not recovered. Appellant was arrested for driving while intoxicated, refusing a breath test, possession of a controlled substance (marijuana), and resisting arrest.

Before trial, appellant's counsel moved to suppress Officer Lackey's testimony about appellant ingesting the off-white substance because (1) there was no evidence that the substance was an illegal drug, (2) it would be prejudicial to admit the testimony, and (3) the officer did not have probable cause to search or arrest appellant when the officer attempted to retrieve the substance. The trial court denied that motion because appellant's action of ingesting the substance was part of the *res gestae*, and without the testimony the jury would not understand why the officer and appellant had struggled.

During the trial, there was an objection regarding the chain-of-custody of the bag of green, leafy material found under appellant. Neither the bag nor any other physical evidence was presented, but the trial court admitted a property receipt and a crime lab report that indicated that the bag had contained marijuana when it was recovered and tested. After the jury returned guilty verdicts on the DWI, resisting arrest, and possession charges, the trial court ruled that the possession of marijuana charge should not have gone to the jury because of the chain-of-custody issue. The court, therefore, granted appellant's motion for a directed verdict with respect to the possession charge. However, the court stated that the initial evidentiary ruling had been correct.

[redacted] Appellant first argues that the trial court erred in allowing Officer Lackey to testify about seeing appellant ingest the unidentified off-white substance. The trial court allowed the testimony as *res gestae* so the jury would have a full understanding of

the sequence of events and why the scuffle ensued. In reviewing a trial court's denial of a motion to suppress, this court makes an independent determination based upon the totality of the circumstances and reverses only if the ruling is clearly against the preponderance of the evidence. *Stewart v. State*, 59 Ark. App. 77, 953 S.W.2d 599 (1997).

The trial court did not err in admitting the testimony as *res gestae*. Appellant was tried for possession of a bag of marijuana. That bag fell out of appellant's clothing during the struggle with Officer Lackey. Without testimony as to why the officer struggled with appellant, the jury would have been left with significant unresolved questions. Moreover, appellant was tried for resisting arrest. All of the circumstances of a particular crime (here, resisting arrest) are part of the *res gestae* of the crime, and all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

> *Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They are proper to be submitted to a jury, provided they can be established by competent means, sanctioned by law, and afford any fair presumption or inference as to the question in dispute . . . . [C]ircumstances and declarations which were contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors are parts of the *res gestae*.

Id. at 241, 707 S.W.2d at 334. There was no error in admitting the testimony as *res gestae*.

Appellant also argues that the testimony should have been suppressed because Officer Lackey had no probable cause to seize appellant after seeing him ingest the off-white substance. Appellant contends that the officer had no reasonable suspicion of any crime, and that the officer began conducting an illegal search when he exerted force upon appellant.

In *Brunson v. State*, our supreme court stated:

> The same standards govern reasonable cause or probable cause determinations, regardless of whether the question is the

> validity of an arrest or the validity of a search and seizure. The determination of probable cause is to be based on the factual and practical considerations of everyday life upon which reasonable and prudent persons act. In assessing the existence of probable cause, our review is liberal rather than strict. (Citations omitted.)

327 Ark. 567, 571, 940 S.W.2d 440, 441 (1997).

Rule 3.1 of the Rules of Criminal Procedure provides that a law enforcement officer lawfully present in any place may stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony, if such action is reasonably necessary to determine the lawfulness of his conduct. A reasonable suspicion is one based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Ark. R. Crim. P. 2.

Officer Lackey testified that as he approached appellant to ask why he was blocking the driveway, appellant "jumped out of the vehicle and started using profanity and I could smell the odor of intoxicants. That's when he reached in his pocket and put the object in his mouth and that's when the scuffle occurred." The officer stated that the substance was an off-white object like a yellowish piece of gravel, that it was clearly not gum, and that "[b]eing the narcotics dog handler, I see a lot of that all the time. I could see his hand when he did it. It was not wrapped in anything, it was loose." Based on the factual and practical considerations of everyday life upon which reasonable and prudent persons act, *Brunson*, *supra*, Officer Lackey had a sufficiently reasonable suspicion to approach appellant to determine whether the substance was an illegal drug. Additionally, whatever seizure occurred after the fight began was a proper physical restraint to arrest appellant for resisting arrest. *See* Ark. R. Crim. P. 3.3; 4.1. Therefore, the trial court did not err in refusing to suppress the officer's testimony based on an argument that the search or seizure was illegal.

Appellant also argues that it was error to admit evidence that the bagged substance found under his body was mari-

juana. After addressing chain-of-custody problems, the trial court admitted two reports indicating that the substance was marijuana. There was no physical evidence admitted, and appellant argues that while minor chain-of-custody discrepancies are for the trial court to weigh, there should have been *some* physical evidence presented at trial. This argument is without merit. We will not reverse an evidentiary ruling absent a showing of prejudice. *Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997). In the present case, the trial court reversed its decision to admit the marijuana evidence and directed a verdict in appellant's favor on the possession charge. Appellant thus suffered no real prejudice as a result of the marijuana evidence.

Appellant's second point on appeal is that the trial court erred in denying a motion for a mistrial. As stated, no physical evidence of marijuana was presented at trial. The only evidence concerning marijuana was a signed property receipt, indicating that Officer Lackey deposited the bag in the evidence locker, and a crime lab report that indicated the substance was indeed marijuana. After the trial court admitted these two exhibits, the following exchange took place:

> APPELLANT'S COUNSEL: I would like to move for a mistrial on the basis that they have lost the evidence in this case and any mention of marijuana is tainting the rest of the trial.
>
> THE COURT: I am going to deny the motion. I think that goes to the weight and I think the jury will take care of that situation.

There was no error in denying appellant's motion. Declaration of a mistrial is a drastic remedy and is proper only when the error is beyond repair. *Warren v. State*, 59 Ark. App. 155, 954 S.W.2d 298 (1997). In addition, the granting of a mistrial is within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a showing of abuse. *Id.*

At the time the motion for mistrial was made, the possession charge was still before the jury. Appellant's argument that the marijuana evidence tainted the trial is therefore unpersuasive. While it is true that the trial court directed a verdict in appellant's favor on the possession charge after the jury had

returned a guilty verdict, the court's ruling on the motion for mistrial was proper. Variances and discrepancies in the proof go to the weight or credibility of the evidence and are, therefore, matters for the factfinder to resolve. *State v. Long*, 311 Ark. 248, 844 S.W.2d 302 (1992). Accordingly, when there is evidence of a defendant's guilt, it is for the jury as factfinder to resolve any conflicts and inconsistencies. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). There was no abuse of discretion is denying appellant's motion.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. In reliance on *McCoy v. State*, 270 Ark. 145, 603 S.W.2d 418 (1980), I respectfully dissent from the majority's decision affirming the trial court's denial of appellant's motion to suppress evidence that he ingested crack cocaine prior to his arrest. Appellant was not charged with possession of cocaine. There was no proof that appellant ingested cocaine. It was highly prejudicial, therefore, that Officer Lackey was allowed to speculate at trial that he thought appellant ingested cocaine. Officer Lackey admitted that he had no idea what the object was that appellant placed in his mouth, and that he had no personal knowledge that appellant actually ingested an illegal substance. The prejudicial impact of the officer's testimony substantially outweighed its probative value. As a result, appellant has been sentenced to three years' imprisonment for resisting arrest and driving while intoxicated under a cloud of speculative, prejudicial testimony. I dissent.

Joshua M. HEAGERTY *v.* STATE of Arkansas

CA 97-1331 971 S.W.2d 793

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 24, 1998

Hubert W. Alexander, for appellant.

Winston Bryant, Att'y Gen., by: *Mac Golden*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Joshua M. Heagerty appeals from the denial of his motion to transfer six narcotic-related charges from Lonoke County Circuit Court to Lonoke County Chancery Court, Juvenile Division. On appeal, he argues that the circuit court erred in refusing to transfer his case to juvenile court. We reverse.

In May of 1997, Heagerty was charged by information with two counts of delivery of cocaine and four counts of delivery of marijuana. The offenses allegedly occurred during a one-month period between August 24 and September 24, 1996. On June 3, 1997, Heagerty moved to have his case transferred to juvenile court. A hearing on this motion was conducted on July 8, 1997, less than a week before Heagerty's eighteenth birthday.

At the hearing, undercover narcotics officer Jason Young testified that he made the first drug buy in August of 1996, shortly after Heagerty had turned seventeen. However, he claimed that charges were not filed for nine months to protect his identity in an on-going investigation. Officer Young testified that the four narcotics buys that he was personally involved with took place on the Cabot High School parking lot.

Heagerty also called his mother, Sheila Heagerty, to testify. Mrs. Heagerty had been a teacher in the Cabot middle school for twenty-one years. She stated that her son had always been a good student until she and her ex-husband got a divorce. She stated that the divorce "really had a big effect on Joshua," that he quit basketball and other sports, his grades went down, and that she "kind of [lost] him" for several months in the fall of 1996. Mrs. Heagerty stated, however, that after she took her son's truck from him and sent him to a short-term drug treatment facility called Recovery Way in March of 1997, his grades returned to A's and B's and that she had no further problems with him. Ms. Heagerty further testified that Joshua had graduated from high school, was going to recovery meetings, attending church, working for a landscaping service, and was enrolled for the fall semester at Arkansas State University in Jonesboro.

The circuit judge denied the motion to transfer. In his ruling from the bench, the judge stated that the six narcotics buys showed a "repetitive pattern," and apparently based his ruling on that finding.

Heagerty argues that the trial court erred when it denied the motion to transfer charges from circuit court to chancery court, juvenile division. He contends that the circuit court erred in refusing to transfer his case to juvenile court because he met his burden of proof under Ark. Code Ann. § 9-27-318(e) (Supp. 1997), and because the State failed to show by clear and convincing evidence that he should be tried as an adult. He asserts that his mother's testimony that he was a good child, did well in school, only got into trouble during a brief period when he was affected by his parents' divorce, and became a "model citizen" after short-term, in-patient treatment at Recovery Way proved that he was an excellent candidate for rehabilitation. He argues that conversely, the State presented no evidence regarding any of the statutory factors except the seriousness of the offense, and did not meet its burden of proof. He contends that he had no prior convictions, and his only previous experience with the criminal justice system was pursuant to a juvenile charge of possession, which was dismissed. Heagerty also urges this court to find his case analogous to *Blevins v. State*, 308 Ark. 613, 826 S.W.2d 265 (1992), where

the supreme court reversed a decision refusing transfer for a sixteen-year-old who had no prior felony record, attended school, made passing grades, was not a problem at home, and employed no violence in the commission of the charged offense, possession of a controlled substance with intent to deliver, involving possession of fifteen rocks of crack cocaine. His argument has merit.

Pursuant to Ark. Code Ann. § 9-27-318(e), a circuit court's decision to retain jurisdiction of criminal charges against a juvenile must be supported by clear and convincing evidence. Ark. Code Ann. § 9-27-318(f); *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997). Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Wright v. State*, 331 Ark. 173, 959 S.W.2d 50 (1998). When reviewing the denial of a motion to transfer to juvenile court, the appellate court views the evidence in the light most favorable to the State. *Id.* The circuit court's decision to retain jurisdiction should not be reversed unless the decision is clearly erroneous. *Id.*

When deciding whether to retain jurisdiction of or to transfer a case to juvenile court, the factors that the circuit court must consider are:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) *Whether the offense is part of a repetitive pattern of adjudicated offenses* which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, or any other factor which reflects upon the juvenile's prospects for rehabilitation.

Ark. Code Ann. § 9-27-318(e). (Emphasis added.) A circuit court does not have to give equal weight to each factor, nor does evidence have to be presented as to each factor. *Wright v. State*, *supra*.

Here, we find from the trial judge's comments from the bench when making his ruling that he misapplied the law in deny-

ing Heagerty's motion to transfer. The trial judge simply stated that "six buys shows a repetitive pattern." This finding obviously referred to Ark. Code Ann. § 9-27-318(e)(2), which allows a trial judge to consider recidivism on the part of a juvenile previously committed to the juvenile justice system in his decision of whether to try him or her as an adult.

The plain language of the statute, however, does not allow mere nonadjudicated charges, no matter how numerous, in and of themselves to be proof of recidivism. *Id.* Moreover, the subsection also specifies what will constitute competent evidence for deciding to apply this factor to deny transfer, i.e., "past efforts to treat and rehabilitate the juvenile and response to such efforts." *Id.* The statute necessarily presupposes prior adjudications in the juvenile justice system, and the supreme court has held that "one prior adjudication and attempted rehabilitation does not a repetitive pattern make." *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997). Juvenile delinquency laws are penal in nature, *Walker v. Arkansas Dep't of Human Servs.*, 291 Ark. 43, 722 S.W.2d 558 (1987), and it is well settled that statutes that are penal in nature are to be strictly construed. *Beebe v. State*, 298 Ark. 119, 765 S.W.2d 943 (1989); *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995). We find that strictly construing the statute leads to the inevitable conclusion that the trial judge misapplied the law.

Furthermore, in the instant case, there is no evidence of a failed attempt at rehabilitation. The State adduced evidence only as to the seriousness of the offenses and conceded that there was no violence involved. It did not present evidence that could support a conclusion that Heagerty is beyond rehabilitation, nor did it present evidence of his prior history, character traits, mental maturity, or any other factor which would sustain a finding regarding his prospects for rehabilitation. Conversely, Heagerty presented clear evidence that he was on the road to rehabilitation even before the charges had been filed against him.

Finally, *Blevins v. State*, *supra*, is clearly analogous; both *Blevins* and the instant case involved serious drug offenses and no use of violence. Moreover, Heagerty, like the juvenile in *Blevins*, has no prior record of juvenile adjudication. Also like the juvenile in *Blevins*, Heagerty presented evidence that he was making good

grades in school and his mother testified that he was not a discipline problem at home. The instant case is only distinguishable from *Blevins* in the number of narcotics-related offenses that Heagerty was charged with and the fact that Heagerty was one year older than the juvenile in *Blevins* at the time that the offense was committed and when he moved to transfer. In *Blevins*, the supreme court held that, under the circumstances, the seriousness of the offense alone did not outweigh the evidence on the other factors proven by Blevins at the hearing, and that the trial court was clearly erroneous in refusing to transfer the case.

We are not unmindful of the supreme court's holding some nine months later in *Hogan v. State*, 311 Ark. 262, 843 S.W.2d 830 (1992), a case also involving facts strikingly similar to Heagerty's case. Hogan, like Heagerty, had been charged with multiple counts of delivery of marijuana and cocaine, possessed cocaine on school premises, had no prior record, was doing well in school and planned to attend college.

However, Hogan's age proved a crucial factor in the court's decision to affirm the denial of transfer. Hogan was one month short of his eighteenth birthday when he was arrested and was eighteen when his motion to transfer was filed. Quoting from *Bright v. State*, 307 Ark. 250, 819 S.W.2d 7 (1991), the court said:

> the appellant was seventeen years and seven months old at the time of the crimes, and has now reached his 18th birthday. A person who has reached his 18th birthday cannot be committed to a youth services center. Ark. Code Ann. § 9-27-331(a)(1) and 9-28-209(a)(1) (Supp. 1991).

311 Ark. At 254, 843 S.W.2d at 831.

Heagerty's crimes were committed shortly after his seventeenth birthday, and although charges were not filed for nine months, he was seventeen at the time of his transfer hearing. Indeed, in recent cases, the supreme court has stated that it is permissible to consider a defendant's age in evaluating the availability of proper rehabilitative services. *Oglesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997); *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997). Furthermore, we acknowledge that the State is precluded by statute from committing Heagerty to a juvenile deten-

tion facility because he has now reached his eighteenth birthday. Ark. Code Ann. § 9-28-209 (Supp. 1995).

However, commitment to a "youth services center," or boys training school, is not the only option available to the juvenile court when an adjudication of delinquency is made. *See* Ark. Code Ann. § 9-27-330 (Supp. 1995). More importantly, since *Hogan* was decided in 1992, the legislature in 1995 greatly expanded the dispositions available to the juvenile court upon a finding of delinquency, from eight to fifteen. *Id.* The fifteen alternative dispositions available are listed in Ark. Code Ann. § 9-27-330, and include probation, fines, voluntary community service, suspension of driving privileges, and residential detention with electronic monitoring. In addition, the juvenile court may retain jurisdiction over the juvenile until he or she reaches twenty-one years of age. Ark. Code Ann. § 9-27-303 (Supp. 1995).

We are not unmindful of the supreme court decisions handed down since the legislature expanded the dispositions available to juvenile court, in which it affirmed a trial court at least in part because the juvenile involved was near or over the age of eighteen.[1] In all of these cases, however, the supreme court found that the prospect for rehabilitation in the juvenile system was nil. In the instant case, the uncontroverted evidence that Heagerty had made excellent progress toward rehabilitation without commitment to the Department of Youth Services can lead us to no other conclusion that his prospects for rehabilitation through one of the alternative dispositions are good. Consequently, the stated rationale for denying transfer to a person near or over the age of eighteen has absolutely no application under these circumstances.

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[1] *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998); *Rhodes v. State*, 332 Ark. 516, 967 S.W.2d 550 (1998); *Wright v. State*, 331 Ark. 173, 959 S.W.2d 50 (1998); *Brown v. State*, 330 Ark. 518, 954 S.W.2d 276 (1997); *Majesty v. State*, 330 Ark. 416, 954 S.W.2d 245 (1997); *Rice v. State*, 330 Ark. 257, 954 S.W.2d 216 (1997); *Fleetwood v. State*, 329 Ark. 327, 947 S.W.2d 387 (1997); *Oglesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997); *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997); *Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997); *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Jones v. State*, 326 Ark. 681, 933 S.W.2d 387 (1996); *Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438 (1996); *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996); *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Macon v. State*, 323 Ark. 498, 915 S.W.2d 273 (1996); *Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996); *McGauchy v. State*, 321 Ark. 537, 906 S.W.2d 671 (1995).

For the foregoing reasons, we conclude that the trial court was clearly erroneous in denying the motion to transfer. Clearly erroneous means that although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). We are left with such a definite and firm conviction in this instance. Accordingly, we reverse and remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

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

MEADS and GRIFFEN, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I disagree that the trial judge misapplied the law in denying appellant's motion to transfer. As stated by the majority, Ark. Code Ann. § 9-27-318(e) (Repl. 1998) requires the trial court to consider specific factors in deciding whether to transfer a case to juvenile court, but evidence does not have to be presented regarding each factor, *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996), nor must equal weight be given to each factor. *Wright v. State*, 331 Ark. 173, 959 S.W.2d 50 (1998).

Although the trial judge mentioned only that "six buys shows a repetitive pattern" when he announced his ruling, clearly other evidence had been presented which impacted his decision. Appellant was seventeen years old at the time of the alleged offenses; on the date of the hearing, he was six days away from his eighteenth birthday. Appellant had been charged with six separate counts of delivery of a controlled substance, most of which occurred on a high school campus. An informant had alerted the drug task force about appellant's drug trafficking before an undercover agent made the first buy from appellant. Upon his arrest, appellant was interviewed by the police and given an opportunity to cooperate, but he refused to do so. Appellant's mother testified, "I lost him the last half of his junior year in high school." His grades fell and he quit sports. There had been other drug charges but no convictions or adjudications. According to his mother, after the present charges were filed, appellant has been "very

good," has a full-time job, attends recovery meetings, goes to church, and has matured a lot.

Our supreme court has ruled that drug offenses are serious crimes, *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Hogan v. State*, 311 Ark. 262, 843 S.W.2d 830 (1992), and that age of the offender is a permissible factor to evaluate when determining whether transfer is proper. *Oglesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997); *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997). Moreover, we must recognize that once a juvenile has turned age eighteen, his prospects for rehabilitation within the Division of Youth Services are "nonexistent." *See Majesty v. State*, 330 Ark. 416, 954 S.W.2d 245 (1997); *Rice v. State*, 330 Ark. 257, 954 S.W.2d 216 (1997).

The majority's preference for leniency in this instance, in light of the disposition alternatives provided in Ark. Code Ann. § 9-27-330 and this appellant's "excellent progress toward rehabilitation," does not compel me to ignore our supreme court's clear direction in juvenile transfer cases. Both appellant's age and the trafficking of marijuana and cocaine on a high school campus are factors that have weighed heavily in past decisions, *see, e.g.*, *Rice v. State*, 330 Ark. 257, 260, 954 S.W.2d 216, 218 (1997); *Majesty v. State*, 330 Ark. 416, 419, 954 S.W.2d 245, 246 (1997); *McClure v. State*, 328 Ark. 35, 40, 942 S.W.2d 243, 246 (1997); *Jensen v. State*, 328 Ark. 349, 353-54, 944 S.W.2d 820, 822 (1997); *Maddox v. State*, 326 Ark. 515, 520, 931 S.W.2d 438, 441 (1996); *Hogan v. State*, 311 Ark. 262, 264, 843 S.W.2d 830, 831 (1992), and should weigh heavily in this one as well. There was clear and convincing evidence before the trial court that this appellant should be tried as an adult, *Booker v. State*, *supra*, and I cannot say that the denial of appellant's motion to transfer was clearly erroneous. We do not reverse a judgment because a trial judge uses the wrong reason to reach the right result. *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987).

I would affirm.

GRIFFEN, J., joins.

David and Ottie HOOKER *v.* DEERE CREDIT SERVICES, INC., Producers Tractor Co., and John Deere Co.

CA 97-1131 971 S.W.2d 267

Court of Appeals of Arkansas
Division I
Opinion delivered June 24, 1998

Appellants, pro se.

Barrett & Deacon, by: *Ralph W. Waddell* and *D.P. Marshall Jr.*, for appellees.

ANDREE LAYTON ROAF, Judge. David Hooker and Ottie Hooker, *pro se* litigants who are son and father respectively, appeal from a chancery court order dismissing with prejudice their complaint for declaratory judgment against Producers Tractor Co. (Producers), Deere Credit Services Inc. (Deere Credit), and John Deere Co. (John Deere). The Hookers raise seven points on appeal. They allege that the trial court erred in 1) denying them a jury trial, 2) denying them assistance of counsel (two non-lawyers), 3) denying their right to contract under a power of attorney (given to the same two non-lawyers), 4) improperly converting appellees' motions to dismiss into summary judgment while discovery was yet pending, 5) failing to follow the rules for summary judgment, and 6,7) dismissing the complaint for lack of jurisdiction and improper service upon appellees. We find no merit to any of these points and hold that the trial court properly dismissed the complaint with prejudice.

On January 23, 1997, the Hookers filed a complaint for declaratory judgment against the appellees in St. Francis County Chancery Court, seeking declaratory, injunctive, and compensatory relief regarding contracts executed by Ottie Hooker for the purchase of three pieces of farm equipment, a combine, tractor, and grain drill, from John Deere. When the complaint was filed, there was pending in St. Francis Chancery Court Case No. E-94-104, styled Ottie Hooker v. John Deere Credit and Producers Tractor Co., involving the same contracts and equipment. Ottie Hooker's two attempts to appeal from interim orders entered in

the 1994 case had been dismissed by the supreme court and by this court.

The Hookers' 1997 suit in essence complained that the chancellor had ordered sequestration of the equipment in case number E-94-104 on May 6, 1996, sought to restrain and enjoin any further action in the 1994 case with regard to the equipment, and sought damages for the alleged loss of use of the equipment since its repossession by Producers in 1993. The complaint alleged that the Hookers had suffered "irreparable harm" in case number E-94-104 and that they "possessed no other adequate or speedy remedy at law in stopping the proceedings in case number E-94-104." The Hookers further asserted that "we stand a chance of losing our property if those proceedings continue with no assurance that the plaintiffs' property will not be taken and the necessity of doing an appeal in E-94-104." The Hookers further demanded a common-law jury trial and asked that the case not be assigned to Judge Kathleen Bell, the chancellor presiding over E-94-104.

On February 19, 1997, Deere Credit and John Deere filed a motion to dismiss alleging ineffective service of process and that the allegations in the complaint arose out of the same transaction or occurrence involved in E-94-104. Producers filed a motion to dismiss on the same grounds and also moved for a protective order suspending its discovery obligations until after a ruling on its motion to dismiss.

At the hearing held on March 27, 1997, Producers argued that the case should be dismissed under Ark. R. Civ. P. 12(b)(8) because of the prior action pending between the same parties arising out of the same transaction and due to defective service because James H. Hooker, who served the complaint, was neither a duly-appointed process server, sheriff, nor deputy. Deere Credit and John Deere adopted Producer's argument regarding service of process and also contended that the case should be dismissed because it involved the same parties and arose out of the same transactions and occurrence as E-94-104. The additional plaintiff and defendant in the 1997 action, David Hooker and John Deere, were characterized by appellees as "surplus" parties, and the 1997

action was characterized as an attempt by the Hookers to appeal from unfavorable orders entered in the 1994 case.

On April 22, 1997, eighty-nine days after the complaint was filed, Judge Bell dismissed the complaint with prejudice based on lack of subject-matter jurisdiction due to the pending 1994 case and because James Hooker was not authorized to serve process. On May 2, 1997, the Hookers filed a motion for reconsideration of the dismissal. The record does not show that this motion was ruled upon by the court. On June 27, 1997, the Hookers thus timely filed a notice of appeal.

As a preliminary matter, we first note that the Hookers' abstract is flagrantly deficient. Although the concurring judge would affirm this case based upon the Hookers' violation of Ark. Sup. Ct. & Ct. of App. R. 4-2, we do not agree that this case may be disposed of in that manner. Appellees Deere Credit and John Deere have provided a twenty-four page supplemental abstract, including the complaint, motions to dismiss, and partial transcript of the hearing on the motions. They have also included the dismissal order as an addendum to their brief. *See* Ark. Sup. Ct. & Ct. of App. R. 4-2(a)(8). The Hookers have adequately abstracted their notice of appeal and we thus have a sufficient record before us to reach at least some of the issues they raise.

■ ■ The Hookers' arguments, while not models of style, are understandable, and the authorities cited by them are not wholly inappropriate to the issue. Where the appellee cures the appellant's deficient abstract by providing a supplemental abstract, we consider the merits of the appeal. *See Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 187 (1998). In this regard, Deere Credit and John Deere have also requested an award of costs, including reasonable attorney fees, for the preparation of the supplemental abstract. As the supplementation was necessary for us to reach an understanding of this appeal, we grant the request upon appellees' providing a statement of cost of the supplemental abstract and the amount of time devoted to its preparation, as required by Ark. S. Ct. & Ct. of App. R. 4-2(b)(1).

We first consider the Hookers' two related points pertaining to the denial of their right to counsel and denial of their right to

contract, pursuant to a durable power of attorney, with the same two non-lawyer counsel. At the hearing on the appellees' motions to dismiss, the trial court inquired of David Hooker, who was proceeding *pro se*, whether the two persons sitting at counsel table with him were licensed attorneys. After being advised that they were not, the trial court had them removed to the spectator's section of the court room. Hooker objected and asserted that the trial court was denying him "assistance of counsel" relying on several United States Supreme Court and federal district court cases upon the durable power of attorney given to the two non-lawyers. The Hookers make the same arguments on appeal.

The Hookers' argument that they were denied assistance of counsel in violation of their right to due process is meritless. They attempt to distinguish "assistance" of counsel from "representation." Arkansas Code Annotated Section 16-22-206 (Repl. 1994) provides that it is illegal to practice law without a license. In *Jones v. Ragland*, 293 Ark. 320, 737 S.W.2d 641 (1987), the chancellor refused to allow a non-lawyer to sit at counsel table with Jones and assist him during a trial. The supreme court summarily disposed of the identical argument now made by the Hookers by stating "[O]nly licensed attorneys can represent another person in court."

The Hookers' resort to federal decisions to support their argument is also unavailing. Only *U.S. v. Stockheimer*, 385 F.Supp. 979 (W.D. Wis. 1974), has even so much as a semblance of relevancy. There the district court held that where a *pro se* defendant had effectively waived the right to assistance of counsel and had chosen to defend himself, he would not be forbidden the assistance of two disbarred lawyers in a criminal proceeding. However, the court in *Stockheimer* declined to grant the defendant's motion to allow the unlicensed lawyers to act as counsel and spokesmen, and stated that "in the absence of any constitutional or federal statutory provision compelling me to either forbid or not to forbid [the] assistance, I may exercise my discretion in the matter." This case is obviously neither controlling nor even persuasive authority for this court to disregard our precedent and resolve this issue in the Hookers' favor.

We do not reach the merits of the argument pertaining to the denial of the right to contract, because the Hookers have failed to abstract the power of attorney. It is the appellant's duty to bring up a sufficient record on appeal. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993). The necessity of abstracting the material parts of the record, including documents, as are necessary to an understanding of all questions presented in an appeal has been stated time and time again. *See* Ark. Sup. Ct. and Ct. of App. R. 4-2(b)(2); *see e.g.*, *Mills v. Holland*, 307 Ark. 418, 820 S.W.2d 63 (1991).

We next consider whether the trial court properly dismissed the Hookers' action, because we need not reach the remaining issues concerning summary judgment and denial of a jury trial if we conclude that the dismissal was proper. In this regard, we agree with appellees that the Hookers' complaint standing alone made it crystal clear that the purpose of the declaratory-judgment action was to thwart the progress of the earlier action filed by Ottie Hooker against two of the three appellees. The complaint made numerous references to the pending action by docket number and baldly asserted that the Hookers wished to enjoin further proceedings in the 1994 case.

We find ample authority for dismissal of such an action. In his treatise, *Arkansas Civil Practice and Procedure* § 33-2 (2d ed. 1993), Justice David Newbern states,

> [T]he declaratory judgment procedure is intended to supplement rather than supersede ordinary actions, and if the question sought to be raised in a declaratory judgment action is already the subject of a pending case a declaratory judgment should be dismissed.

In *City of Cabot v. Morgan*, 228 Ark. 1084, 312 S.W.2d 333 (1958), the supreme court reversed a chancellor's issuance of a temporary restraining order pursuant to a declaratory-judgment action filed by disgruntled taxpayers, while a civil action was already pending in the justice of the peace court for collection of the tax. The court stated:

> [w]e condemn the practice of a person after being charged with violating the law . . . then asking for a declaratory judgment in an

> independent cause, with the result that the two cases involving the same subject matter are pending at the same time. If such were permitted, it would cast an unnecessary burden on the courts and the law enforcement authorities . . . . [W]hen . . . another action between the same parties, in which all issues could be determined is actually pending at the time of the commencement of the action for declaratory judgment, the court abuses its discretion when it entertains jurisdiction.

(Citations omitted.) *See also Robinson v. Morgan*, 228 Ark. 1091, 312 S.W.2d 329 (1958).

In *Mid-State Constr. Co. v. Means*, 245 Ark. 691, 434 S.W.2d 292 (1968), the supreme court held that a circuit court was without jurisdiction to entertain the question of a deceased worker's status as an employee in a declaratory-judgment action filed while the same question was already at issue in a case pending before the Workmen's Compensation Commission. Also, in *Riley v. City of Corning*, 294 Ark. 480, 743 S.W.2d 820 (1988), the court affirmed a circuit court's dismissal of a declaratory-judgment action seeking a determination of whether legislation creating the Corning Municipal Court was unconstitutional, because the appellant was raising the same issue in a pending appeal to circuit court from a *nolo contendere* plea of DWI entered in the municipal court.

■ ■ These authorities lead us to the inescapable conclusion that, notwithstanding the additional parties, the trial court correctly dismissed the Hookers' declaratory-judgment action. As the appellees so aptly state, the allegations and request for relief in their complaint doomed the Hookers' 1997 case, because a trial court certainly does not have the power to exercise appellate jurisdiction over itself. Indeed, the supreme court has defined jurisdiction as "the power to hear and determine the subject matter in controversy between the parties to the suit." *Young v. Smith*, 331 Ark. 525, 964 S.W.2d 784 (1998).

While it is clear that the Hookers are not happy with the way matters have progressed in the 1994 case, the appellees surely can be no less pleased to find themselves embroiled in litigation over equipment repossessed some five years ago. Doubtless we would all be better served if the Hookers, with the aid of this equipment, were busily engaged in what they apparently do very well —

farming their land and providing nourishment and sustenance for their fellow man.

However, in seeking to do so, they must follow our rules. As the concurring justice in *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990), pointed out:

> [t]he rules of practice and procedure constitute the foundation supporting our system based upon the rule of law. In order for the system to work in an efficient manner, it is imperative that the rules under which litigants and their attorneys operate be, as nearly as possible, definite, certain, and uniform in application.

Id. (Turner, J., concurring). The Hookers are obliged, as are we all, to abide by the rule of law. They are not free to pick and choose from among our rules and laws those provisions which they will follow and others which they will disregard.

Affirmed.

NEAL, J., agrees.

MEADS, J., concurs.

MARGARET MEADS, Judge, concurring. I concur in the result reached by my colleagues but would not reach the merits of the appeal because appellants have failed to comply with Rule 4-2 of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas.

Appellants have filed a brief listing seven points on appeal which are mainly conclusive statements of errors allegedly made by the trial court. These points are difficult to understand and several involve documents for which no abstract has been provided. Each point is followed by a list of citations allegedly supporting that point. However, there is neither discussion nor convincing argument regarding how the citation applies to the point or to the instant case. Appellate review of these points is controlled by the rule that an assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent, without further research, that the assignment of error is well taken. *Smith v. Smith*, 41 Ark. App. 29, 848 S.W.2d 428 (1993).

Moreover, appellant's brief fails to comply with Rule 4-2, Rules of the Arkansas Supreme Court and Court of Appeals. The fact that appellants are *pro se* is immaterial. *Van Bibber v. Laster*, 289 Ark. 87, 709 S.W.2d 90 (1986).

In the first place, appellants' table of contents fails to note the page at which each pleading and document is abstracted. Rule 4-2(a). Moreover, appellant's statement of the case is deficient. Under the rule, this statement shall be a concise statement, without argument, sufficient to enable the court to read the abstract with an understanding of the nature of the case, the general fact situation, and the action taken by the trial court. Rule 4-2(a). Appellants' four-page statement consists of a narrative so interspersed with dates, citations, and argument that it is extremely difficult to understand either the nature of the case or the general fact situation.

Further, appellants' abstract is written in narrative form and interspersed with argument and citation to authority. It is not an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of the questions presented to the court for decision. Rule 4-2(a).

Moreover, appellants have failed to properly abstract the pleadings. Although most of the required pleadings and orders are noted in the abstract, their essential components are missing. *Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994). Appellants' abstract is replete with such references as "R. Vol. I, P. 104 is the Order Setting Hearing on P.T.C. Motion for Protective Order for March 13, 1997 & was filed by Chancellor Bell on 3-7-96," and "Hookers did a Pet. To Reconsider the Protective Order filed 3-27-97 R. Vol. 2, ps. 223-237 with exhibits & Affidavits attached filed April 4, 1997 setting forth (p. 223, 227) . . . ." A notation that merely references the location of the document in the record is not sufficient. *Hooker v. Farm Plan Corp.*, 331 Ark. 418, 962 S.W.2d 353 (1998); Rule 4-2(a).

Also, I believe appellants' notice of appeal is insufficiently abstracted. It is abstracted as follows:

> Hookers file Notice of appeal on June 27, 1997 to the Arkansas Supreme Court with various orders and exhibits attached, R. Vol.3, ps. 463-472. (P.463)Hookers appeal to Ark. Supreme court under Rules of supreme Court Rule 1-2(a)(1). (P.465) Dismissal Order was attached & will not be abstracted again as it has been previously abstracted, (p.476) Protective Order was also attached and has already been previously abstracted, also scheduling Order surrounding Hookers summary Judgment Motion & Order vacating Hooker scheduled hearing on Hookers summary judgment motion was also attached & also has previously been abstracted and will not be abstracted again a second time.

From the foregoing it is virtually impossible for me to determine with specificity the orders from which appellants appeal or the contents of those orders.

The appellant bears the burden of producing an abstract that is an impartial condensation, without comment or emphasis, of the material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented on appeal. *Hooker, supra.* When the abstract is flagrantly deficient, we will affirm the judgment of the trial court. *Id.* The rules are not relaxed for *pro se* appellants. *Jewell v. Arkansas State Bd. of Dental Examiners,* 324 Ark. 463, 921 S.W.2d 950 (1996).

Although appellees have submitted a supplemental abstract, I do not agree that it cures the myriad deficiencies of appellants' abstract. For example, among the items missing are an abstract of the Durable Power of Attorney, the contracts, the affidavits, and three sets of discovery attached to appellants' complaint. Also, appellees have not supplemented appellants' abstract of the notice of appeal.

For the reasons stated above, I would affirm the order of the trial court without reaching the merits of appellants' case.