Nicki Ray WEEKS *v.* STATE of Arkansas

CA CR 98-358 977 S.W.2d 241

Court of Appeals of Arkansas
Division III
Opinion delivered November 4, 1998

Christopher Carter, Public Defender, for appellant.

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

JOHN B. ROBBINS, Chief Judge. Appellant Nicki R. Weeks was convicted in a jury trial of first-offense DWI, felony fleeing by means of a vehicle, and misdemeanor fleeing on foot. He was sentenced to four years in the Arkansas Department of Correction for felony fleeing, to run concurrently with one-year and thirty-day terms in the county jail for DWI and fleeing on foot, respectively. In addition, Mr. Weeks was fined a total of $6100.00.

On appeal, Mr. Weeks does not challenge his conviction for fleeing on foot. However, he argues that his convictions for DWI and felony vehicular fleeing should be reversed. For each of these charges he contends that there was insufficient evidence to support the verdict.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, con-

sidering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

Officer Neal Thomas testified that he came into contact with Mr. Weeks during the late evening hours of February 21, 1997, and early morning hours of February 22, 1997. According to Officer Thomas, he observed a vehicle traveling at 58 miles per hour in a 45-mile-per-hour speed zone shortly before midnight, and attempted to pursue the vehicle but was not able to keep up with it. Then, shortly after midnight, he saw the same car speeding again and gave chase. Officer Thomas testified that, while his blue lights were on and he was in pursuit of the vehicle, it sped up and passed three cars on the left side of double yellow lines. The cars being passed were forced to ease off the road and give way to the speeding car, which continued to increase its speed to about 95 miles per hour.

Officer Thomas started slowing down when the suspect's vehicle came to a curve, and he witnessed the vehicle "fish tail" through some gravel and ultimately come to a stop at a gas station. According to Officer Thomas, there were several people around the store and a man was pumping gas during the incident. When the vehicle being pursued came to a stop, Officer Thomas saw Mr. Weeks step out of the car and flee across the road on foot.

After Mr. Weeks fled the scene on foot, Officer Thomas placed the woman who was a passenger in the car under arrest. The woman, who was ultimately not charged with anything, advised Officer Thomas that Mr. Weeks might be headed toward a particular mobile home. Officer Thomas called for backup, and Officer Mark Morton proceeded to the trailer identified by the passenger in the car. Officer Morton observed Mr. Weeks on the steps of the trailer, at which point Mr. Weeks fled on foot for another 500 yards before finally being apprehended. Shortly after his arrest, Mr. Weeks registered .104 on a breathalyzer test.

With regard to the automobile chase, Officer Thomas gave the opinion that Mr. Weeks did not have full control of his vehicle and that "it was unsafe to enter the parking lot at that speed." Officer Thomas further testified that Mr. Weeks' erratic driving caused the three cars that he passed to exit to the shoulder for safety purposes, and that Mr. Weeks operated his vehicle in a man-

ner that created a substantial danger of death or serious physical injury to other persons on the evening at issue.

Mr. Weeks testified on his own behalf, and he acknowledged traveling at a speed in excess of eighty miles per hour and passing a few vehicles. However, he stated that he was unaware that a police car was behind him with its blue lights on, and that he was hurrying to the Missouri border so that he could get to the liquor store before it closed. Mr. Weeks testified that, as soon as he saw the blue lights, he stopped his vehicle, but that he then fled on foot because he was scared. As to whether or not he was intoxicated, Mr. Weeks stated, "Let's put it this way: I could have sat there and drank a bunch more."

For reversal, Mr. Weeks first contends that there was insufficient evidence to convict him of felony fleeing by means of a vehicle. The fleeing statute is codified at Ark. Code Ann. § 5-54-125 (Repl. 1997), which provides in pertinent part:

> *5-54-125. Fleeing.*
>
> (a) If a person knows that his immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of such person to refrain from fleeing, either on foot or by means of any vehicle or conveyance.
>
> (b) Fleeing is a separate offense and shall not be considered a lesser included offense or component offense with relation to other offenses which may occur simultaneously with the fleeing.
>
> (c) Fleeing on foot shall be considered a Class C misdemeanor, except under the following conditions:
>
> (1) If the defendant has been previously convicted of fleeing on foot anytime within the past one-year period, subsequent fleeing on foot offenses shall be Class B misdemeanors;
>
> (2) Where property damage occurs as a direct result of the fleeing on foot, the offense shall be a Class A misdemeanor;
>
> (3) Where serious physical injury occurs to any person as a direct result of the fleeing on foot, the offense shall be a Class D felony.
>
> (d) Fleeing by means of any vehicle or conveyance shall be considered a Class A misdemeanor.

> (1) Fleeing by means of any vehicle or conveyance shall be considered a Class D felony if, under circumstances manifesting extreme indifference to the value of human life, a person purposely operates the vehicle or conveyance in such a manner that creates a substantial danger of death or serious physical injury to another person or persons.

Mr. Weeks was convicted under subsection (d)(1) of the above statute, and he asserts that the conviction must be reversed because the evidence presented by the State was insufficient to establish that he purposely operated his vehicle in a manner that created a substantial danger of death or serious physical injury, or that he exhibited an extreme indifference to the value of human life. He submits that, at most, his conviction for fleeing in a vehicle should be reduced to a Class A misdemeanor.

Viewed in the light most favorable to the State, we find substantial evidence to support Mr. Weeks' conviction for Class D felony vehicular fleeing. Officer Thomas testified that Mr. Weeks exceeded the speed limit by 50 miles per hour; passed three cars on the left of a double yellow line, which compromised the safety of the passengers of the other cars; approached a curve at a dangerously high speed; and entered a convenience store parking lot at about eighty miles per hour while patrons were present. This evidence supported the jury's determination that, during his flight from Officer Thomas, Mr. Weeks purposely operated his vehicle in a manner that created a substantial danger of death or serious physical injury to others, and that he did so under circumstances manifesting an extreme indifference to the value of human life.

Mr. Weeks' remaining argument is that there was insufficient evidence to convict him of DWI. Arkansas Code Annotated section 5-65-103 (Repl. 1997) provides:

> (a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

Mr. Weeks points out that he registered .104 on the breathalyzer test and that Officer Thomas testified on cross-examination that "[t]he [breathalyzer] machine has a plus or minus factor of .01 for the external check." He contends that, if the machine has a .01 variance for determining whether or not it is accurate when tested, this variance should also apply to his breath sample, which means that his true blood-alcohol level was somewhere between .094 and .114. Thus, he argues, there was insufficient proof that his blood-alcohol level was .10% or more, and that he should not have been convicted under subsection (b) of Ark. Code Ann. § 5-65-103 (Repl. 1997). He acknowledges that subsection (a) only requires intoxication in order to support a DWI conviction for a person in control of a motor vehicle, and "intoxicated" is defined as follows:

> "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians[.]

See Ark. Code Ann. § 5-65-102(1) (Repl. 1997). However, he contends that there was insufficient evidence that he was intoxicated under this definition because he testified that he did not feel intoxicated, was able to stop his vehicle and run at least 500 yards, and was administered no sobriety tests.

We reject Mr. Weeks' final contention. Although he suggests that his blood-alcohol level might have been as low as .094, Officer Thomas stated:

> It is not true that if Mr. Weeks registered .104 that, using those standards, he could potentially be between .094 and .114. The .01 ratio is an allowed figure for the external standard check. It has nothing to do with the personal sample.

Moreover, the breathalyzer test was not administered until about forty-five minutes after Mr. Weeks fled from Officer Thomas. This evidence amounted to substantial evidence that, at the time he was in control of his vehicle, Mr. Weeks' blood-alcohol level was at least .10.

We further find that, even in the absence of the breathalyzer test, the State presented substantial evidence of intox-

ication. It is undisputed that Mr. Weeks had been drinking and was traveling at a very high rate of speed and was passing cars in an unsafe manner. According to the arresting officers, he smelled strongly of alcohol when he was arrested, was stumbling to the point where he had to be assisted in walking, and had slurred speech and bloodshot, watery eyes. Officer Thomas did not administer sobriety tests because, for the safety of everyone involved, he wanted to incarcerate Mr. Weeks as soon as possible. However, Officer Thomas testified that he had been in law enforcement for nine years and has been involved in more than 100 DWI arrests, and that there was no doubt in his mind that Mr. Weeks was intoxicated. It was also permissible for the jury to consider Mr. Weeks' flight as evidence of guilt of DWI. *See Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991). The State presented sufficient evidence that, while he was operating his vehicle, Mr. Weeks was affected by the ingestion of alcohol to such a degree that his reactions, motor skills, and judgment were altered to the extent that he posed a clear and substantial danger to himself and other motorists or pedestrians.

Affirmed.

STROUD and MEADS, JJ., agree.

Don K. FRYER, Don K. Fryer & Associates, and CISCO *v.* Guy BOYETT

CA 98-236 978 S.W.2d 304

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1998

George H. Stephens, II, for appellants.

Brazil, Adlong, Murphy & Osment, by: *Matthew W. Adlong,* for appellee.

JOHN MAUZY PITTMAN, Judge. Don Fryer, individually and d/b/a Don K. Fryer & Associates, and CISCO have appealed from a judgment entered by the Faulkner County Circuit Court in favor of appellee Guy Boyett for commissions appellants owed to appellee. We cannot say that the circuit judge erred in making this award to appellee and affirm.

In 1989, appellee entered into two written agreements to act as a sales representative for appellants Don Fryer & Associates and CISCO. Both sales agreements provided that appellee, an independent contractor, would be paid his commissions after appellants received payment in full. Appellee received no other form of compensation. The CISCO agreement stated: "Profit share is due after payments are received in full by [CISCO] and profit is determined by sales price less cost of goods sold, freight

charges, taxes, etc." The agreement with Don K. Fryer & Associates stated: "All commissions earned by [appellee] hereunder are payable only out of commissions paid by the [manufacturer] and shall be due and payable to [appellee] on or before the 10th day of the month following receipt by [appellant] of payment from the [manufacturer] of the sums from which [appellee's] commissions are payable." The CISCO contract stated: "[Appellant] is interested only in the results obtained by [appellee] who shall have sole control of the manner and means of performing under this agreement."

Both contracts contained the following provision for termination:

> This agreement shall continue in full force and effect until the first to occur of the following events, at which time it shall terminate:
>
> (1) The expiration of thirty (30) days after [appellee] gives written notice to [appellant] of [appellee's] election to terminate this agreement, which right [appellee] is hereby granted and which shall be within [appellee's] sole discretion . . . .

On July 6, 1993, appellee gave appellant Fryer the following written notice of his intention to resign:

> In accordance with Sub-Agent (Independent Contractor) agreement between Don Fryer and Guy W. Boyett dated 2/27/89 I elect to terminate agreement 30 days from this date or 7/31/93 if you prefer.
>
> After expiration of the 30 day period I will receive commission on only the outstanding purchase orders Metalex has with O.D. Funk and Specialty Services, Inc. when commission is paid by Metalex.
>
> During the life of these open purchase orders I am willing to service these accounts when and if any problems arise.
>
> Prior to 7/31/93 I will make a list of these open purchase orders for your approval.

On that date, appellee also gave a similar notice to CISCO of his intention to resign.

After appellants refused to pay appellee the commissions he had earned before the date of the contracts' termination, appellee

sued appellants for $6,738.72. Following trial, the circuit judge stated in his letter opinion:

> The issue is whether the plaintiff is entitled to commissions after the termination of the contract he had with Defendant. I find that the issue is settled not by the silence of the contract or the fact that another contract containing specific language was not accepted, but by the language of both the "Fryer" and "CISCO" contracts which provide that commissions earned by the sub-agent shall be due and payable following receipt of full payment by the principal.

The circuit judge then entered judgment for appellee in the amount of $6,742 plus attorney's fees of $4,700 and $300 in costs.

On appeal, appellants argue that the circuit judge erred in his construction of the contracts to provide for payments of commissions to appellee after termination. Citing *Brown v. Cooper Clinic, P.A.*, 734 F.2d 1298 (8th Cir. 1984), appellants contend that, because the contracts are silent on this question, no such right existed. *Brown v. Cooper Clinic* did not, however, hold as a matter of law that, if a contract is silent on this issue, a right to compensation after termination can never be found to exist. The clinic distributed 45% of the monthly collections to the surgery department, and the appellant had agreements with other members of that department whereby he would receive 40% of those collections as his monthly salary. In that case, the appellant sought to be paid his portion of the fees billed but not yet collected. The clinic also had an unwritten policy that physicians were not entitled to any portion of the clinic's accounts receivable upon departure. We believe that case is, therefore, distinguishable from the case before us. In *Brown v. Cooper Clinic*, the appellant's salary was not directly tied to his personal billings or collections; thus, his agreement with the clinic was materially different from the contracts involved herein. Accordingly, that case provides no helpful precedent to the issue now before us.

Like the circuit judge, we are also not persuaded by appellants' emphasis of the fact that, during negotiations, appellee had not accepted a proposed contract that specifically provided for compensation after termination. Because the contracts the parties

did accept are not ambiguous, our focus is necessarily upon their express terms.

The initial determination of the existence of an ambiguity rests with the court. *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997). When a contract is unambiguous, its construction is a question of law for the court. *Rowland v. Faulkenbury*, 47 Ark. App. 12, 883 S.W.2d 848 (1994); *Moore v. Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 821 S.W.2d 59 (1991). A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Singh v. Riley's, Inc.*, 46 Ark. App. 223, 878 S.W.2d 422 (1994). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Hampton Road, Inc. v. Miller*, 18 Ark. App. 9, 708 S.W.2d 98 (1986). Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible. *Pate v. U.S. Fidelity and Guar. Co.*, 14 Ark. App. 133, 685 S.W.2d 530 (1985). The contracts in question distinguished between appellee's earning the right to payment of his commissions and the time at which they were payable. True, the contracts are subject to differing constructions, but not to equally reasonable ones. The more reasonable construction is that, although appellee could only *earn* his commissions before termination of the contracts, he could *receive* them after his representation of appellants had ended, if appellants had been paid. We therefore cannot say that the circuit judge erred in his decision.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Johnny DAVIES, Jr. *v.* STATE of Arkansas

CA CR 98-513 977 S.W.2d 900

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1998

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

Winston Bryant, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., and *Pamela Epperson*, Law Student Admitted to Practice

Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Arkansas Supreme Court, for appellee.

SAM BIRD, Judge. Johnny Davies, Jr., was charged by information with possession of a controlled substance (crack cocaine) with intent to deliver. At trial, during voir dire and during closing argument, appellant admitted that he was guilty of possession of cocaine, but he argued that he was not guilty of possession with intent to deliver. Appellant was found guilty by a jury of possession and sentenced to seventy-two months in the Arkansas Department of Correction, and a $3,000 fine. On appeal he argues that he should have been granted a mistrial or a new trial because an alternate juror was in the jury room during deliberations.

At the trial held on January 15, 1998, Willie Pegues, a narcotics officer with the Hot Springs Police Department, testified that he did a "pat-down" search of appellant in connection with a traffic stop. Appellant kept moving his hand to his waist, so Officer Pegues checked and found a cellophane package that contained a white rock-looking material that the officer believed to be "rock" cocaine. Chris Harrison, a forensic drug chemist from the Arkansas State Crime Laboratory, testified that he tested the substance taken from appellant and found it to be 1.318 grams of 76% pure cocaine.

Following the reading of the jury's verdict and the polling of the jurors, a colloquy took place at the bench:

> THE COURT: I just realized that the alternate probably went back in there. I'm going to excuse her at this point.
>
> MR. BOSSON [Prosecuting Attorney]: I don't see any problem with that.
>
> MR. BECKER [Defense Counsel]: I do, Your Honor. I move for a mistrial.
>
> THE COURT: That will be denied unless you can show some prejudice.
>
> MR. BECKER: Well, Your Honor, . . . only twelve were suppose[d] to go back. The alternate should only go back if there's a — the normal procedure is if one of the jurors is disqualified or

> cannot take up deliberations and then they are to begin deliberations.
>
> THE COURT: Well, at this point I don't see where any prejudice has been done. I'm going to exclude the alternate juror and we're [going to] proceed. Your motion will be denied.
>
> *END OF SIDE BAR CONFERENCE.*
>
> THE COURT: Mr. Terral, we appreciate your service as alternate juror. You are allowed to be excused at this point.

The jury was then instructed, arguments on sentencing were heard, and the jury retired to deliberate on sentencing.

On January 22, 1998, appellant filed a motion for new trial on the ground that the number of jurors that deliberated on his guilt was thirteen and that he had an absolute right to a twelve-member jury. On January 27 at the sentencing proceeding, defense counsel informed the court that he did not have any evidence to present on the motion for new trial. After reviewing the circumstances of the alternate juror being present for the guilt phase of jury deliberations, the court denied the motion for new trial on the basis that appellant was unable to show any prejudice, as the jury had convicted him of only simple possession and he had admitted his guilt to that charge in court. Appellant's only argument on appeal is that the court erred in denying his motion for mistrial and motion for a new trial on the ground that there were thirteen jurors in the jury room during the guilt phase of jury deliberations.

Arkansas Code Annotated section 16-32-202(b)(1) (Supp. 1997) provides that "[j]uries shall be composed of twelve (12) jurors." In arguing that the thirteenth juror in the room during deliberations violated his right to a trial by a twelve-person jury under the United States and Arkansas Constitutions, appellant cites *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 434 (1994), and *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

We find those cases to be inapplicable to the present situation. In *Byrd*, the court considered a constitutional challenge to an amendment to Ark. Code Ann. § 16-32-202(b)(1), which allowed six-person juries to hear misdemeanor cases at the trial

court's discretion. The court held that the right to a twelve-person jury is inviolate and that the amendment was unconstitutional.

In *Collins*, the appellant had been convicted by an eleven-member jury, without waiving his right to trial by a twelve-member jury. Our supreme court held that the right to trial by a twelve-member jury is a fundamental right, the violation of which renders the judgment void and subject to collateral attack. Neither of these cases involved the issue of an alternate juror present during deliberations.

Arkansas Code Annotated section 16-30-102 (1987) provides that the court may direct that not more than three alternate jurors be called and impaneled in addition to the regular jury to replace a regular juror who becomes unable or disqualified to serve. When the jury retires to deliberate, an alternate juror who is not needed to replace a regular juror shall be discharged.[1]

It is not unprecedented for alternate jurors or other nonjury members to appear in the jury room during deliberations. In *Campbell v. State*, 264 Ark. 575, 572 S.W.2d 845 (1978), a woman who had been with the appellant when he was arrested for possessing a stolen automobile testified for the State. During a recess in appellant's trial, the woman, who was intoxicated, wandered into the jury room, apparently looking for a cup of coffee. Although appellant was aware of the woman's actions, no immediate objection was made. Appellant subsequently filed a postconviction petition pursuant to Ark. R. Crim. P. 37, and one of his arguments was that the court erred in not declaring a mistrial on the basis of the woman in the jury room. The Arkansas Supreme Court held that the burden was upon appellant to show actual improper influence on the jury.

In *United States v. Olano*, 507 U.S. 725, 737 (1993), the Court considered the trial court's action at the end of a three-month trial in allowing, with the consent of the defendants, two alternate jurors to attend jury deliberations, although instructing

[1] On May 21, 1998, the Arkansas Supreme Court adopted Rule of Criminal Procedure 32.3 to govern the use of alternate jurors in criminal trials when a regular juror is unable to serve or is disqualified. *See* Appendix, 333 Ark. 732 (1998).

them not to participate. Federal Rule of Criminal Procedure 24(c) provides, as does Ark. Code Ann. § 16-30-102(b) (Repl. 1994), that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." The Court held that, although the presence of the alternate jurors during deliberations was a deviation from Rule 24(c), and the error was "plain," no prejudice would be presumed. The burden was on the defendants to make "a specific showing of prejudice."

McDonald v. State, 37 Ark. App. 61, 824 S.W.2d 396 (1992), is directly on point. The alternate juror in that case had been excused but, through some misunderstanding, entered the jury room fifteen minutes after the jury had retired, and remained there for about fifteen minutes. Appellant argued that the mere presence of the alternate juror compromised the sanctity of the jury's deliberations and his right to a fair and impartial trial. This court held that the appellant had failed to show any prejudice by the alternate's presence in the jury room.

In the instant case appellant was charged with and tried for possession of cocaine with intent to deliver. He admitted that he possessed the cocaine, but argued to the jury that he was not guilty of "intent to deliver." The jury returned with a verdict that appellant was guilty of possession, not possession with intent to deliver. Since the jury returned the verdict that appellant sought, he cannot say he was prejudiced by the presence of the alternate juror during deliberations.

Appellant also argues that he should have been granted a new trial on the same basis. Appellee contends that the motion for new trial was not timely and should not be considered. Appellant's motion for new trial was filed on January 22, 1998. However, the judgment and commitment order was not filed until February 10, 1998. A posttrial motion that is filed prior to the entry of the judgment is untimely and ineffective. *See Brown v. State*, 333 Ark. 698, 970 S.W.2d 287 (1998); *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996)(*per curiam*); and *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995)(*per curiam*).

Even if appellant's motion for new trial had been timely filed, our decision would be the same. Because the jury returned the verdict appellant had sought, he cannot show that he suffered any prejudice because of the thirteenth juror in the jury room.

Affirmed.

PITTMAN and GRIFFEN, JJ., agree.

Gayle MEDLIN *v.* WAL-MART STORES, INC.

CA 98-345 977 S.W.2d 239

Court of Appeals of Arkansas
Division IV
Opinion delivered November 4, 1998

John Bartlett, for appellant.

Roberts Law Firm, P.A., by: *Mike Roberts*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove that her work was the major cause of her disability. On appeal, appellant argues that there is no substantial evidence to support the Commission's decision and that the Commission erred as a matter of law in applying Ark. Code Ann. section 11-9-102(5)(E)(ii) (Supp. 1997). We agree with appellant's second point and reverse and remand.

Appellant began working for appellee in August of 1995, primarily as a cashier. In December of 1995, appellant began developing numbness in her right hand, and she noticed a decrease in her ability to grip. When her symptoms interfered with her sleep, she sought medical attention and was referred to Dr. Ken Carpenter. Dr. Carpenter diagnosed carpal tunnel syndrome. Appellant was referred to orthopedic surgeon Dr. Larry Mahon, who performed a surgical release on March 28, 1996. Appellee denied compensation, and a hearing was held.

The Commission found that Dr. Mahon's opinion did not provide any definitive guide to whether the claimant's *work* was the major cause of her disability and:

> Dr. Mahon can only state that it is compatible with the disability and need for treatment but he cannot state that it is or is not the major cause. Accordingly, we cannot find that Dr. Mahon's opinion is sufficient to establish the major cause requirement necessary to prove the compensability of her claim. When claimant

> has failed to submit sufficient evidence to overcome the major cause requirement . . . the claim is not compensable. . . . . In our opinion, we should be guided by Dr. Mahons' educated medical opinion. Dr. Mahon cannot state within a reasonable degree of medical certainty that the claimant's work accounts for more than fifty percent of her disability or need for treatment. If Dr. Mahon cannot render such an opinion, we cannot see there is sufficient evidence in the record to allow us to make such a finding.

Arkansas Code Annotated section 11-9-102(5)(E)(ii) provides that the burden of proof for injuries falling within the definition of compensable injury that are not caused by a specific incident or are not identifiable by time and place of occurrence, such as carpal tunnel syndrome, shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Thus, in the present case, appellee had the burden of proving by a preponderance of the evidence that her carpal tunnel syndrome injury was the major cause of the disability or need for treatment. *Tyson Foods, Inc. v. Griffin,* 61 Ark. App. 222, 966 S.W.2d 914 (1998). However, the Commission erred as a matter of law in its application of Ark. Code Ann. section 11-9-102(5)(E)(ii) because it required a finding that appellant's work, as opposed to her injury, was the major cause of the disability or need for treatment. It appears that the Commission has mistakenly confused the requirements for establishing a causal connection between a claimant's work and his/her injury, and the added requirement after 1993 that an alleged compensable injury must be the major cause of the claimant's disability or need for treatment where the injury is not caused by a specific incident or is not identifiable by time and place of occurrence. These are two distinct requirements that do not coincide with each other. A causal connection must be established in every case; however, the requirement that an alleged compensable injury must be the major cause of the disability or need for treatment only comes into play when an injury is not caused by a specific incident or is not identifiable by time and place of occurrence. Because of the Commission's misapplication of Ark. Code Ann. section 11-9-102(5)(E)(ii), we must reverse and remand for the Commission to reconsider the facts of this case not inconsistent with this opinion. We do not

reach appellant's challenge to the sufficiency of the evidence because of our resolution of the previous issue.

Reversed and remanded.

JENNINGS and CRABTREE, JJ., agree.

Anthony JOHNSON *v.* Danny K. JONES
and Connie S. Jones

CA 98-57 977 S.W.2d 903

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 4, 1998

Baxter, Jensen, Payne & Young, by: *Ray Baxter*, for appellants.

Kemp, Duckett, Spradley & Curry, by: *Stephanie Houston Angel* and *Hal Joseph Kemp*, for appellees.

JOHN F. STROUD, JR., Judge. Anthony Johnson, Tony Johnson, Mark Mills, and Virgil Taylor, as members, trustees, deacons, and elders of Unity Missionary Baptist Church, an unincorporated religious society, and all other members of Unity Missionary Baptist Church appeal from a decree of the Saline County Chancery Court holding that appellees Danny Jones and Connie Jones established a prescriptive easement across land owned by the Church. We hold that the chancellor's decision is not clearly erroneous.

Appellees own a tract of land adjacent to property owned by the Church. Appellees' driveway, their only access to a county road, crosses the Church's property and connects to its parking lot. Appellees' house was built around 1974 by Harold and Carolyn

McClendon. According to appellants, the Church's members voted to give the McClendons permission to traverse the Church's property for access to their home. In early 1984, the McClendons sold their property to Ronald Eaton. In July 1984, Mr. Eaton sold this tract of land to appellees.

In 1996, appellees attempted to make some improvements to their property but were unable to acquire financing for the project without receiving a recordable written easement from the Church. After appellants refused to give a written easement, appellees filed this action to establish a prescriptive easement over the Church's property.

At trial, Mr. Eaton testified that, when he acquired the property, he assumed that the gravel driveway came with the land and that he had not asked anyone for permission to use it. He stated that, while making repairs to the property in 1984, he used the driveway and no other access to it approximately four days a week. He also said that he had thought that he had conveyed the right to use the driveway along with the land in his deed to appellees. He stated that he had trusted the abstract company in this regard and would not have paid what he did for the property if he had not believed that there was a recorded right of access to it.

Appellee Danny Jones testified that this driveway is the only access to the property that he has ever used. He also stated that he had assumed that he had acquired the right to use the driveway along with the property and had not believed that he needed permission to use it. He said that no one from the Church had ever indicated that he needed permission to use this driveway nor had anyone from the Church given him permission to do so. He further testified that appellees' visitors and everyone providing services to their house have used this driveway. He also said that he had maintained the driveway and kept it clear of debris. He said that he had put gravel on it and that Edwin Johnson, a member of the church, had graded it for him. He said that a garbage truck had once damaged a side of the driveway and that he had repaired it in the presence of Church members. He testified that appellees had continuously used the driveway since 1984 in the presence of Church members and that no one from the Church had ever

mentioned the subject to him. On cross-examination, Mr. Jones admitted that he and his wife had started attending the Church shortly after moving into their home; although his wife had joined the Church, he had not. He stated that they had stopped attending services there four or five years ago.

Appellant Anthony Johnson testified that, originally, he had owned this property and that he had been a member of the Church when the McClendons had acquired it. He stated that the McClendons had sought the Church's permission to use the road to their property; this permission was granted by the consent of the Church's members. He admitted, however, that no one from the Church had ever informed Mr. Eaton or appellees that they needed or had permission to travel across the Church's property for ingress or egress to their land. He admitted that he had never attempted to limit anyone's use of the driveway and that, until this dispute arose, he had not even known that Mr. Eaton had once owned the property.

Appellant Mark Mills also testified that, although he had observed appellees and their guests using the driveway, he had never done anything to prevent such use and had never personally communicated to appellees that their use was permissive. He also testified that, although he had been a member of the Church for six years, he had never had contact with Mrs. Jones at the Church.

In their first and second points on appeal, appellants challenge the sufficiency of the evidence and argue that appellees and their predecessors in title were simply using the driveway with the Church's permission. In their third point on appeal, appellants argue that Mrs. Jones's use of the driveway could not have been adverse to the Church's interest because she was a member of the Church for a period of time.

■ ■ Prescription is the acquisition of title to a property right which is neither tangible nor visible (incorporeal hereditament) by an adverse user as distinguished from the acquisition of title to the land itself (corporeal hereditament) by adverse possession. *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984). Although we do not have a statute setting forth the length of time for the ripening of a prescriptive easement, for many years the

supreme court has considered the period for acquiring a prescriptive right-of-way as analogous to the statutory seven-year period for the acquiring of title by adverse possession and has held that both require seven years. *Id.* Unlike adverse possession, however, prescriptive use need not be exclusive. *Id.*

One asserting an easement by prescription must show by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991); *Fields v. Ginger*, 54 Ark. App. 216, 925 S.W.2d 794 (1996). Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. *Manitowoc Remanufacturing, Inc. v. Vocque, supra; Fields v. Ginger, supra.* Permissive use of an easement cannot ripen into an adverse claim without clear action placing the owner on notice. *Manitowoc Remanufacturing, Inc. v. Vocque, supra; Fields v. Ginger, supra.* For use by permission to ever ripen into title, the claimant must put the owner on notice that the way is being used under a claim of right. *Massey v. Price*, 252 Ark. 617, 480 S.W.2d 337 (1972). *Accord Wallner v. Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987). When one has sufficient information to lead him to a fact, he is put upon inquiry and shall be deemed cognizant of that fact. *Diener v. Ratterree*, 57 Ark. App. 314, 945 S.W.2d 406 (1997).

In *Fields v. Ginger, supra*, we noted that the supreme court has long recognized a variation in the general rule of law spoken of in *Manitowoc Remanufacturing, Inc. v. Vocque.* Quoting *Fullenwider v. Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954), we stated that previous decisions on this issue can be reconciled:

> Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right.

54 Ark. App. at 221, 925 S.W.2d at 797. We rejected the notion that it was necessary in all cases that persons claiming a prescriptive easement must openly communicate their intention to use the road adversely before permissive use can ripen into an adverse right and recognized that the length of time and the circumstances under which the roadway was opened and used are sufficient to establish an adverse claim, when those circumstances indicate that the true owner knew or should have known that the road was being used adversely. Citing *White v. Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992), we held that the use may ripen into an easement by prescription even if the initial usage began permissively, if it is shown that the usage continued openly for the statutory period after the landowner knew that it was being used adversely, or under such circumstances that it would be presumed that the landowner knew it was adverse to his own interest.

The determination of whether the use of a roadway is adverse or permissive is a question of fact. *Stone v. Halliburton*, 244 Ark. 392, 425 S.W.2d 325 (1968); *Fields v. Ginger, supra; Wallner v. Johnson, supra.* A chancellor's finding with respect to the existence of a prescriptive easement will not be reversed by this court unless it is clearly erroneous. *Kelley v. Westover*, 56 Ark. App. 56, 938 S.W.2d 235 (1997). In fact, former decisions are of little value on the factual issue of whether a particular use is permissive or adverse. *Williams v. Fears*, 248 Ark. 486, 452 S.W.2d 642 (1970); *Stone v. Halliburton, supra.*

Appellants argue that the chancellor was required to find that the McClendons' use of the property was permissive simply because Mr. Johnson testified to that fact without contradiction. Even though the McClendons' use of this driveway was with the permission of the Church, it does not change the outcome of this case. The use of this driveway by Mr. Eaton and appellees was sufficient for the prescriptive easement to occur.

It is clear that the driveway is the only means of access to appellees' home. Appellees, and their predecessor, Mr. Eaton, assumed that they had acquired a right to use the driveway along with title to their property. *Hicks v. Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990), is a boundary-line dispute case, but the

court's holding that the intent to retain possession under an honest belief of ownership is adverse possession also seems appropriate here. Appellants were aware that appellees had acquired title to the property in 1984 and that they had consistently used and maintained the driveway since that time. Appellants were also charged with notice that Mr. Eaton had purchased this property before he sold it to appellees. It is clear from the testimony that appellees and Mr. Eaton had used the driveway under a claim of right for over twelve years and that appellants had never attempted to limit their access or to inform them that their use was permissive. The Church cannot assume that permission requested and given to a landowner is imputed to all subsequent owners of such land. Given these circumstances, we cannot say that the chancellor's decision is contrary to settled law or that his findings are clearly erroneous.

Appellants also argue that, because Mrs. Jones was a member of the Church for a period of time, her use of the driveway could not have been adverse to the Church's interest. Although appellants cite *Neyland v. Hunter, supra*, for this contention, that case does not support their argument. In *Neyland v. Hunter*, the supreme court recognized that, unlike adverse possession, prescriptive use need not be exclusive. Appellants also cite Arkansas Code Annotated section 18-11-106 (Supp. 1997), which only deals with adverse possession claims. In fact, appellants have cited no authority that supports their argument that Mrs. Jones's membership in the Church should defeat her claim of a prescriptive easement. Assignments of error unsupported by convincing argument or authority will not be considered on appeal. *Rogers v. Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994). Even if we were to consider this issue on the merits, we would not be persuaded by appellants' argument. The testimony reveals that Mrs. Jones did not join the Church until after appellees had already acquired title to their property and had begun their use of the driveway. Certainly, one can easily infer that Mr. Jones's maintenance of the driveway was also done on his wife's behalf. Therefore, the Church was on notice that Mrs. Jones was using the driveway adversely to its interest before she joined it. Accordingly, we find no merit in appellants' third point on appeal.

[redacted] However, it is necessary that we remand this case so that the chancellor may amplify and correct the decree by adding a precise legal description of the easement (that part of the driveway that appellees have actually used). In the decree, this easement is described as a line for which no width is given. When a chancellor's decree does not describe a prescriptive easement with sufficient specificity so that it can be identified solely by reference to the decree, we may remand for the chancellor to amend the decree and provide the easement's legal description. *See Rice v. Whiting*, 248 Ark. 592, 452 S.W. 2d 842 (1970); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Affirmed in part; remanded in part.

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

GRIFFEN and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Although the majority would affirm the chancellor's decision declaring a prescriptive easement across a driveway owned by the appellants' (deacons of Unity Baptist Church), I believe that appellees failed to prove adverse use of the property as required by our case law. Therefore, I respectfully dissent.

Danny and Connie Jones purchased a tract of land adjacent to property owned by Unity Church in April 1984. Appellees' property was purchased from Ronald Eaton, who had purchased the tract from Harold McClendon in February 1984. McClendon and his wife had purchased the tract from Anthony and Mary Johnson in December 1973. Anthony Johnson is a deacon of Unity Church.

In Saline County, access to appellees' property is possible by crossing through the Unity Baptist property and then crossing property owned by International Paper Company to reach Unity Road. A driveway existed through those properties when McClendon acquired the tract from the Johnsons. Anthony Johnson testified that the Unity Baptist Church voted to permit McClendon to use that driveway. However, appellee Danny Jones did not know that the driveway was not his land (despite the fact that it was located on the church property and was not described

in his deed from Eaton). He and his wife used the driveway from the time they acquired their property without objection from the church. He testified that he made minor repairs to the driveway (replacing gravel). When he and his wife attempted to obtain financing on their home to make some repairs, they learned that the financing institution would not extend credit because they did not have legal right to use the driveway. Jones obtained an easement from International Paper. Unity Baptist indicated that it would consent to continued use of the driveway, but would not agree to an alienable easement. Jones then sued the church elders, claiming a prescriptive easement in the driveway through the church property. The chancellor granted the prescriptive easement, holding that because appellees and their predecessors in title had continuously used the driveway for at least twenty-three years, had not asked permission to use the road from the church elders, and because the elders had not acted to prevent that use or object to it, the continuous use was adverse use for purposes of satisfying the requirement for a prescriptive easement.

Whether one follows the reasoning of our decisions dating to *Fullenwider v. Kitchens*, 223 Ark. 442, 226 S.W.2d 281 (1954), which hold that, to establish a prescriptive easement, the true owner must either know or be presumed to know of the adverse character of the claimant's possession based on the facts and circumstances of the claimant's use, or the alternative line of cases dating to *Manitowoc Remanufacturing v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991), which hold that the claimant must take affirmative steps to put the true owner on notice of an adverse claim to support a prescriptive easement, Arkansas case law clearly requires that the claimant prove *adverse* use for seven years. There must be a "distinct and positive assertion . . . of a right hostile to the owner." *Harper v. Hannibal*, 241 Ark. 508, 408 S.W.2d 591 (1966).

Although appellees, as claimants, had the burden of demonstrating adverse use, they presented no proof that they ever asserted a right to use the driveway that was adverse to the church. They simply argued that they were entitled to a prescriptive easement because they and their predecessors in title had used the driveway continuously and openly without objection or permis-

sion from the church. If the law of prescriptive easement required no more than this, I could join the majority and vote to affirm the chancellor. However, the law of prescriptive easement requires that a claimant prove open, continuous, *and adverse* use. None of our cases provide that adverse use is demonstrated merely by proof of continuous and open permissive use, whether by the claimant or by the claimant's predecessors in interest. The fact that there were successive users between the initial permissive use to Eaton and the use exercised by appellees is immaterial given that none of the successive users claimed or exercised an adverse use as to appellants. Yet that is the upshot of the decision announced today.

It is difficult to understand how continuous permissive use of a driveway can rise over time to a prescriptive right when that use involved no activity that was hostile to the right of the owner of the property that the driveway traverses. Here we have no proof that appellees erected a fence, gate, or other barrier across the driveway so as to suggest an interest in it that was something other than that of a permissive user. The fact that appellees made minor repairs to the driveway certainly was not an adverse action to appellants; after all, appellees used the gravel driveway without charge, interruption, or disagreement. That they made minor repairs to a driveway they used for free demonstrates nothing more than common courtesy, not that they held or claimed a legal right to the land across which they drove every day. Despite appellees' argument that the repairs evidenced adverse use, the repairs were no more adverse to appellants' interest than would be the act of having a flat tire fixed on a vehicle that one has been permitted to use by another.

Contrary to appellees' argument, appellants did not acquiesce in an adverse use by not objecting to the use of the driveway across their property. There was no acquiescence because the use was never adverse. Acquiescence arises when the true owner fails to object or assert his rights after having received notice of an adverse claim or use, not merely because the owner's land is used by others in a way that is not adverse for more than seven years. The reasoning employed by appellees and now validated by the majority opinion creates an adverse use from mere prolonged permissive use. This is a clear departure from the time-honored principle

that permissive use cannot ripen into a legal right merely by lapse of time. *See McGill v. Miller*, 172 Ark. 390, 288 S.W. 932 (1926).

I consider it especially anomalous that appellees — who profess that they did not know that the driveway in question was not their land — are now deemed to have intended to deprive the true owner of that land of its use by using the driveway the very way that had been permitted by appellants. Neither appellees nor the majority opinion explain how mere persistent ignorance over time rises in law or logic to clear, distinct, and unequivocal evidence of an intent to exercise an adverse interest or right over property that belongs to another as required by our supreme court. *See Dillaha v. Temple*, 267 Ark. 793, 590 S.W.2d 331 (1979). That persistent ignorance can be successfully massaged into a prescriptive right is the antithesis of equity.

I would reverse the chancellor and am authorized to state that Judge CRABTREE joins in this opinion.

Steven Earl HILL *v.* STATE of Arkansas

CA CR 98-26 977 S.W.2d 234

Court of Appeals of Arkansas
Division I
Opinion delivered November 4, 1998

John H. Bradley, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. A jury convicted Steven Earl Hill of second-degree murder in connection with the starvation death of his four-year-old daughter Krystal Hill. Appellant was sentenced to eighteen years' imprisonment in the Arkansas Department of Correction. For reversal of his conviction, appellant raises four points on appeal. Based upon our review of the record of the trial proceedings, we conclude that no errors were committed and affirm his conviction.

We address appellant's arguments in the order they are presented in his brief. At trial, the prosecutor cried while making

his closing argument. The appellant objected and moved for a mistrial, arguing that the prosecutor's actions were an improper appeal to the jurors' passions. The trial court denied the motion for a mistrial, and admonished the jury to disregard the prosecutor's display of emotion, and to consider only the evidence in determining appellant's guilt or innocence. Appellant now contends that the trial court should have granted his motion for a mistrial.

A mistrial is an exceptional remedy to be used only when possible prejudice cannot be removed by an admonition to the jury. *Gray v. State*, 327 Ark. 113, 937 S.W. 2d 639 (1997). A mistrial should only be declared when an admonition to the jury would be ineffective. *Puckett v. State*, 324 Ark. 81, 918 S.W. 2d 707 (1996). The trial court is given broad discretion to control counsel in closing arguments, and the appellate courts will not disturb the trial court's decision absent an abuse of discretion. *Lee v. State*, 326 Ark. 529, 932 S.W. 2d 756 (1996). Remarks that require a reversal are rare and require an appeal to the jurors' passions. *Id.* Moreover, not every instance of prosecutorial misconduct mandates a mistrial. *Muldrew v. State*, 331 Ark. 519, 963 S.W. 2d 580 (1998).

Although the propriety of a prosecutor crying during a closing argument has yet to be addressed by our courts, other jurisdictions have addressed this precise issue. In *Coburn v. State*, 461 N.E.2d 1154 (Ind. App. 2 Dist. 1984), the Indiana Court of Appeals held that the trial court had not abused its discretion in refusing to grant a mistrial where the prosecutor cried during defense counsel's closing argument. The court reasoned that where the effect of or impact of the unrecorded conduct is not and cannot realistically be reported in a written record, deference should be given to the discretion of the trial judge who was on the scene and in the best position to evaluate the conduct, its propriety, its inadvertence, and its impact, if any, on the jury. Similarly, in *Gibbons v. State*, 495 S.E. 2d 46 (Ga. App. 1997), the court did not find error in the trial judge's refusal to grant a mistrial where the prosecutor, the victim and her mother, and other witnesses cried during closing arguments. The decision was based upon the

fact that the record did not show that their actions disrupted the court or otherwise affected the jury.

Here, the fact that the prosecutor cried does not, in itself, amount to an improper appeal to the passions of the jurors. In fact, appellant has not included in his abstract proof that any of the jurors were visibly affected by the prosecutor's emotional display. Further, though shedding tears, the prosecutor urged the jury to look at the evidence and not to allow their emotions to factor into their decision regarding appellant's fate. Moreover, the trial court admonished the jury to disregard the prosecutor's emotional display. Based upon the facts presented in the record on appeal, we conclude that although the prosecutor's emotional display may have been improper, it was not an appeal to the jurors' passions that would require the granting of the motion for a mistrial.

Although appellant does not challenge the sufficiency of the evidence to convict, a brief recitation of the facts is necessary. On April 17, 1996, the Blytheville Police received a 911 call and were dispatched to appellant's residence. Police officers arrived at the residence to find Krystal Hill dead on the floor of one of the residence's bedrooms. An autopsy was performed and the medical examiner determined that the cause of Krystal's death was kidney failure due to malnutrition and neglect, exacerbated by physical abuse.

On October 31, 1996, appellant and his wife, Ida Hill, who was Krystal's stepmother, were charged by information with first-degree murder. Prior to trial, appellant moved to sever his trial from his co-defendant's. The trial court denied the motion. During the course of the trial, appellant moved for severance on several different occasions. The trial court denied all but one of the motions. Severance was finally granted when appellant gave testimony that implied that his wife caused Krystal's death.

Appellant raises as a point of error the trial court's refusal to grant his motion for severance prior to trial. It is well settled that trial courts have discretion to grant or deny a severance, and on appeal we will not disturb the ruling in the absence of an abuse of that discretion. *Cox v. State*, 305 Ark. 244, 808

S.W. 2d 306 (1991). In determining whether to grant a severance, a trial court should weigh the following factors: (1) whether the defenses of the defendants are antagonistic; (2) whether it is difficult to segregate the evidence; (3) whether there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) whether one defendant could have deprived the other of all peremptory challenges; (5) whether one defendant will be compelled to testify if the other does so; (6) whether one defendant has no prior criminal record and the other has; and (7) whether circumstantial evidence against one defendant appears stronger than against the other. *Echols v. State*, 326 Ark. 917, 936 S.W. 2d 509 (1996). The presence of any one of the factors does not necessarily require severance, as there are multiple factors to consider. *Rockett v. State*, 319 Ark. 335, 891 S.W. 2d 366 (1995).

Appellant argues that the trial court erred in refusing to grant his pretrial motion for severance, because the nature of the charges indicated that they would present antagonistic defenses. We disagree. At the time the trial court denied the motion, there simply was no evidence that the defendants would present antagonistic defenses. In statements given to the authorities during the course of the investigation of Krystal's death, each of the defendants gave testimony that tended to absolve the other of wrongdoing. For instance, appellant's wife gave a statement that appellant was a good father who loved his children, and that he did not harm his children. Appellant's statement to authorities indicated that he believed his wife did a good job of caring for the children, and that she would not harm the children. There clearly was no evidence that the defendants would present antagonistic defenses until appellant testified and implicated his co-defendant in Krystal's death.

The State points out that antagonistic defenses arise when each defendant asserts his innocence and accuses the other of the crime, and the evidence cannot be successfully segregated. *Cooper v. State*, 324 Ark. 135, 919 S.W. 2d 205 (1996). However, our courts have held that when there is no reason the jury could not have believed both defenses, the defenses are not antagonistic. *Echols*, *supra*. In the present case, prior to trial, both defendants

maintained their innocence in causing Krystal's death. Both defendants stated that neither had caused the child harm, and that she had been fed. The only evidence tending to implicate one defendant and not the other was introduced in the testimony of the appellant, after the State had rested its case.

Appellant argues that there was difficulty in segregating the evidence. He argues that his co-defendant's taped statement that she did not cause Krystal's death, although admitted as a statement against her own interest, accused him by implication of causing Krystal's death. However, because both maintained their innocence at the time the motion was denied and neither accused the other, we cannot find that there was difficulty in segregating the evidence. Although there are other factors that are to be weighed in making the decision to sever, appellant does not argue that any of those factors were present. We accordingly decline to address those factors.

Appellant also contends that the trial court erred in admitting the taped statement made by Ida Hill. According to appellant, the introduction of the taped confession of his co-defendant who did not testify at a joint trial violated his rights under the Sixth Amendment's Confrontation Clause. It is well settled that where two or more defendants are tried jointly, the pretrial confession of one that implicates the other is not admissible against the other unless the confessing defendant waives his Fifth Amendment rights so as to permit cross examination. *Moore v. State*, 297 Ark. 296, 761 S.W. 2d 894 (1988). Ida Hill's statement did not contain a confession. In fact, Ms. Hill's statement tended to clear appellant of any wrongdoing. In her statement, Ms. Hill stated that appellant never abused Krystal, that he fed her, and that he was a loving father. In the absence of a confession by his co-defendant, we cannot conclude that a violation of appellant's rights granted under the Sixth Amendment's Confrontation Clause occurred.

Appellant also argues that Ida Hill's statement was hearsay as to him, and should not have been admitted. Hearsay is any statement made by an out-of-court declarant that is repeated in court and is offered into evidence for the truth of the matter

asserted. *See Bragg v. State*, 328 Ark. 613, 946 S.W. 2d 654 (1997). Hearsay evidence is generally inadmissible, except as provided by law or the rules of evidence. *Id.* Even if we were to decide that Ms. Hill's statement is hearsay, the statement tended to exculpate, rather than inculpate, appellant. Moreover, appellant has failed to demonstrate that he was prejudiced by the trial court's ruling. Our appellate courts do not reverse a trial court's ruling regarding such evidentiary matters, absent a demonstration of prejudice. *See Misskelley v. State*, 323 Ark. 449, 915 S.W. 2d 702 (1996).

Appellant's final argument is that the trial court erred in denying his motion to suppress items seized pursuant to a search warrant that he characterizes as defective due to an excessively broad affidavit. Specifically, appellant argues that the warrant was defective because it did not describe with particularity the things to be seized.

In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances, and we reverse only if the ruling is clearly against the preponderance of the evidence. *State v. Blevins*, 304 Ark. 388, 802 S.W. 2d 465 (1991).

The requirements for the contents of search warrants are found in Rule 13.2(b) of the Arkansas Rules of Criminal Procedure, which provides in part that, "[t]he warrant shall state, or describe with particularity . . . the location and designation of the places to be searched[.]" Rule 16.2(e) provides that "[a] motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state."

Blytheville Police Captain James Sanders testified that after being informed by the medical examiner that Krystal's death was ruled a homicide that resulted from starvation and dehydration, he prepared an affidavit for a warrant to search appellant's home. The medical examiner also noted that there were approximately one hundred scars found on Krystal's body. In the affidavit for the search warrant, Captain Sanders wrote that a four-year-old child

had died in appellant's home, that the medical examiner had ruled the death a homicide, and that the cause of the death was starvation and dehydration. Captain Sanders wrote in the affidavit that he believed that there was currently being concealed in the home certain property, namely evidence of child abuse and neglect, abusive punishment, starvation, and visual observations of adverse child living conditions.

Captain Sanders presented the application for the search warrant to Blytheville Municipal Judge Max Harrison. After reading the affidavit, Judge Harrison asked Captain Sanders to inform him of the items the police were specifically looking for. Judge Harrison placed Captain Sanders under oath, and Captain Sanders informed the judge that the police were looking for extension cords, bent coat hangers, and metal fly swatters, based upon the medical examiner's opinion that the injuries found on Krystal's body could have been inflicted by those items. Judge Harrison then had an addendum typed on the bottom of the affidavit that included among the items to be seized bent coat hangers, metal fly swatters, extension cords, and drug paraphernalia.

Appellant contends that because the warrant did not state that the items added to the affidavit were to be seized, those items along with photographs taken of his home should not have been allowed into evidence. The supreme court has previously held that highly technical attacks on search warrants are not favored, as such attacks would only serve to discourage police officers from obtaining them. *Norman v. State*, 326 Ark. 210, 931 S.W. 2d 96 (1996). In *Vanderpool v. State*, 276 Ark. 220, 633 S.W. 2d 374 (1982), the supreme court reasoned that if a magistrate determines that an affidavit is insufficient the defect can be cured, if the affiant has the required good cause, by putting the affiant under oath and allowing him to testify or by allowing him to execute a supplemental affidavit under oath. The supreme court has also upheld the validity of a search warrant where, although the language in the warrant was vague, the affidavit attached to the warrant described the location to be searched with particularity. *See Baxter v. State*, 262 Ark. 303, 556 S.W. 2d 428 (1977).

Here, where the magistrate administered an oath to the officer and attached an addendum that stated with particularity the items to be seized, we cannot say that the trial court's decision to deny the motion to suppress was against the preponderance of the evidence.

Affirmed.

AREY and ROAF, JJ., agree.

WASHINGTON REGIONAL MEDICAL CENTER *v.* DIRECTOR, Employment Security Department, and Debbie L. Hamilton

E 97-160 979 S.W.2d 94

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 4, 1998

Burke & Eldridge, P.A., by: *Thomas J. Olmstead*, for appellant.

Phyllis Edwards, for appellees.

OLLY NEAL, Judge. Washington Regional Medical Center (WRMC) appeals the decision of the Board of Review that Debbie Hamilton was not disqualified from receiving unemployment compensation benefits. WRMC argues that appellee's failure to obtain certification as a respiratory therapist from the Arkansas State Medical Board amounted to misconduct. We disagree and affirm.

The relevant facts are these. The appellee was employed in several different capacities by WRMC from March 31, 1986, until January 1, 1997. She worked as a respiratory therapist from 1994 until her termination on January 1, 1997. In 1995, the General Assembly passed legislation that made it necessary for individuals

employed as respiratory therapists to obtain a license from the Arkansas State Medical Board authorizing the individual to practice respiratory care in the state. *See* Ark. Code Ann. § 17-99-301 (Repl. 1995). The appellee took the certification examination in November 1996 and failed to receive a passing score. Appellee was able to obtain a temporary license on at least two occasions. The last temporary license expired on December 30, 1996. According to WRMC, appellee was informed that if she did not obtain a license by December 30, 1996, she would no longer be employed there. Appellee indicated that she inquired as to whether she could transfer to another department. There was disputed testimony as to whether appellant's representatives offered to place appellee in another position, or whether she inquired of other employment opportunities with her employer. On December 26, 1996, appellee was away from work on sick leave. On December 30, 1996, her temporary license expired. On January 7, 1997, appellee received a letter dated January 3, 1997, from WRMC that informed her of the need to seek other employment as of January 1, 1997.

WRMC contends that appellee was terminated because of the legislation that required that she become certified and her failure to successfully obtain the requisite certification. WRMC asserts that this case presents an issue of first impression, as it involves the issue of whether an employee's failure to obtain a governmental license constitutes misconduct warranting a denial of unemployment compensation. WRMC cites several cases from other states that have upheld the denial of unemployment compensation for failure to obtain a required license. *See DiClemente v. Hudacs,* 616 N.Y.S.2d 678 (1994); *Richardson v. Employment Sec. Com'n,* 593 So. 2d 31 (Miss. 1992); *Pisarek v. Unemp. Comp. Bd. Of Review,* 532 A.2d 54 (Pa. Cmwlth. 1987); *Jones v. Unemp. Comp. Bd. Of Review,* 518 A.2d 1150 (Pa. 1986). Each of the cases cited by appellant can be easily distinguished from the case at bar.

In *Pisarek, supra,* the claimant had been employed for thirteen years as a physician's assistant when he was fired for not being properly certified. The decision to deny the claimant unemployment compensation benefits was based upon the claimant's admis-

sion that he was aware that he needed to obtain certification to work as a physician's assistant, but that he did not make any effort to obtain a license.

The claimant in *DiClemente, supra,* allowed his emergency medical technician (EMT) certification to expire, and failed to renew his certification after he had been informed that he needed the EMT certification to remain employed. The decision that he was not eligible for unemployment compensation benefits was based upon the finding that such conduct amounted to misconduct.

In *Williams, supra,* the claimant was employed as a pest-control serviceman. The performance of his duties required that he possess a valid driver's license and safe driving habits. The claimant's license was suspended because he failed to pay outstanding fines. His employment was terminated because the employer's insurer would not provide coverage for him. The Unemployment Compensation Review Board held that he was not entitled to unemployment compensation because of his willful misconduct in failing to pay fines.

In *Jones, supra,* the claimant was a teacher who was dismissed for failure to complete enough credits to obtain a teaching certificate. The Board found that appellant was terminated through her own fault, where the evidence revealed that she voluntarily delayed completing the required course work.

In the present case, appellee's failure to obtain certification was not the result of her failure to perform a required act, but rather was the result of her inability to obtain a satisfactory score on the licensing examination.

Although appellant argues that we should examine the manner in which other jurisdictions have addressed the issue of whether the failure to obtain a license required for employment precludes an award of unemployment compensation benefits, we believe that our present law provides an adequate means of addressing this issue. The issue of what factors constitute misconduct connected with the employee's work has long been resolved by this court. *See Clark v. Director,* 58 Ark. App. 1, 944 S.W.2d

862 (1997); *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997); *Dray v. Director*, 55 Ark. App. 66, 930 S.W.2d 390 (1996); *Perry v. Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995); *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988).

"Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has the right to expect; and (4) disregard of the employee's duties and obligations to her employer. *Kimble v. Director*, 60 Ark. App. 36, 959 S.W.2d 66 (1997). There is an element of intent associated with a determination of misconduct. *Id.*

As we explained in *Perry*, *supra*:

> Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence, or good-faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional or substantial disregard of an employer's interest or of an employee's duties and obligations.

48 Ark. App. 128, 891 S.W.2d 73 (1995).

The issue of misconduct is a question of fact for the Board of Review to determine. On appeal, the findings of fact made by the Board are conclusive if they are supported by substantial evidence. *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). Substantial evidence is defined as such evidence as a reasonable person might accept as adequately supporting a conclusion. *Rucker v. Director*, 52 Ark. App. 126, 915 S.W.2d 315 (1996). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

In the case at bar, appellee had been employed as a respiratory therapist by WRMC since 1994. WRMC notified appellee of the need to obtain certification after the legislation passed. Appellee testified that she studied and prepared to the

best of her ability in preparation for taking the examination. Therefore, appellee's failure was not the result of a conscious or deliberate disregard of her employer's interests. Here, where appellee has taken affirmative steps to procure required certification, we cannot say that her inability to pass the certification examination amounts to misconduct under our existing law.

Affirmed.

PITTMAN, AREY, ROGERS, and GRIFFEN, JJ., agree.

CRABTREE, J., dissents.

TERRY CRABTREE, Judge, dissenting. In this case of first impression for the State of Arkansas, the majority holds that an employee, who is terminated because of her failure to attain certification required by law, has not engaged in "misconduct," and is therefore entitled to unemployment benefits. I disagree.

Debbie Hamilton began working for appellant in 1986, first as a phlebotomist, and then, from 1994 until her termination on January 1, 1997, as a respiratory assistant. As the majority opinion correctly points out, our General Assembly passed legislation in 1995 requiring individuals engaged in the practice of respiratory care to obtain a license from the Arkansas State Medical Board ("Medical Board"). *See* Ark. Code Ann. §§ 17-99-301 & 302 (Repl. 1995). In order for a license to be issued, Hamilton, like other similarly situated respiratory care therapists, was required to pass certification examinations.

After having failed to achieve the minimum passing score on a prior occasion, the Medical Board informed appellee in writing, on November 8, 1996, that she needed to pass the examination by December 30, 1996, the expiration date of her second temporary license. Hamilton prepared for this exam but again failed to achieve the minimum score necessary for certification.

Appellant also received a letter from the Medical Board, informing it that it would be in violation of the laws of this State should it continue to employ Hamilton as a respiratory therapist

after December 30, 1996. Our statutory law is clear on this point, "[i]t shall be unlawful for any person to practice respiratory care or to profess to be a respiratory care practitioner . . . without first obtaining . . . a license authorizing the person to practice respiratory care in this state." Ark. Code Ann. § 17-99-301(a) (Repl. 1995). Faced with no other alternatives, appellant terminated Hamilton on January 1, 1997.

Appellant contends that Hamilton's failure to pass the required examinations for state respiratory care licensure amounts to misconduct under Ark. Code Ann. § 11-10-514(a)(1). I agree.

On appeal, we are not limited to a "rubber stamp" review of decisions arising from the Board of Review. Instead, where we have reviewed cases involving "misconduct" and found insubstantial evidence to support the findings of the Board, we have not hesitated to reverse. *See, e.g., Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997) (the claimant's use of "harsh and provocative" words held to have not risen to the level of misconduct); *Blackford v. Arkansas Employment Sec. Dept.*, 55 Ark. App. 418, 935 S.W.2d 311 (1996) (claimant did not intentionally withhold information vital to the employer's interest, nor deliberately inefficient, nor guilty of such negligence as to be deemed in deliberate violation of the employer's rules); *Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996) (claimant's actions did not amount to misconduct); and, *Grace Drilling Co. v. Director*, 31 Ark. App. 81, 790 S.W.2d 907 (1990) (holding that employee's actions constituted misconduct).

Furthermore, this Court has held illegal conduct to be appropriate grounds for a finding of misconduct. *See A. Tenenbaum Co. v. Director of Labor*, 32 Ark. 43, 796 S.W.2d 348 (1990); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Here, Hamilton would have violated the laws of this State had she continued to practice respiratory care. Appellant could have been held accountable for this illegal conduct should it have continued to employ Hamilton.

Citing *Kimble v. Director*, 60 Ark. App. 36, 959 S.W.2d 66 (1997), the majority provides four factors to be considered in determining whether an employee was engaged in "misconduct," (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has the right to expect; and (4) disregard of the employee's duties and obligations to her employer. The majority also cites intent as a critical element to be associated with a finding of "misconduct."

It is on this element, intent, that I beg to differ with the majority. The majority contends that Hamilton did her best to pass the necessary examinations, but could not. Therefore, the majority posits, Hamilton lacked the intent to act against the employer's interest. It is my position, however, that whenever continued employment would result in a violation of the laws of this State, that, in every case, there should be a finding of misconduct.

Finally, I would agree with those cases from other jurisdictions, cited by appellant, which have made the determination that the failure to obtain the necessary state licensure equates to misconduct. *See, e.g., DiClemente v. Hudacs*, 616 N.Y.S.2d 678 (1994) (EMT denied unemployment benefits on the basis of misconduct due to his failure to obtain EMT certification); *Pisarek v. Unemployment Comp. Bd. Of Rev.*, 532 A.2d 54 (Pa. Cmwlth. 1987) (physician's assistant denied unemployment benefits because of the failure to obtain certification); *Richardson v. Employment Sec. Com'n.*, 593 So.2d 31 (Miss. 1992) (detoxification specialist denied benefits due to misconduct associated with the employee's failure to maintain a valid driver's license after his license was suspended for driving without liability insurance).

Derrick ALLEN *v.* STATE of Arkansas

CA CR 98-178 977 S.W.2d 230

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered November 4, 1998

[Petition for rehearing denied December 2, 1998.*]

* ROBBINS, C.J., and BIRD, J., would grant.

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

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

ANDREE LAYTON ROAF, Judge. Derrick L. Allen was convicted in a bench trial of second-degree battery and resisting arrest, stemming from an altercation that he had with North Little Rock police officers. For the felony battery offense, he received three years' probation and 120 days in the Pulaski

County Jail, to run concurrent with a nine-month sentence imposed by the trial court for the misdemeanor resisting-arrest offense. Allen's sole point on appeal is that the evidence was insufficient to sustain his second-degree battery conviction. We agree, and affirm as modified.

On the evening of September 12, 1996, Allen, a seventeen-year-old senior at North Little Rock High School West campus, attended a North Little Rock High School East campus football game wearing sunglasses and headphones. Ken Kirspel, principal of the East campus, and Gary Goss, the athletic director, advised Allen of a school policy that prohibited wearing sunglasses and headphones on school grounds. Allen initially removed his sunglasses and headphones, but later put them back on. When Kirspel and Goss subsequently encountered Allen again wearing the prohibited items, they informed him that he would have to leave the game.

Allen refused to comply, and several uniformed, off-duty North Little Rock police officers came to assist them. Because a nearby exit gate was locked, the officers attempted to lead Allen to another exit through the stadium manager's office. A struggle ensued in the office when the officers attempted to place Allen under arrest. Before he was subdued, Allen got one arm free and raised it in a threatening manner; one officer testified that he saw Allen strike Officer James Bona, the victim of the battery, on the top of his head.

During the altercation, Officer Bona sustained several abrasions to his upper forehead that he described as "oozing" blood. While acknowledging that he did not notice the injury until it was called to his attention by other officers and that the injury did not cause him to be unable to perform his duties, he nonetheless described the pain from his injuries as "stinging pretty good." Officer Bona was later examined at a hospital, but did not receive stitches or pain medication for his injuries.

When Allen moved for directed verdict at the conclusion of the State's evidence, the trial court denied the motion, finding that Officer Bona suffered an impairment of physical condition because he had to stop what he was doing and go to the hospital.

On appeal, Allen argues that the evidence was insufficient to establish that he caused physical injury to Officer Bona. Relying on *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), Allen asserts that the evidence is insufficient to sustain his conviction because Officer Bona's description of his pain indicated that it was not substantial, that he did not require medical treatment, and that he opined that the injury did not render him unable to perform his duties.

In resolving the question of the sufficiency of the evidence in a criminal case, this court views the evidence in the light most favorable to the State and affirms the judgment if there is any substantial evidence to support the finding of the trier of fact. *Armstrong v. State*, 35 Ark. App. 188, 816 S.W.2d 620 (1991). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* In order for the court to have found Allen guilty of second-degree battery in violation of Ark. Code Ann. § 5-13-202(a)(4)(A) (Repl. 1997), the State was required to prove: "(4) [H]e intentionally or knowingly without legal justification cause[d] physical injury to one he knows to be: (A) [a] law enforcement officer . . . while such officer . . . is acting in the line of duty . . . ."

Arkansas Code Annotated section 5-1-102(14) (Repl. 1997) defines "physical injury" as the impairment of physical condition or the infliction of substantial pain. Pain is a subjective matter and difficult to measure from testimony. *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997). In determining whether an injury inflicts substantial pain, the fact-finder must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. *Id.* The fact-finder is not required to set aside its common knowledge and may consider the evidence in light of its observations and experiences in the affairs of life. *Id.*

First, *Kelly v. State*, *supra*, is clearly analogous. In that case, this court found the evidence insufficient to support a jury verdict

convicting the defendant of battery in the third degree because the evidence did not show that the injuries to the victim caused him "substantial pain," or "impairment, " where the injury did not require medical attention and was described by one witness as a "fingernail scratch." 7 Ark. App. at 136, 644 S.W.2d at 642. In *Kelly*, the victim suffered his injury when the defendant stabbed him in the shoulder through his clothes. *Id.* The case is silent as to whether the victim testified as to how painful the injury actually was. Certainly the injury in the instant case is no more extensive than the knife wound in *Kelly*.

By comparison, in *Johnson v. State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989), this court upheld a battery conviction by finding that a police officer had sustained a physical injury by virtue of the infliction of substantial pain despite his only injury being what a doctor described as a "superficial abrasion" to his little finger. As in the instant case, the officer had sought a medical examination of the injury after the incident and resumed his duties afterward. However, *Johnson* is readily distinguishable from the instant case by the severity of the injuries. In *Johnson,* the victim testified that the defendant took his left hand and beat it against the pavement "five, six, seven times," and that "the pain was intense." 28 Ark. App. at 257, 773 S.W.2d at 451. Further, the pain actually affected the officer's job performance, as he testified, "When the pain got to me I had to turn loose of his hand," and stated that he was required to wear a splint for two days, did not regain full use of his finger for a week, and could write only with pain. *Id.* By comparison, Officer Bona testified that he did not even notice the injury until after Allen had been subdued and his fellow officers called his attention to it. The injury did not impair Officer Bona in his job performance. The fact that he had to have his injury checked at the hospital was apparently not even his idea, but rather required by his supervisor, and the only reason that he did not return to the stadium after finishing at the hospital was because the game was over. Here, in denying Allen's "directed verdict" motion, the trial court found only that Officer Bona suffered a physical impairment under the meaning of the statute because he had to leave the job site and declined to find

that he suffered substantial pain. While the State correctly contends that pain is a subjective matter and that bruises and scrapes can cause substantial pain, significantly, neither Officer Bona nor the trial court characterized this injury as causing substantial pain. Further, we cannot say from the record before us that the testimony describing the injury and the pain associated with it rises to the level of "infliction of substantial pain."

Moreover, there is also insufficient evidence to support a finding of impairment of physical condition. Although there are no reported cases in which the affirmance of a battery conviction is based solely on this alternative means of establishing physical injury, this court found sufficient evidence of both the infliction of substantial pain and the impairment of physical condition in *Hundley v. State,* 22 Ark. App. 239, 738 S.W.2d 107 (1987). In *Hundley*, the victim, a police officer, was stabbed completely through the shoulder with a three-inch knife and testified that afterward he felt faint, experienced chest pains and difficulty in breathing, and sought treatment at an infirmary. This court held that these symptoms, in addition to evidencing substantial pain, showed the "temporary impairment of physical condition." 22 Ark. App. at 243, 738 S.W.2d at 110. In the instant case, we have no symptoms whatsoever on which to base a finding of impairment.

As far as considering the evidence in light of the factors listed in *Sykes v. State, supra,* the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted, it is significant that Officer Bona did not even remember being struck by Allen. Accordingly, we have here only a scuffle involving at most a single blow, and Allen's conduct, while unlawful, was hardly a severe attack.

As to the disposition of this case, in *Tigue v. State,* 319 Ark. 147, 889 S.W.2d 760 (1994) the supreme court stated,

> [w]here the evidence presented is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser included offense of that crime, this court may "reduce the punishment to the maximum for the

> lesser offense, reduce it to the minimum for the lesser offense, fix it . . . at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally.

The evidence in this case would clearly sustain a conviction for assault in the second degree. Arkansas Code Annotated section 5-13-206 (Repl. 1997) provides:

> (a) A person commits assault in the second degree if he recklessly engages in conduct which creates a substantial risk of physical injury to another person.
>
> (b) Assault in the second degree is a Class B misdemeanor.

We therefore modify the judgment of conviction to the lesser-included offense of assault in the second degree under Ark. Code Ann. § 5-13-206, and reduce Allen's concurrent sentence to the maximum allowable for Class B misdemeanors, ninety days. *See* Ark. Code Ann. § 5-4-401(b)(2) (Repl. 1997).

Affirmed as modified.

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

ROBBINS, C.J., and BIRD, J., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. I agree that we can modify a judgment of conviction to a lesser-included offense in an appropriate case, but I disagree that this case is an appropriate one for modification. The difference that separates me from the majority is the application of the meaning of "the infliction of substantial pain." Appellant was charged with second-degree battery in violation of Ark. Code Ann. § 5-13-202(a)(4)(A) (Repl. 1997), which involves "physical injury" to a law enforcement officer. Arkansas Code Annotated section 5-1-102(14) (Repl. 1997) defines "physical injury" as the impairment of physical condition or the infliction of substantial pain. The trial court found that Officer James Bona suffered a physical injury at the hands of appellant. The majority holds that, as a matter of law, the trial court could not reasonably make such a finding.

In determining the sufficiency of the evidence to support a criminal conviction, we must review the proof in the light most favorable to the State, considering only that evidence which tends to support the verdict. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996); *Moore v. State*, 58 Ark. App. 120, 947 S.W.2d 395 (1997). The proof presented to the court permits the following facts to be found:

> North Little Rock police officer James Bona was working a football game at the North Little Rock High School East Campus on September 12, 1996. During an altercation that evening, appellant struck Officer Bona with his fist on which were several rings. The blow caused three or four cuts to the top of the officer's head. While the cuts did not bleed profusely, they oozed blood. Officer Bona testified that "there was some pain. It was stinging pretty good." He went to the hospital to be checked out, and was treated and released.

This is the evidence that could support a determination that appellant inflicted substantial pain to Officer Bona.

In modifying the trial court's judgment, the majority opinion emphasizes and discusses the following evidence that does not tend to support the trial court's decision:

1) Officer Bona testified that he did not even notice the injury until after appellant had been subdued and his fellow officers called his attention to it;

2) that the injury did not impair Officer Bona in his job performance;

3) that it was not Officer Bona's idea to go to the hospital, but he was required to go by his supervisor, and the only reason that he did not return to the stadium after finishing at the hospital was because the game was over;

4) and finally, that it was significant that Officer Bona did not even remember being struck by appellant.

Were we sitting as a jury, all of the above evidence would be relevant and pertinent in a determination of guilt. We do not, however, sit as a jury. The majority violates our standard of review

that requires us to only consider the evidence which tends to support the trial court's decision. *Prowell v. State, supra; Moore v. State, supra.*

I believe that a blow to the head of a police officer by a fist with several finger-rings, which causes blood to ooze, is substantial evidence and would permit the finder of fact to reasonably conclude that this constituted "the infliction of substantial pain" to the officer.[1] I would affirm the appellant's conviction without modification.

BIRD, J., joins in this dissent.

[1] While the majority opinion states that the trial court made no finding that Officer Bona suffered substantial pain, this conclusion is not apparent from the record. After the State's case, the trial court denied the appellant's motion for directed verdict, and commented that there was evidence of an impairment to Officer Bona. At the conclusion of the case, the trial court denied the appellant's directed verdict motion without comment, and thereafter announced a judgment of guilt on the second-degree battery charge. The trial court made no specific factual findings at the conclusion of the case, nor did it at any time express the opinion that Officer Bona did not suffer substantial pain. We presume that the trial court acted properly and made such findings of fact as were necessary to support the judgment. *Morgan v. Stocks*, 197 Ark. 368, 122 S.W.2d 953 (1938); *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998). In reaching its judgment, the trial court did not specify on which basis the State proved a physical injury, and no clarification was requested. Our duty on review of this case is to affirm if there is substantial evidence to support the conviction, whether this evidence established "substantial pain" or whether it established an "impairment;" either would support a conviction under the statute at issue.

Paul Craig JORDAN *v.* JERRY D. SWEETSER, INC.

CA 98-040 977 S.W.2d 244

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1998

[Petition for rehearing denied December 9, 1999.]

Kelly Ann Proctor-Pierce, for appellant.

Bassettt Law Firm, by: *William Robert Still* and *Vince Chadick*, for appellee.

ANDREE LAYTON ROAF, Judge. This is a negligence case. Paul Craig Jordan appeals a directed verdict in favor of Jerry D. Sweetser, Inc. (hereinafter Sweetser), the road contractor in charge of the construction site where Jordan was injured. Jordan argues that the trial court erred in granting the directed-verdict motion because, viewing the evidence in the record with all reasonable inferences in the light most favorable to him, there is substantial evidence of the construction company's negligence and material breach of the construction contract. We disagree, and affirm.

On January 26, 1994, at approximately 5:30 p.m., Jordan left his Fayettville home in his pickup truck and headed to a church supper and Bible study at the First Baptist Church in Springdale. His route took him through a section of North Street in Fayetteville that was being widened from two lanes to four lanes by Sweetser, pursuant to a contract with and under supervision of the Arkansas State Highway Commission. At the site, traffic was detoured onto a twenty-foot wide section of road with two-way traffic. The respective lanes were denoted by double four-inch yellow stripes. High-visibility orange plastic barrels marked the side of the detour where excavation was underway. On this particular evening, the street was wet from a recent rain.

Jordan had proceeded approximately a mile past the construction when he discovered that he had forgotten his Bible and lesson plan. He admitted that he was "a little aggravated" over forgetting his materials and that it caused him to be running late. He turned around and eventually reentered the detour through the construction site. Jordan encountered the headlights of an automobile passing through the site in the opposite direction.

According to Jordan, he thought that the other vehicle was about to hit him and he tried to avoid it by jerking his truck to the right. He remembered hitting something that he assumed was a warning barrel and then crashing into a deep excavation, some two to three feet off the edge of the roadway. Jordan hit his head and lost consciousness. Eventually he awoke and tried to radio for help on his C.B. before again passing out. Some time later, he was rescued by police and taken to the hospital. Jordan apparently suffered permanent injuries.

On May 19, 1995, Jordan filed suit against Sweetser, alleging that it negligently constructed and failed to properly mark the excavation. Sweetser denied liability and invoked sovereign immunity in its answer. A two-day jury trial followed.

Jordan attempted to prove negligence on the part of Sweetser in two ways. First, he attempted to prove that the excavation was deeper than the plans specified. Toward this end he called as his first witness private investigator Gary Swearington, who testified that he measured the excavation at the point where Jordan left the roadway and that it was slightly more than six-feet deep. He also introduced a photograph of a private investigator, standing in the excavation, to show that the excavation was "as deep as that man is tall." Jordan also attempted to prove noncompliance with the plans through the testimony of Sweetser president Bill Sweetser and general superintendent Gary Tyree. Bill Sweetser testified that he thought the excavation was three or four feet deep, but was not sure. Tyree testified that although he did not clearly remember this part of the job, or actually know exactly where Jordan drove into the excavation, he thought the excavation should have only been three or four feet deep. Jordan asked Tyree in open court to find the depth specified in the plans and to determine if a six-foot hole was out of compliance. Tyree, however, expressed his inability to interpret the plans. With the court's permission, Jordan gave Tyree leave to study the plans when the trial concluded for the day, with the understanding that he would reserve the question for when the trial resumed in the morning. According to the record, Jordan did not pursue this question when the trial resumed.

Jordan also attempted to prove negligence by introducing into evidence general provisions of a publication produced by the Federal Highway Administration entitled "Manual on Uniform Traffic Control Devices" and the Arkansas State Highway and Transportation Department publication "Standard Specifications for Highway Construction," and by questioning Bill Sweetser about their applicability to the North Street improvements. He also questioned Tyree about the absence of white striping, or "fog lines" on the edge of the pavement, where it was apparently required by the standard drawings for the job. Tyree, however, testified that the specific plans directed that high-visibility traffic-control barrels be placed along the roadway instead and that the specific drawings took precedence over the standard drawings. Jordan also elicited testimony concerning the placement and maintenance of the barrels.

At the close of Jordan's case, Sweetser moved for a directed verdict, relying on *Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992), to argue that there was no evidence of negligence independent of the plans or in following the plans and therefore it was entitled to share in the State's sovereign immunity. Jordan resisted the motion by arguing two theories: 1) that there was testimony that, viewed in the light most favorable to the plaintiff, showed that there were required markings that were not there; and 2) that in addition to the plans and specifications, the contractor has an obligation to provide for the safety of the traveling public, which is dictated by his judgment, prudence, and reasonable care. Regarding the latter point, Jordan asserted that what constituted the required protective measures was a fact question for the jury. The trial judge expressed skepticism about Jordan's argument, but ruled at that time that he found a question of fact in whether the standard rules regarding the placement of white fog lines on the edge of the pavement was overridden by the more specific rules that specified that barrels mark the edge of the pavement as Tyree testified.

In Sweetser's case-in-chief, Arkansas Highway and Transportation Department resident engineer Leon Brewer, who oversaw the North Street project, testified. Brewer brought with him a copy of the daily diary of inspections made by him and his inspec-

tors on the project. Brewer testified that the daily inspections of the site revealed no deficiencies in the placement of warning devices and that the devices were properly placed according to the plans. He also testified that his department's specifications did not require white striping at the edge of the pavement. According to Brewer, the specific plan represented a site-specific adaptation from the standard drawings. Finally, he testified that he found no deficiency with respect to the excavation.

At the close of the evidence, Sweetser renewed its directed-verdict motion. Jordan again resisted the motion by asserting that: 1) the lines were missing, 2) the "ditch" was "too deep," and 3) the contract imposed "obligations separate and apart from the specifications under the books introduced in evidence." The trial judge granted the motion after noting that his previous ruling was essentially based on his assessment that the contract could somehow be interpreted to require the white striping. The trial judge, however, indicated that he had reconsidered and now concluded that the barrels provided better warning of the conditions than the striping. Furthermore, he found no other evidence of contractor negligence.

Jordan argues that the trial court erred in granting Sweetser's directed-verdict motion because there was substantial evidence in the record of Sweetser's negligence and material breach of the construction contract. He contends that Sweetser failed to comply with the contract, plans, and federal and state manuals regarding the placement of warning devices. Further, Jordan argues that *Muskogee Bridge Co. v. Stansell, supra,* which he contends has very similar facts to the instant case, does not allow Sweetser the benefit of sovereign immunity. We find Jordan's argument unpersuasive.

A directed verdict for a defendant is proper only when there is no substantial evidence from which the jurors as reasonable individuals could find for the plaintiff. *Avery v. Ward*, 326 Ark. 829, 934 S.W.2d 516 (1996). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or the other, without resort to speculation or conjecture. *Id.* Evidence introduced by the plaintiff, together with all reasonable inferences therefrom, is examined in the light

most favorable to the plaintiff when a motion for directed verdict is made by the defendant. *Id.* With this standard in mind, we conclude that the directed verdict was proper.

Jordan's negligence argument is rooted in his contention that Sweetser owed a duty of care that was more extensive than its obligation under the contract it had with the Arkansas Highway Commission. In support of this theory, Jordan points to a general provision in the Manual on Uniform Traffic Control Devices, which states, "In particular situations not adequately covered by the provisions of the Manual, the protection of the traveling public, pedestrians, officers, fire persons, and of the workers on the scene will dictate the measures to be taken, consistent with the general principles set forth herein." He also points to Bill Sweetser's testimony that he was not familiar with the manual as proof of his company's noncompliance. We find these argument unpersuasive and not well supported by the facts.

Contrary to Jordan's assertion, the warning-device placement plan was more extensive than the standard drawings called for, and significantly, that decision was made by the highway commission. The State's contract specified that high-visibility traffic-control barrels were to mark the edge of the pavement. Contained within *Muskogee Bridge Co. v. Stansell* is a jury instruction that sets out the black-letter law regarding the liability of construction companies under contract with the state. It states:

> A contractor who performs in accordance with the terms of [a] contract with a governmental agency is not liable for damages resulting from that performance. However, a contractor is liable for damages resulting from negligence in the performance of the contract.

Id.

Moreover, the question of whether a duty is owed is always a question of law and never one for the jury. *Bartley v. Sweetser*, 319 Ark. 117, 890 S.W.2d 250 (1994). Accordingly, we find that this alleged higher duty is simply not the law.

In addition, Jordan's assertion that Bill Sweetser's apparent unfamiliarity with the manual could support an inference

of noncompliance is likewise unpersuasive. Sweetser testified that the individual superintendents and foreman were responsible with keeping up with the various regulations concerning the maintenance of traffic-control devices.

Regarding Sweetser's alleged deviation from the plans and contract, Jordan asserts that Sweetser dug the excavation to a depth of six feet when the plans called for four to five feet; failed to install white striping along the edge of the roadway; failed to "adequately supplement or modify" the traffic-control devices when they were placed on notice that they were inadequate; and violated federal law by willfully falsifying, distorting, or misrepresenting information concerning the placement of traffic-control devices under the terms of the construction contract. This argument also fails to persuade.

There simply is no proof that the depth of the excavation exceeded that which was specified in the plans. Although the excavation may have been deeper than either Bill Sweetser or Gary Tyree thought it was, neither man claimed to have a specific recollection as to how deep it actually was or should have been. Moreover, the plans, which were admitted into evidence, do not clearly show how deep the excavation was required to be at the point in question. Although Jordan questioned Tyree on this issue, he ultimately abandoned this line of inquiry. Only Leon Brewer of the highway department actually answered this question, and he testified that the excavation was within specifications.

Furthermore, even if the excavation was deeper than the plans specified, unlike the situation in *Muskogee Bridge*, that variation did not cause the accident. In *Muskogee Bridge*, the supreme court affirmed a jury verdict in favor of persons injured when a driver lost control of her vehicle as she passed over an unmarked dip on a bridge that was being renovated by a contractor pursuant to a contract with the Arkansas State Highway Commission. The supreme court held that there was substantial evidence that the dip was between four and eight inches and that the contract specified that it be no more than an inch to an inch and a half, and the creation of the drop-off and failure to properly warn of its location constituted both negligence *and proximate cause*

of the accident. In the instant case, Jordan's own testimony establishes that the cause of the accident was an oncoming vehicle that he perceived to be in his lane and his actions in swerving or jerking his truck off the roadway. While it is true that proximate cause is usually a question for the jury, *see, e.g., Craig v. Taylor*, 323 Ark. 363, 915 S.W.2d 257 (1996), it is not error not to submit the question to the jury if, based on the evidence adduced during the trial, the jury would be required to resort to speculation or conjecture to find for the plaintiff. *See Ambrus v. Russell Chevrolet Co.*, 327 Ark. 367, 937 S.W.2d 183 (1997).

Jordan also urges this court to find dispositive the fact that Sweetser did not place white stripes along the edge of the pavement even though they were required by the standard drawings. However, the specific drawings required traffic-control barrels and not the white lines required by the standard drawings, and both Tyree and Brewer testified that the specific drawings took precedence. There was no evidence to the contrary regarding this interpretation. Moreover, as was the case with his excavation argument, there is absolutely no evidence that the accident was caused by Jordan's inability to discern the edge of the pavement. Indeed, Jordan testified that he intentionally left the roadway and that he even hit one of the traffic-control barrels. We also cannot fault the trial judge's reasoning that barrels which stood three feet high marked the edge of the roadway better than flat white striping. Again, in contrast to the situation in *Muskogee Bridge*, Jordan did not present any evidence that the use of barrels in lieu of white striping caused the accident.

As to Jordan's contention that Sweetser failed to supplement the devices when it was placed on notice that the existing arrangement was inadequate, the record is devoid of any evidence that Sweetser had such notice. While it is true that Jordan elicited testimony from Bill Sweetser that he perhaps could have placed more warning devices, the record is devoid of evidence that, except for Jordan's accident, there was any incident that would have put Sweetser on notice of the inadequacy of the warning devices.

Regarding Jordan's argument that Sweetser falsified the inspection reports concerning the placement of the barrels, and that this wrongful act provided the necessary inference that the barrels were improperly placed, we note that Jordan did not make this argument in response to either of Sweetser's directed-verdict motions. It is well settled that arguments raised for the first time on appeal will not be considered. *See, e.g., Ambrus v. Russell Chevrolet Co., supra.*

In sum, this accident resulted from Jordan's reaction to the presence of an oncoming vehicle that he perceived to be in his lane. He did not testify that he was unable to follow the detour because of Sweetser's failure to properly mark the pavement. There is also no evidence that Sweetser failed to properly perform its contract. Accordingly, we cannot say that the trial court erred in granting Sweetser's motion for directed verdict, and affirm.

Affirmed.

AREY and NEAL, JJ., agree.

BURLINGTON INDUSTRIES and Liberty Mutual Insurance Company *v.* Alice PICKETT

CA 97-1380 983 S.W.2d 126

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered November 11, 1998

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellants.

Baim, Gunti, Mouser, DeSimone & Robinson, by: *Judith A. DeSimone*, for appellee.

SAM BIRD, Judge. This is an appeal from a Workers' Compensation Commission order that awarded appellee, Alice Pickett, interest that was incurred on medical bills paid by her health-insurance carriers after she suffered a compensable injury while working for Burlington Industries. The appellants, Burlington Industries and Liberty Mutual Insurance Company, do not contest the medical bills that they have been ordered to pay, but they contend that they should not have to pay interest on these bills because the bills were not itemized or provided to them in a timely manner and because the bills were not submitted in accordance with Rule 30 of the Workers' Compensation Commission; therefore, they have not been able to evaluate them to determine which bills are reasonable and necessary.

Appellee was employed by Burlington Industries when she sustained a gradual-onset injury to her lower back. The appellants controverted compensability, and, after a hearing on the issue, the administrative law judge entered an opinion on February 9, 1994,[1] finding that appellee had sustained a compensable injury and awarding temporary total disability benefits beginning May 25, 1990, continuing reasonable medical expenses, and awarding attorney's fees. Between the time that the injury manifested itself in May 1990, and the time that the injury was found to be compensable in 1994, the appellee underwent two back surgeries and incurred substantial medical bills.

On March 1, 1996, a second hearing was held to determine claimant's entitlement to additional benefits because she contended that she was permanently and totally disabled, and she sought reimbursement for medical payments that had been made by Provident Insurance Company, John Hancock Insurance Company, Medicare, and herself. The law judge found that as of the March 1, 1996, hearing, the appellants had paid a total of $35,589.74 in indemnity benefits, temporary total disability benefits from May 25, 1990, through February 22, 1994, and attorney's fees. However, the appellants had paid neither indemnity benefits nor medical benefits for the period subsequent to February 22, 1994. The law judge also found that Provident Life Insurance Company, the group health-care provider for the employees of Burlington Industries, had paid $43,612; that John Hancock Insurance Company, the health-care provider for appellee's husband, had paid $47,552.18, and that Medicare had paid $408. Further, the law judge found that appellee had incurred $1,066.17 in out-of-pocket expenses and at least $500 in annual deductibles.

On October 31, 1996, the administrative law judge entered an order in which he made the following findings[2]:

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[1] In his October 31, 1996, order, the law judge repeatedly referred to his "February 22, 1994, Opinion." However, it is obvious to us from the record that the law judge's first order was actually dated February 9, 1994, and that his repeated reference to an opinion or order dated February 22, 1994, is a mistake.

[2] The law judge referred to the appellants as "Respondents #1" because, at the time of the hearing, the Second Injury Fund was a party in the case, and the law judge referred to it as "Respondent #2."

9. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 24, 1990.

10. Respondents #1 have failed to pay temporary total disability benefits to the claimant subsequent to February 22, 1994, and a 20% penalty is assessed on said benefits pursuant to Ark. Code Ann. § 11-9-802(c).

11. Respondents #1 have failed to pay indemnity benefits to the claimant to correspond to the claimant's permanent physical impairment as a result of her May 24, 1990, compensable injury, accordingly, a 18% penalty attached to said benefits pursuant to Ark. Code Ann. § 11-9-802(b).

12. Respondents #1 is liable for interest, pursuant to Ark. Code Ann. § 11-9-809, on incurred medical paid on behalf of claimant's compensable injury by Providence [*sic*] Life Insurance; John Hancock Insurance and Medicare — Blue Cross/Blue Shield.

The Full Commission affirmed and adopted the findings of the law judge, and the appellants bring this appeal.

When reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998); *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993); *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 941 S.W.2d 434 (1997); *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). 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 Commis-

sion's conclusion, we must affirm its decision. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998); *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). In our review, this court recognizes that we must defer to the Commission in determining the weight of the evidence and the credibility of the witnesses. *High Capacity Prods. v. Moore, supra*; *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). We have applied this standard of review to the case at bar and find there to be substantial evidence to support the Commission's decision, and we affirm.

Appellants argue that the Commission erred in awarding interest because the appellee did not produce any medical bills in conformance with Rule 30 of the Workers' Compensation Commission; therefore, the bills cannot be considered "properly submitted bills." They argue that appellee failed to present any medical bills until the second hearing, on March 1, 1996, and those bills contained only total amounts; not a breakdown as required by Commission Rule 30. The appellants argue that because the bills were not itemized and submitted in a timely fashion, they have not been afforded the opportunity to determine the reasonableness, necessity, or relatedness of the medical treatment or the amounts claimed. Moreover, appellants argue that a blanket statement from a health-insurance provider with only the total amount paid is insufficient for a determination of the reasonableness of the service as required by the Commission under Rule 30. Appellants also assert that the burden falls on the appellee to produce bills for medical services and to prove that those services were reasonable, necessary, and related to her compensable injury, and that appellee has failed to meet that burden.

Arkansas Code Annotated section 11-9-809 (Repl. 1996) provides for the assessment of interest on awards of workers' compensation benefits. This section states that "Compensation shall bear interest at the legal rate from the day an award is made by either an administrative law judge or the full Workers' Compensation Commission on all accrued and unpaid compensation." This court has stated that interest on an award of compensation begins to run upon accrued and unpaid installments of compensa-

tion to be computed from the dates when they should have been paid, beginning, however, no earlier than the date on which a referee or full Commission first enters an award allowing or denying a claim. *Eureka Log Homes v. Mantonya*, 28 Ark. App. 180, 772 S.W.2d 365 (1989). This rule was explained in *Clemons v. Bearden Lumber Co.*, 240 Ark. 571, 401 S.W.2d 16 (1966), in which the court wrote,

> This rule has the merit of simplicity, fixing the rights of all concerned with certainty. It has the far more important merit of fairness, providing the claimant with some measure of redress for the fact that the payment of his just claim has been delayed, through no fault of his, for months or even, as in the case at bar, for years. Morever [*sic*] this construction of the statute treats delinquent payments with the same justice that applies to advance payments, which must be discounted to their present value.

240 Ark. at 576, 401 S.W.2d at 19. This court has found that since very few seriously injured employees have the resources to pay for expensive medical care, the award of interest is part and parcel of the benefits due an injured employee. *Eureka Log Homes v. Mantonya, supra.*

Arkansas Workers' Compensation Rule 30 was promulgated pursuant to Ark. Code Ann. § 11-9-517 (Repl. 1996) for the purpose of implementing a medical cost-containment program with respect to injuries adjudged to be compensable under our workers' compensation laws. While it is true that a workers' compensation claimant has the burden of proving the necessity, reasonableness, and the relatedness of his bills for medical services, we do not read Rule 30 as either enhancing or diminishing that burden. Nor do we see anything in Rule 30 that relieves a workers' compensation insurance carrier from the obligation to pay interest pursuant to Ark. Code Ann. § 11-9-809. Rather, Rule 30 is aimed at providing a procedure for the submission, review, and payment of workers' compensation related medical expenses, with the goal of reducing those expenses. The rule establishes a procedure by which a carrier that disputes a medical-service provider's bill can seek an adjustment and can even request an administrative hearing if no agreement can be reached with a medical-services provider to adjust a bill. This procedure was

available to the appellants had they elected to utilize it. Instead, appellants elected to contest the compensability of appellee's claim, and, with full knowledge that appellee had undergone substantial medical treatment, including two surgeries, and incurred substantial bills, stood aside while the medical bills were being paid by someone else.

It is also true, as appellants assert, that Rule 30(I)(2) states that a carrier shall not make payment for a service unless all required review activities pertaining to that service are complete. Again, appellants' difficulty in relying upon this provision is that they chose to contest the compensability of appellee's claim and to not pay the bills. We do not believe that Rule 30 can be construed to permit a workers' compensation carrier to controvert the compensability of a claim, decline to pay any of the claimant's medical bills, and then, upon the Commission's determination that the claim is compensable, complain that it did not have the opportunity to utilize the procedures set out in Rule 30 for objecting to the appropriateness of those bills. By the time the claim was determined to be compensable, the medical bills had been long since paid by appellee's medical insurers, and it was too late for appellants to avail themselves of the provisions of Rule 30. In declining to pay the bills and standing by while the appellee or some other insurance source paid them, appellants waived their right to rely on Rule 30.

The law judge addressed appellants' argument that they should not have to pay interest, when he wrote,

> The evidence clearly reflects that Respondents #1 had the capabilities and means to ascertain the extent of its obligation relative to the claimant. Further, Respondents #1 were under directive to satisfy its statutory obligation pursuant to the February 22, 1994, Order and Opinion. The claimant in the instant claim has undergone a hearing on the issue of compensability relative to her May 25, 1990, injury and has been awarded workers' compensation benefits in a February 22, 1994, Opinion. Thereafter, an appeal was had and respondents directed to comply with the previous order and ruling. As a consequence of the orders of the Commission filed in this claim respondent was not in a position to idly sit by and wait to see if the bills would be submitted for

> the claimant's medical treatment. Respondent was fully aware that it had not paid bills relative to the claimant's surgeries and medical travel. . . . Respondents #1 failure to even put forth a possible good faith effort is evidenced by the fact that it has not paid even minimally on the impairment rating. Respondents #1 adherence to its statutory obligation under the Arkansas Workers' Compensation statute and Awards, Order, and directives of the Workers' Compensation Commission with respect to the handling of this claim when considered in its entirety is at best flagrant and broach the boundary of misconduct.

Appellants presented no evidence of any efforts they had made to obtain copies of the medical bills or of any attempts on their part to pay them. The law judge found that appellants were fully aware that they had not paid the bills relative to the claimant's surgeries and medical travel, and he concluded "that respondent's [*sic*] explanation for its failure to pay medical benefits on behalf of the claimant in accordance with the February 22, 1994, Award and Order is not persuasive and wholly lacking in credibility." This court has stated that we defer to the Commission in determining the weight of the evidence and the credibility of the witnesses. *High Capacity Prods. v. Moore* and *Mikel v. Engineered Specialty Plastics, supra.* We cannot say that the decision of the Commission is not supported by substantial evidence.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

PITTMAN and AREY, JJ., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. The prevailing opinion of our court affirms an award of interest made by the Workers' Compensation Commission to an injured employee. The interest award pertains to over $91,000 in medical expenses incurred by the claimant. This does not include a bill for $150, which was submitted to appellant's carrier and timely paid. The bills representing the outstanding $91,000 of medical expenses were never submitted to appellant's insurance carrier, as required by Workers' Compensation Rule 30, yet the Commission, and now our court, requires appellants to bear the additional burden of

paying interest on those medical expenses. While mindful of the standard of review when reviewing decisions of the Commission, I am also mindful that an agency's interpretation of promulgated rules is not binding on this court if the interpretation is plainly erroneous or inconsistent. *Harness v. Arkansas Public Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

The appellants were merely following the stated purposes of Rule 30 of the Commission promulgated pursuant to Ark. Code Ann. § 11-9-517 (1987). The Rule became effective September 15, 1992, and the revisions on September 1, 1994. The earliest order that found appellants liable for medical expenses was entered in February 1994. The Rule "establishes a system for the evaluation by a carrier of the appropriateness in terms of both the level of and the quality of health care and health services provided to injured employees, based upon medically accepted standards." Rule 30, Part I(A)(e). It defines a "bill" as a request by a provider submitted to a carrier for payment for health-care services provided in connection with a covered injury or illness. Rule 30, Part I(F)(4). It further defines a "properly submitted bill" as a request by a provider for payment of health-care services submitted to a carrier on appropriate forms that are completed pursuant to, and that must contain appropriate documentation as required by Rule 30. According to the Rule, a carrier shall not make a payment for a service unless all required review activities pertaining to that service are completed. Rule 30, Part I(I)(2). Furthermore, billings that are not submitted on the proper form may be returned to the medical provider for correction and resubmission, and the days between the return to the medical provider and their return when corrected to the carrier shall not apply toward the thirty days within which the carrier is required to make payment. Rule 30, Part I(I)(6). The tenor of this rule, promulgated according to statute and approved by the Commission for use by those under the Workers' Compensation Act, is clearly that the medical provider, or the claimant who should be well aware of who his specific providers are and who are billing him or her for the excess, must bear the burden of presenting known bills. The rules do not place this responsibility on the employer or its carrier.

Otherwise, as in the instant case, a carrier would be subject to punishment by the Commission as a consequence of abiding by the Commission's own rules. In my mind, the Commission's interpretation, which the prevailing opinion affirms today, creates an inconsistency within Rule 30.

The prevailing opinion cites *Clemons v. Bearden Lumber Co.*, 240 Ark. 571, 401 S.W.2d 16 (1966), in which the supreme court said with regard to the statute on interest that:

> It has the far more important merit of fairness, providing the claimant with some measure of redress for the fact that payment of his just claim has been delayed, through no fault of his, for months or even, as in the case at bar, for years.

Thus, the statute contemplates, as it has been interpreted by our highest court, that the claimant must bear no fault in the processing of his "just claim." I cannot in good conscience condone an interest award when, as the prevailing opinion agrees, the claimant bears the burden of proving the necessity, reasonableness, and relatedness of his bills for medical services. A carrier should indeed pay those reasonably related medical bills as ordered by the Commission. It should not, however, be penalized for contesting a claim it deemed noncompensable — a right it has at law — until the claimant could prove that the employer was indeed liable for those costs. At the very earliest, it was February 1994 when appellants were ordered to reimburse three health-insurance companies that had paid for claimant's medical expenses while the claim was controverted. At such time as appellants were found to be liable for the medical expenses related to claimant's injury, they stood ready and willing to pay upon proper submission and processing of her bills. Until the appellants were found liable for these expenses, how could they be expected to utilize the process set up in Rule 30? I cannot agree that there has been a waiver during the period of litigation.

We have before us, as did the Commission, the testimony of the claimant herself. She acknowledged that she did not provide appellants any of the bills until the March 1, 1996, hearing, and then she only furnished summary totals from each health-insur-

ance provider. The claimant further acknowledged that "most of the times I was going to the doctor, it was for my back" but some of the visits were for B-12 injections, hormone shots, chest pain evaluations, bladder infections, annual checkups, and mammograms. She admitted some submissions to her health-insurance company were for medical expenses incurred by her son. By her own admission, there were costs not associated with any compensable conditions that were being lumped into the health-insurance summaries.

While *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ark. App. 1980), is a case involving a penalty, rather than interest, it contains instructive dicta. We stated that the insurance company was being asked to pay medical expenses in excess of $40,000 and was entitled to a hearing and determination on the issue of reasonableness and necessity without being assessed a penalty, inasmuch as the Commission's order that found the employer liable did not deal with the exact amount of medical expenses to be paid. We considered $40,000 of expenses to be "astronomical" in 1980. The same can be said of the $91,000 plus of medical expenses in today's case and, similarly, appellants were entitled to the same right of exploring the reasonableness of the bills.

I cannot reason that appellants should be penalized with interest in this case for complying with the Commission's Rules, and I therefore respectfully dissent.

PITTMAN and AREY, JJ., join in this dissent.

Diana KELLERMAN and Linda Spencer *v.* Marianne ZENO

CA 98-293 983 S.W.2d 136

Court of Appeals of Arkansas
Division III
Opinion delivered November 11, 1998

Davis, Cox & Wright, by: *Constance G. Clark* and *Don A. Taylor*, for appellants.

Wilson, Engstrom, Corum, & Coulter, by: *Gary D. Corum* and *Nate Coulter*, for appellee.

JOHN F. STROUD, JR., Judge. This case involves a malicious prosecution action filed by appellee against appellants. The jury found in appellee's favor and awarded her $30,000 compensatory damages and $58,000 punitive damages. Appellants assert three points of error on appeal: (1) the jury's conclusion that there was no probable cause for the criminal prosecution of appellee is not supported by substantial evidence; (2) the trial court erred in excluding the deposition testimony of prosecutor Paul Eaton; and (3) the trial court erred in rejecting their proffered instructions on comparative fault. We find no error and affirm.

During the times relevant to this case, appellant Dana Kellerman and her husband Barry were owners of a furniture store in the city of Maumelle. Appellant Linda Spencer was the store manager. In April 1995, appellee was hired to work at the store. Her tenure there was brief, lasting only about four months. On

August 16, 1995, she quit her job for reasons unrelated to this case. During the time of her employment, appellee acquired certain items from the store's inventory and suppliers and took the items home to be used for her own purposes. The merchandise, having a total value of $1,283.40, consisted of fabric, border, wallpaper, a wall hanging, and bedroom furniture, including a mattress set. According to appellee, appellant Spencer approved an arrangement whereby appellee would make payments on the items between July and September, then pay the balance due at the end of September when her husband received his year-end bonus. By August 2, appellee had made two payments totaling $175.

Shortly after appellee relinquished her job, appellant Kellerman and her husband became concerned that appellee had taken the merchandise from the store without paying for it in full. According to the Kellermans, the store had a strict no-credit policy. After seeking the advice of their personal attorney, the Kellermans contacted the Maumelle Department of Public Safety. As a result, Sergeant Mike Wilson prepared an incident report that referenced the crime of theft of property and cited appellee as a suspect. The report contained a list of the merchandise that appellee had acquired from the store. Shortly thereafter, the Kellermans made contact with deputy prosecuting attorney David Clark. After Clark spoke with the Kellermans in person and with appellant Spencer by phone, he drafted the following affidavit, purportedly consisting of facts constituting reasonable cause to arrest appellee for theft of property:

> On or about 6-10-95 Ms. Zeno filled out a purchase order for Marsha Rawls and had the order approved by Linda Spencer. This order was altered to include an additional 6 Drawer Dresser and mirror. Ms. Rawls cancelled her order.
>
> Ms. Zeno then removed from the store one 6 Drawer Dresser, one mirror, one headboard and a lamp. All of these items had been ordered on the ticket for Ms. Rawls. Store employees must pay in full for any items they take. Ms. Zeno did not pay for these items in full. These items have a retail value of $568. Ms. Zeno paid $175 prior to her termination but kept the payments hidden from the accountant.

> After Ms. Zeno's termination a mattress and a picture could not be accounted for in inventory. Ms. Zeno admitted to Linda Spencer to having these items. Additionally, some wallpaper and fabric was listed by Ms. Zeno as being used for store display but when Ms. Spencer contacted Ms. Zeno about these items, Ms. Zeno stated that they were hers.

Appellants would later admit that the affidavit contained numerous inaccuracies, particularly the statements that Ms. Rawls had canceled her order, that appellee hid her payments from the accountant, and that a mattress and a picture could not be accounted for in the store's inventory. Nevertheless, appellants signed the affidavit.

On September 22, 1995, appellee was arrested in her home, transported to the police station, interrogated, and booked for theft of property. She spent approximately one hour in a small room until she bonded out. Her husband arrived at the store several days later to pay the balance owed on the merchandise. On November 28, 1995, appellee was brought to trial and was acquitted by directed verdict at the close of the State's case. On January 18, 1996, she filed suit against appellants for malicious prosecution. After a trial, the jury unanimously found in her favor and awarded damages as we have previously mentioned. It is from that verdict that appellants bring their appeal.

Appellants first challenge the sufficiency of the evidence to support the verdict against them. When reviewing the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997). The jury's verdict will be affirmed if there is substantial evidence to support it. *Id.* Substantial evidence is evidence that passes beyond mere suspicion or conjecture and is of sufficient force and character that it will with reasonable and material certainty compel a conclusion one way or the other. *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998). To prove the tort of malicious prosecution, the plaintiff must establish each of the following elements: (1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the

plaintiff; (3) absence of probable cause for the proceedings; (4) malice on the part of the defendant; and (5) damages. *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996).

The element we are concerned with in this case is the "probable cause" element. Probable cause must be based upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993); *Parker v. Brush*, 276 Ark. 437, 637 S.W.2d 539 (1982). Probable cause is to be determined by the facts and circumstances surrounding the commencement and continuation of the legal action. *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989). On disputed facts, the question of probable cause is for the jury to determine. *Crockett Motor Sales, Inc. v. London*, 283 Ark. 106, 671 S.W.2d 187 (1984). Further, ordinary caution is a standard of reasonableness that presents an issue for the jury when the proof is in dispute or subject to different interpretations. *Cordes v. Outdoor Living Ctr., Inc., supra; Parker v. Brush, supra.*

The thrust of appellants' argument is that probable cause conclusively existed in this case because they acted on the advice of the Kellermans' attorney, Greg Stephens, and prosecutor David Clark. Acting upon the advice of counsel is a defense to a charge of malicious prosecution. *Machen Ford-Lincoln Mercury, Inc. v. Michaelis*, 284 Ark. 255, 681 S.W.2d 326 (1984). However, to avail themselves of the defense, defendants must have made a full, fair, and truthful disclosure of all facts known to them and act *bona fide* on counsel's advice. *McLaughlin v. Cox, supra; Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990). *See also Jennings Motors v. Burchfield*, 182 Ark. 1047, 34 S.W.2d 455 (1931). The defendants have the burden of proving this defense. *Eggleston v. Ellis*, 291 Ark. 317, 724 S.W.2d 462 (1987).

The jury in this case was instructed on the advice-of-counsel defense. According to appellee, the jury might well have found that appellants did not fully disclose to counsel all facts known to them, in particular the existence of an agreement between appellee and appellant Spencer to allow purchase of the items on an

installment plan. We agree. Attorney Greg Stephens testified that he had counseled the Kellermans that if someone took merchandise from the store without permission, a crime had been committed. However, he also told them that if they extended credit to someone who did not pay or if someone removed merchandise from the store with authorization, no theft of property had occurred. David Clark testified that, based upon the information he obtained from the police report and his discussion with appellants, he believed that probable cause existed for appellee's arrest. However, he said that if appellant Spencer had told him that she knew of appellee's purchases and approved the installment plan, it would change his assessment of the existence of probable cause.

Appellants argue that they did not inform counsel of an agreement between appellee and appellant Spencer because no such agreement existed. However, the evidence on this point is in conflict. While Linda Spencer testified that no installment plan had been arranged for appellee, appellee testified that such a plan existed. Sarah Williams, who worked in a business located in the same building as the furniture store, testified that appellee had openly discussed in Spencer's presence her purchase of the bedroom furniture and the wallpaper. Williams also testified that despite appellants' assertion of a strict no-credit policy, she had been allowed to purchase items on credit with appellants' approval. Further, appellee introduced an invoice prepared by Spencer listing the bedroom furniture and showing $75 "paid on account."

Where testimony is in sharp conflict, it is the province of the jury to resolve such conflict. *McWilliams v. Zedlitz*, 294 Ark. 336, 742 S.W.2d 929 (1988). In particular, where the evidence conflicts as to what a defendant told his attorney in a malicious prosecution action, a jury question is presented on the advice-of-counsel defense. *Eggleston v. Ellis, supra.* Viewing the testimony in the light most favorable to appellee, there is substantial evidence that an installment plan was authorized. If there was substantial evidence of such authorization, it follows that there was substantial evidence of appellants' failure to make a full and complete disclosure of facts to counsel. A jury may reject the advice-of-counsel defense if there is substantial evidence that the defendants either did not impartially state all the facts to counsel or did

not honestly and in good faith act upon the advice given them. *Parker v. Brush, supra.*

We also note that the jury had evidence before it that appellants signed an affidavit containing false and misleading information. Appellants claim that they should not be held responsible for the contents of the affidavit because it was prepared by David Clark. Although Clark conceded that he could have made an error on the affidavit, he also testified that, to the best of his memory, the affidavit contained the facts as relayed to him. Appellants further claim that, at the behest of a police officer, they signed the affidavit *after* appellee's arrest, despite trying to tell the officer that the affidavit contained inaccuracies. Appellants' testimony on this point is disputed. The affidavit itself was dated September 19, 1995, three days prior to appellee's arrest. Don Belew, the arresting officer, testified that at the time he arrested appellee, the affidavit had been signed. Further, Sarah Williams testified that at some point before appellee's arrest, appellants came into the store and said they were going to have appellee arrested. According to Williams, appellant Spencer was mad at appellant Kellerman because the allegations in the affidavit were not true. Based upon the foregoing, and viewing the evidence in the light most favorable to the appellee, we hold that the jury's verdict is supported by substantial evidence.

The next issue is whether the trial court erred in excluding the proffered testimony of prosecuting attorney Paul Eaton. In late October 1995, Eaton became the prosecutor on appellee's criminal case in place of David Clark. Appellants sought to introduce Eaton's deposition testimony[1] during the trial of this matter. Eaton testified that he made the decision to go forward with the case based upon his discussions with appellants shortly before trial, although he could not recall what was said during the discussions. He also said that, to his knowledge, appellants made a full and fair disclosure of all facts and that, in light of his discussions with appellants, the affidavit played no significant part in his decision to

[1] Eaton was out of the country and unavailable for live testimony.

prosecute. Eaton displayed no knowledge of any agreement between appellant Spencer and appellee. On cross-examination, he acknowledged that a party's consent to removal of property would be relevant in determining whether to prosecute a case.

Appellee objected to Eaton's testimony as irrelevant because it dealt with matters that occurred after the initiation of the prosecution. She also objected to Eaton's testimony as cumulative to other evidence, particularly the testimony of David Clark, Greg Stephens, and Sergeant Mike Wilson, regarding their opinions on the existence of probable cause. The trial judge sustained appellee's objection, stating that the testimony was cumulative and only concerned events occurring after appellee's arrest.

Relevant evidence may be excluded if its probative value is substantially outweighed by needless presentation of cumulative evidence. Ark. R. Evid. 403. The admission or rejection of evidence under Rule 403 is left to the sound discretion of the trial court. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997). On appeal, the trial court's ruling will not be reversed absent a manifest abuse of discretion. *Id.*

Appellants contend that Eaton's testimony would have allowed them to pull their case together in a coherent form by presenting the testimony of the attorney who actually prosecuted appellee. They rely on our recent decision in *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998). *Potter* involved a fee agreement between a lawyer and a client. The lawyer testified about the agreement during the client's case-in-chief. However, when the lawyer attempted to testify about the agreement during his own case, the trial judge rejected the testimony as being cumulative. We reversed and held that the lawyer's testimony during the client's case-in-chief was "sketchy at best" and that the exclusion of the testimony deprived him of the ability to present "the essence of his case."

We do not see the same detriment to appellants' case here. Eaton's testimony, while possibly relevant, added nothing of substance to the testimony already offered by previous witnesses.

We cannot say that a manifest abuse of discretion occurred or that appellants' substantial rights were affected by the exclusion of this evidence. *See* Ark. R. Evid. 103(a).

The final issue concerns appellants' attempt to have the jury instructed on comparative fault. Appellants argue that appellee's conduct in failing to follow proper bookkeeping procedures and in falsely assuring appellant Spencer she would make payment within "a few days" should be compared with their own conduct in assessing fault. The trial court rejected appellants' comparative-fault instructions, apparently on the basis that such instructions are not proper in the case of an intentional tort.

Arkansas's comparative-fault statute provides in pertinent part:

> (a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.
>
> . . .
>
> (c) The word "fault" as used in this section includes any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party.

Ark. Code Ann. § 16-64-122 (Supp. 1997).

Appellants contend that, under the broad definition of fault contained in our statute, a comparative-fault instruction may be used in a malicious prosecution case. They cite the comment to AMI 306, which reads: "Comparative fault may apply in cases involving intentional torts." They acknowledge, however, that our supreme court disagreed with that comment in *Whitlock v. Smith*, 297 Ark. 399, 762 S.W.2d 782 (1989). *Whitlock* involved the tort of battery. The defendant contended at trial that he struck the plaintiff in self-defense and asked the trial court to instruct the jury on comparative fault. The trial court refused, and the refusal was upheld on appeal. The supreme court stated:

"This was a battery case, pure and simple, not a negligence case, and the judge correctly refused to give the instruction on comparative fault." *Whitlock v. Smith*, 297 Ark. at 402, 762 S.W.2d at 783. *Whitlock* has been cited by two noted commentators as holding that comparative negligence is not applicable in an intentional tort case. *See* Henry Woods and Beth Deere, *Comparative Fault* § 7:1 at 151 (3d ed. 1996).

Recognizing the difficult hurdle they face in the *Whitlock* case, appellants attempt to argue that malicious prosecution is not an intentional tort. It is true that the elements of the tort do not mention intentional conduct. However, the state of mind of malice is required. Malice is any improper or sinister motive for instituting a lawsuit. *Cordes v. Outdoor Living Ctr., supra.* Our research reveals that other jurisdictions recognize malicious prosecution as an intentional tort. *See Rodick v. City of Schenectady*, 1 F.3d 1341 (2d Cir. 1993); *Allstate Ins. Co. v. Moulton*, 464 So.2d 507 (Miss. 1985); *Koury v. Straight*, 948 S.W.2d 639 (Mo. App. 1997); *Bittner v. Cummings*, 188 A.D.2d 504, 591 N.Y.S.2d 429 (1992); *Closs v. Goose Creek Consol. Indep. Sch. Dist.*, 874 S.W.2d 859 (Tex. App. 1994). Based upon our supreme court's holding in *Whitlock v. Smith*, we find no error in the trial court's rejection of appellants' proffered comparative-fault instructions.

Affirmed.

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

Bill CRAWFORD d/b/a Crawford Builders, Inc. *v.* LEE COUNTY SCHOOL DISTRICT; Janis Waddy, Lafayette Smith, Suzy Keasler, Evelyn McCall, J. Harvey Shaw, Robert Shearon, and Phylistia F. Stanley, Individually and in Their Official Capacities as Lee County School District Board of Directors

CA 98-140 983 S.W.2d 141

Court of Appeals of Arkansas
Division III
Opinion delivered November 11, 1998

[redacted]

Wilson & Valley, by: *E. Dion Wilson*, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Dan F. Bufford* and *Brian A. Brown*, for appellees.

MARGARET MEADS, Judge. Appellant, Bill Crawford d/b/a Crawford Builders, Inc., appeals from an order granting summary judgment to appellees.

On November 16, 1995, appellant signed a contract with James Culp, Superintendent of the Lee Country School District, for asbestos abatement and soffit covering at Strong Elementary School. Appellant agreed to do the work for the sum of $27,500. On May 31, 1996, appellant filed a complaint in chancery court for specific performance alleging that he began performance of the parties' contract on November 30, 1996, and finished the contract within a reasonable time thereafter. He also alleged that appellees were indebted to him in the amount of $27,500, plus interest, had breached the contract by failing to pay for the work performed, and had been unjustly enriched by their failure to pay. On September 26, 1996, the suit was transferred to circuit court. Appellees filed a motion for summary judgment on May 15, 1997,

and the motion was granted. On appeal, appellant argues that the trial court erred in granting summary judgment because (1) appellees failed to meet their burden of proof pursuant to Ark. R. Civ. P. 56; (2) appellant was not allowed to depose appellees pursuant to Ark. R. Civ. P. 30; and (3) the Lee County School Board had ratified the contract.

Summary judgment is authorized by Ark. R. Civ. P. 56(c) when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." It is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). In considering a motion for summary judgment, the court views the facts in the light most favorable to the party against whom the judgment is sought; all inferences are drawn against the moving party. *Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990). Once a moving party establishes *prima facie* entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Appellant's complaint alleged breach of contract and unjust enrichment. In their motion for summary judgment, appellees averred that the alleged contract was void and unenforceable. They admitted that James Culp signed the purported contract and that appellant began performance, but asserted that the alleged contract was not presented to the Board of Directors of the Lee County School District until their January 1996 meeting, at which time the Board declined to approve the contract. Appellees also asserted that appellant failed to post the bond Arkansas law requires from a contractor doing work on a public building.

Attached to appellees' motion were the affidavits of James Culp and J. Harvey Shaw, president of the Lee County School Board. Mr. Culp asserted that during November 1995, contractors were performing roofing work on Strong Elementary School;

that appellant was the lowest bidder to remove asbestos material and soffit covering the school; that he intended to present the contract to the school board at its December meeting, but because of illness did not do so until January; that he told appellant that the contract was contingent upon school board approval, but appellant began work without contacting him to determine whether approval had been obtained; that appellant removed the asbestos and soffit material, but did not replace it with vinyl or aluminum; and that appellant failed to post a bond with the school board prior to beginning work. Mr. Shaw asserted that appellant removed the soffit material, but the project was incomplete because the outer covering was not replaced; that appellant failed to post bond prior to beginning work; that the first time the school board became aware that appellant had performed work was at the January 1996 meeting; and that the board declined to approve the contract because work had been started without school board authority.

At the hearing on appellees' motion, appellant argued that his complaint alleged both breach of contract and unjust enrichment. He argued that the contract was ratified by the school board in that its members knew the work was being done and had hired a quality-control agent to oversee appellant's work. Appellant asserted that while the work was being done, appellees in effect sat back and watched, and appellees received a benefit by having the asbestos removed. He further argued that appellees do not dispute that they were unjustly enriched by appellant's work, that there had been no objection to his claim of unjust enrichment, and that the claim had not been challenged. Appellant said that he wanted to proceed on his claim for unjust enrichment and breach of contract, and that he should be paid.

On November 18, 1997, the trial court entered an order granting summary judgment on the finding that the contract was not valid or enforceable because it was not approved or ratified by the school board and no bond was provided. Appellant's complaint was dismissed with prejudice.

We first address appellant's second argument on appeal. Appellant argues that the trial court erred in granting summary

judgment because he was not allowed to depose appellees pursuant to Ark. R. Civ. P. 30. Appellant says that on January 21 and March 31, 1997, he requested that appellees be made available for deposition on three alternate dates; that appellees' counsel would not allow the depositions to be taken before the summary-judgment motion was decided; and that because his request was denied he was not allowed to proceed further in the development of his case.

In support of his argument, appellant relies on *First National Bank v. Newport Hospital & Clinic, Inc.*, 281 Ark. 332, 663 S.W.2d 742 (1984), a medical malpractice case in which our supreme court held that the trial court erred in granting summary judgment before discovery was complete. However, in that case the supreme court stated that there was no suggestion of a lack of diligence in discovery efforts. Here, appellant filed a motion on May 15, 1997, which requested among other things that the court order appellees to be made available for depositions. In their response and brief in support of that response, appellees admitted that there had been several requests for discovery. However, appellant failed to obtain a ruling on this issue. Moreover, no hearing was held or further motions submitted on the issue of discovery, and appellant failed to bring up the matter of discovery in either his response to appellees' motion for summary judgment or at the hearing on the motion. The burden of obtaining a ruling is on the movant, and objections and matters left unresolved in the trial court are waived and may not be relied upon on appeal. *Carpetland of N.W. Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991).

Further, appellant failed to file an affidavit substantiating the fact that he was having problems gathering facts to support his opposition to summary judgment, as provided under Ark. R. Civ. P. 56(f). Had he done so, the trial court might well have postponed a decision on summary judgment pursuant to Rule 56(f) so that the depositions could have been taken. *See Jenkins v. International Paper Co., Inc.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

Appellant's first and third arguments are related. Appellant's first argument is that the trial court erred in granting summary

judgment because appellees failed to meet their burden of proof. We first address this argument with respect to appellant's claim for breach of contract, and we address his third argument regarding ratification under this point.

Appellant's argument, as we understand it, is that the trial court erred in granting summary judgment on the breach-of-contract issue because there was a question of fact regarding whether the Lee County School Board ratified the contract. Appellant contends that he put forth sufficient facts to dispute appellees' allegation that they were not aware that the work was being done. He says the work was performed outside, and appellees were able to see him doing the work. Further, appellant argues that to ensure appellant was doing the work contracted for, appellees contracted with and paid Murdock Enterprises for quality-control services for asbestos abatement. Therefore, according to appellant, one can only conclude that appellees knew work was being performed by appellant. We do not agree that appellees failed to meet their burden of proof in regard to appellant's contract claim.

In affidavits attached to their motion for summary judgment, appellees averred that roofing work was being done at the school during November 1995, and that the school board did not become aware of appellant's activities at the school until their January 1996 meeting. Appellant filed no affidavits, depositions, or other proof on this issue. Thus, appellant failed to meet proof with proof and demonstrate the existence of a genuine issue of material fact on this issue.

In regard to appellant's argument that appellees contracted with Murdock Enterprises for quality-control services for asbestos abatement, there is nothing to confirm that this contract was entered into by appellees. In appellant's brief in support of his response to appellees' motion for summary judgment, appellant states that appellees hired a quality-control agent to supervise or monitor the work being done by appellant. Attached to the brief is a purported contract for quality-control services for asbestos abatement at Strong Elementary School. The services were to include evaluation of "AHERA" management plan, review of sited areas, coordination of bid proceedings, and a final report

upon project completion. Also attached to the brief are several checks to Murdock Enterprises from appellees. However, these documents are neither verified nor attested to; the purported contract bears no signatures; and the checks predate appellant's contract with appellee.

Therefore, we cannot find that the trial court erred in granting summary judgment on the issue of breach of contract. However, that does not dispose of the argument regarding appellant's claim of unjust enrichment.

In *City of Damascus v. Bivens*, 291 Ark. 600, 602-03, 726 S.W.2d 677, 679 (1987), our supreme court stated:

> We find that the unjust enrichment principle is firmly embedded in Arkansas law in the context of work performed pursuant to illegal contracts made by political subdivisions such as cities and counties. We alluded to it as recently as 1980 in a case where we ultimately found a valid contract to exist. *McCuistion v. City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980). We have permitted restitution based on unjust enrichment even when the associated contract was "void." *City of Little Rock v. The White Co.*, 193 Ark. 837, 103 S.W.2d 58 (1937); *International Harvester Company v. Searcy County*, 136 Ark. 209, 206 S.W. 312 (1919). Cf. *Revis v. Harris*, 219 Ark. 586, 243S.W.2d 747 (1951).

Further, a claim in quantum meruit is generally made under the legal theory of unjust enrichment and does not involve the enforcement of a contract, and a quantum meruit claim can succeed even when it is argued, in the alternative, pursuant to a contract that has been declared void. *Sanders v. Bradley Cty. Human Servs. Pub. Fac. Bd.*, 330 Ark. 675, 956 S.W.2d 187 (1997). Our supreme court has allowed quantum meruit recovery after a contract with a government entity was declared invalid, *Damascus, supra*, and where a county kept purchase money for material purchased, retained ownership of the materials and, as a bar to recovery, asserted that no appropriation had been made. *Yaffe Iron & Metal Co. v. Pulaski County*, 188 Ark. 808, 67 S.W.2d 1017 (1934). In order for the legal theory of unjust enrichment to pertain, there must be some enrichment or benefit to the party against whom the claim is made. *Sanders, supra.*

Here, appellant alleged that he had performed the work called for by the contract. Appellees presented no proof on this issue and failed to address it in their summary-judgment motion. *See Sublett, supra.* Indeed, not only did appellees fail to challenge appellant's unjust enrichment claim in their motion, but Mr. Culp's affidavit submitted in support of the motion asserted that appellant removed the asbestos and soffit material, and Mr. Shaw's affidavit also asserted that appellant removed the soffit material. We therefore reverse and remand for trial on appellant's claim of unjust enrichment.

Affirmed in part; reversed and remanded in part.

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

Zachary DANIEL *v.* STATE of Arkansas

CA 98-75 983 S.W.2d 146

Court of Appeals of Arkansas
Division III
Opinion delivered November 11, 1998

Keith and Miller, P.A., by: *Andrew R. Miller*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

MARGARET MEADS, Judge. On August 18, 1997, Zachary Daniel, a juvenile, was adjudicated delinquent for the offenses of sexual abuse in the first degree and failure to appear, and an order to that effect was filed of record the following day. A disposition hearing was set for August 27, 1997. The behavior comprising the basis for the sexual-abuse charge occurred on June 24, 1996, when appellant was fourteen years old. The State has filed a motion to dismiss the appeal on the basis that the order from which appellant appeals is not a final appealable order. We agree; therefore, we dismiss the appeal.

The requirement that an order be final to be appealable is a jurisdictional requirement. *K.W. v. State*, 327 Ark. 205, 937 S.W.2d 658 (1997). The purpose of the finality requirement is to avoid piecemeal litigation. *Id.* An order is final if it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy; the order must put the judge's directive into execution, ending the litigation, or a separable branch of it. *Id.*

Appellant filed his Notice of Appeal on September 18, 1997, appealing the August 19 adjudication order. However, the

August 19 order specifically stated that appellant was to return to court on August 27, 1997, for a disposition hearing. By agreement of the parties, the disposition hearing was continued to September 8, 1997, at which time appellant was committed to the Arkansas State Hospital/Sexual Offender Program. Appellant argues, without citation to any authority, that the September 8 hearing and disposition order were collateral matters and that the August 19 order constituted a final order. We disagree. When an order provides for a subsequent hearing, that provision prevents the order from being a final order. *See Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992). There was no final, appealable order in the present case until the entry of the September 8, 1997, disposition order.

In his response to the State's motion to dismiss, appellant attached a copy of the September 8 order, and we deemed the record to be supplemented with this order. However, as the State properly points out, this inclusion does not cure the jurisdictional defect. A notice of appeal must designate the judgment or order appealed from, Ark. R. App. P.—Civ. 3(e) (1998), and orders not mentioned in a notice of appeal are not properly before the appellate court. *Arkansas Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988). Because the final appealable order was not designated in appellant's notice of appeal, and because the August 19, 1997 order that was designated in appellant's notice is not a final order, we cannot reach the merits of appellant's argument regarding the adjudication hearing.

Appeal dismissed.

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

Eddie INSKEEP, Employee *v.*
EMERSON ELECTRIC COMPANY, Employer

CA 98-502 983 S.W.2d 132

Court of Appeals of Arkansas
Division III
Opinion delivered November 11, 1998

[Petition for rehearing denied December 16, 1998.]

Snellgrove, Laser, Langley , Lovett, & Culpepper, by: *Todd Williams*, for appellant.

Bud Roberts, for appellee.

MARGARET MEADS, Judge. This is an appeal from the Arkansas Workers' Compensation Commission. Appellant, a truck driver for appellee Emerson Electric, suffered a compensable injury in September 1977 when the truck that he was driving overturned, pinning him in the truck for several hours and killing his driving partner. Appellant suffered injuries to his left leg and spine that required two leg surgeries and five back surgeries, including fusions from L3 to the sacrum. He received permanent partial impairment ratings of twenty-five percent to the left leg and thirty-five percent to the body as a whole for the spine. Nonetheless, appellant returned to work for Emerson in 1986. On January 2, 1996, appellant was involved in two accidents as a result of icy road conditions while driving a tractor-trailer rig with a partner. At the time the first accident occurred, appellant was in the sleeper; he was driving when the second accident occurred.

At a hearing held August 7, 1996, on appellant's workers' compensation claim, appellant contended that he was entitled to payment of further medical expenses and six months of additional temporary total disability benefits. Issues regarding change of physician and extent of permanent disability were reserved. On September 16, 1996, an administrative law judge (ALJ) entered an order holding that appellant sustained an aggravation, or new injury, of his preexisting condition on January 2, 1996; that as a result of his compensable injuries he was entitled to temporary total disability benefits beginning with his last day worked and ending on February 7, 1996; and that he is entitled to payment of all medical expenses incurred for treatment by Dr. Tyrer subsequent to January 2, 1996. No appeal was taken from this order.

On January 8, 1997, a hearing was held on the issues of change of physician, additional permanent partial impairment rating, and wage-loss disability. The transcript and exhibits from the August 7, 1996, hearing were incorporated by reference, and additional evidence was received. In an opinion entered February 25, 1997, the ALJ found that appellant did not sustain additional permanent partial impairment to the body as a whole as a result of the January 2, 1996, accidents; that appellant sustained a thirty-five percent impairment to his wage-earning capacity; and that appellant's authorized family physician, Dr. Shedd, is authorized to refer appellant to Dr. Larry Mahon for future medical maintenance as necessary. In a supplemental opinion filed March 24, 1997, the ALJ found that appellant sustained an additional permanent partial impairment of five percent to the body as a whole as a result of the January 2, 1996, incidents, and that appellant's compensation rate should be based upon his January 1996 earnings.

The full Commission affirmed the ALJ's award of a thirty-five percent wage-loss disability and the change of physician. However, it found that appellant failed to prove that he sustained an additional five percent permanent anatomical impairment and that appellant's compensation rate should be based on his 1977 earnings rate. Appellant appeals from the reversal of the five percent anatomical impairment and the application of his 1977 earnings.

There was evidence that appellant continued to have problems with his leg and back after he returned to work in 1986, and that after the January 2, 1996, accidents he hurt between his shoulder blades and in the upper part of his back. On January 4, 1996, Dr. Shedd took appellant off work. Appellant was subsequently treated by Dr. Roy Tyrer, Jr., and underwent an independent medical evaluation by Dr. Larry Mahon. Appellant has not been physically able to drive a truck since the January 2 accidents. Since that time, appellant has not worked for anyone, but he had a construction business in which he did supervisory work and actual labor.

Appellant testified, however, that he stopped working in that business in November 1996 and turned it over to his son, because he got to the point where he was not having "a good day." Mentally and physically he could not do the work. His bad days got closer together, he had no one to take care of him "prescription wise," and it got to the point where when he tried to do anything at all, he would get "down" and could not get "up." He said that he would just go home. Appellant now has constant pain; there are days that he cannot get out of the house because of pain even if he has not done anything. The pain comes all of a sudden, it "knocks him to his knees," and it is all he can do to get back "up."

Appellant testified further that he now has problems that he did not have prior to January 1996. The upper part of his back gives him problems; he cannot raise his arm; it feels as if he is having a heart attack; the pain is like a knife and limits his motion on his right side. He said that he is worse now than he was before the 1996 accidents.

Dr. Tyrer reported on January 29, 1996, that appellant had been troubled with upper lumbar discomfort extending into the interscapular area since the January accidents. His impression was mild to moderate thoracal lumbar muscle sprain. He did not feel that appellant sustained significant additional injury in the January accidents. A January 31, 1996, isotope bone scan showed increased activity in the lower lumbar area where appellant had the prior spinal fusion, and increased activity in the right rib cage and

in the left tibia below the knee, both of which are areas where appellant had a prior injury. An MRI of appellant's thoracic spine performed March 18, 1996, showed slight disc dessication in the mid-thoracic area without evidence of intervertebral disc herniation or other definite abnormality. On April 17, 1996, Dr. Tyrer reported that he told appellant that he did not believe any additional treatment was indicated or would be beneficial, and he did not think that the January accidents had any appreciable adverse effect on appellant's preexisting chronic low-back problem.

Dr. Larry Mahon's report dated June 3, 1996, recites that appellant has pain in his low back and numbness in his toes, the back of his right thigh, and his calf. He also has some aching pain between his shoulders and aching discomfort of the left lower leg associated with weather changes. AP and lateral x-rays of his thoracic spine reveal extensive osteoarthritis with bone spurring. Based upon the history, Dr. Mahon opined that appellant's new complaints concerning his mid-thoracic area were apparently due to one of the January 1996 injuries. It was his further opinion that appellant sustained permanent aggravation of his prior existing lumbar pathology as a result of the January 1996 injury, and assuming appellant's history was correct, the permanent aggravation contributed an additional five percent permanent partial impairment to the body as a whole.

Dr. Mahon wrote that he was surprised appellant was able to perform the duties of a truck driver since 1982 [*sic*] with his history of chronic back problems and multiple surgeries; that he must be a rather stoic individual very desirous of remaining employed; that his work tolerance during that time was marginal; and that the additional injuries and symptomatology resulted in appellant's inability to return to that level of activity.

On appeal, appellant first argues that the Commission erred in denying the additional five percent permanent partial anatomical impairment because he failed to establish any additional impairment to the lumbar spine with "objective findings." Appellant contends that fair-minded persons with the same evidence before them could not have reached the Commission's conclusion.

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). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). 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. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). Conflicts in the medical evidence are a question of fact for the Commission, and when the Commission chooses to accept the testimony of one physician over another in such cases, we are powerless to reverse the decision. *Henson v. Club Prods.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). However, these standards must not totally insulate the Commission from judicial review; to do so would render this court's function meaningless in workers' compensation cases. *Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988).

Here, Dr. Tyrer stated that he did not feel that appellant sustained significant additional injury in the January accidents, and that he did not believe the January accidents had any appreciable adverse effect on appellant's preexisting low-back problem. This evidence constitutes substantial evidence to support the Commission's findings on the issue of additional impairment to appellant's lumbar spine, and we affirm the Commission's findings on this issue.

Appellant's next two arguments are related and concern the proper wage rate upon which to base appellant's thirty-five percent wage-loss disability. The Commission found, after considering appellant's age, education, work experience and the nature of the problems which he experienced as a result of the 1996 accidents, that the ALJ's award of a thirty-five percent impairment to appellant's wage-earning capacity was correct. It noted that appellant continued to work as a truck driver until the accidents

on January 2, 1996, and that the medical evidence establishes that he is not now physically capable of returning to truck driving. It noted further that both Dr. Mahon and Dr. Tyrer expressed surprise that appellant was able to continue his employment as a truck driver as long as he did in light of his low-back abnormalities. The Commission found, however, that appellant's "time of accident" was the date of appellant's 1977 injury.

Arkansas Code Annotated section 11-9-518(a)(1) (Repl. 1996) provides that compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident. Arkansas Code Annotated section 11-9-102(18) (Supp. 1997) defines "time of accident" or "date of accident" as the time or date of the occurrence of the accidental incident from which compensable injury, disability, or death results. Here, despite his 1977 accident, appellant was able to continue driving from 1986 until the accidents that occurred on January 2, 1996, and it was only after those accidents that appellant suffered any loss of earnings. Thus, appellant's compensable wage-loss disability resulted from the 1996 incidents. Pursuant to the above statutes, the date of accident is 1996, and appellant's compensation rate should be based on his 1996 earnings and the 1996 maximum rate. We therefore reverse and remand on this point for the Commission to determine appellant's 1996 earnings, and for entry of an order consistent with this opinion.

Affirmed in part; reversed and remanded in part.

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

Ted Byron WADE *v.* STATE of Arkansas

CA CR 98-447 983 S.W.2d 147

Court of Appeals of Arkansas
Division I
Opinion delivered November 11, 1998

Montgomery, Adams & Wyatt, PLLC, by: *Dale E. Adams*, for appellant.

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

ANDREE LAYTON ROAF, Judge. On October 21, 1996, appellant Ted Wade pleaded guilty to a charge of first-degree assault and was sentenced to twelve months' probation. In addition to the requirement that he obey all federal, state, and local laws, Wade was also required to perform 100 hours of community service, and to complete an alcohol-rehabilitation program within six months of sentencing. On May 23, 1997, the prosecuting attorney filed a petition for revocation alleging that Wade violated the terms of his probation by failing to complete his court-ordered community service, and because he tested positive for methamphetamine on May 8, 1997. An amended petition for revocation was filed August 26, 1997, that alleged that Wade violated the terms his probation by committing domestic battery on August 2, 1997, and for failure to complete his court ordered community service. After a hearing, the trial court found that Wade failed to complete his court ordered community service, revoked his probation, and imposed a sentence of twelve months in the Pulaski County detention center. The State presented no evidence as to the alleged use of methamphetamine, and the trial court explicitly declined to find that Wade committed domestic

battery after the victim, Wade's wife, testified that he did not beat her. Wade's sole argument on appeal is that the trial court erred by revoking his probation due to his failure to complete his community service by the deadline imposed by the probation office. Because the requirement that he complete his community service by the date imposed by the probation office, rather than by the end of his probation period, was not in writing, we 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. *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.*

Wade contends that the trial court erred by revoking his probation due to his failure to complete 100 hours of community service by the deadline imposed by the probation office. Wade argues that the court, rather than the probation office, is required to specify the terms and conditions of his probation. Arkansas Code Annotated section 5-4-303 (Repl. 1997) provides:

> (a) If the court suspends imposition of sentence on a defendant or places him on probation, it shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.
>
> . . .
>
> (e) If the court suspends the imposition of sentence on a defendant or places him on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he is being released.

In addition to the requirement that he obey all federal, state, and local laws, the terms of Wade's probation required, among other

things, that he complete an alcohol-rehabilitation program within six months of sentencing, and that he perform 100 hours of community service. Although the order did not explicitly restrict the time in which Wade was to complete his service, his work-program adviser for the Department of Community Punishment required that he complete the service by working weekends between January 18, 1997, and April 30, 1997. During testimony, the adviser acknowledged that the probation order did not explicitly provide that Wade complete the service by April and that the length of his probation was through October 1997. However, the adviser stated that she interviewed Wade at the start of his probation to determine his hours of availability to perform community service; Wade indicated that he was available to work eight hours a day on Saturdays and Sundays. Accordingly, she assigned a deadline that allowed him ample time to complete his obligation by the end of April 1997. However, Wade completed only 28 hours of his community service and was not allowed to perform any further services after the petition to revoke was filed on May 25, 1997.

The requirement that the court specify the terms of probation is well settled. In *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980), the defendant appealed the trial court's decision to revoke his probation for violating the terms of his probation by committing aggravated battery and assault. He argued that the order did not explicitly include the requirement that the defendant refrain from criminal conduct. On appeal, the supreme court reversed, holding that:

> [A]ll conditions for a suspended sentence, including any requirement of good behavior, must be in writing if the suspended sentence is to be revocable. Therefore, courts have no power to imply and subsequently revoke conditions which were not expressly communicated in writing to a defendant as a condition of his suspended sentence. This result not only comports with any due process requirements owed to a defendant upon the imposition of a suspended sentence but may serve to deter criminal conduct which a defendant might otherwise commit but for a full appreciation of the extent of his jeopardy.

Id. In *Neely v. State*, 7 Ark. App. 239, 647 S.W.2d 473 (1983), the trial court granted the State's petition for revocation upon the introduction of evidence that the probationer had committed burglary and theft of property. Because the State failed to provide the defendant with written terms indicating that his probation could be revoked for inappropriate behavior, the court of appeals reversed the revocation of appellant's probation. This was done despite the court having "great difficulty in reaching the conclusion that a probationer could misunderstand that a suspended sentence on good behavior requires that he not commit a felony."

We find these cases to be dispositive to the facts in the present case. We note that as a rule, criminal statutes are strictly construed with any doubts resolved in favor of the accused. *Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997). The statute clearly states that "the defendant shall be given a written statement explicitly setting forth the conditions under which he is being released." Ark. Code Ann. § 5-4-303(e). Precedent has established that even implied terms, such as good behavior, must be explicitly included in the written terms of probation in order to revoke for a violation of those terms. Although the written notice of the terms of probation provided to Wade did indicate that he was to perform 100 hours of community service, it did not explicitly impose a deadline of April 30, 1997, rather than completion prior to the end of his period of probation. Because his revocation was based on a failure to comply with a term not included in the written notice, we reverse the decision of the trial court.

Reversed.

AREY and NEAL, JJ., agree.

Harold STIVERS *v.* STATE of Arkansas

CA CR 98-472 978 S.W.2d 749

Court of Appeals of Arkansas
Division III
Opinion delivered November 18, 1998

[redacted]

William C. McArthur, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., and *Pam Epperson*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Arkansas Supreme Court under the Supervision of *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Harold Stivers was convicted in a bench trial of fourth-offense DWI and fifth-offense DWI. He was thereafter sentenced to two three-year prison sentences, with the sentences to run concurrently. Mr. Stivers now appeals, arguing that there was insufficient evidence to support his convictions. In addition, he contends that the purported judgments offered by the State to prove prior offenses were improperly admitted into evidence by the trial court. We agree

that the conviction for fourth-offense DWI must be reversed, but affirm the fifth-offense DWI conviction as modified.

■ ■ When an appellant challenges the sufficiency of the evidence, we review the sufficiency argument prior to a review of any alleged trial errors. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State, supra.* In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

Officer Chris Jarvis testified that he was dispatched to the scene of an accident on the afternoon of January 5, 1996. Upon his arrival, Officer Jarvis observed a pickup truck that had collided with a tree, and Mr. Stivers was seated in the driver's seat and slumped over into the passenger's seat. The keys were in the ignition, and the motor was still running. Mr. Stivers had suffered injuries, and he was transported by ambulance to the hospital.

According to Officer Jarvis, Mr. Stivers appeared to be very sleepy at the scene of the accident and was unresponsive. In addition, he observed a strong smell of alcohol emitting from Mr. Stivers's person. Officer Jarvis indicated that the road conditions were good at the time of the accident, and that no sobriety tests were conducted because Mr. Stivers was almost unconscious.

Officer Denise Allred was also at the scene of the accident on January 5, 1996. She, too, noticed a strong, alcoholic smell. Officer Allred stated that a blood sample was taken and she transported it to the State Crime Lab. The prosecution did not offer the test results into evidence.

Officer John Como testified next, and he stated that he was called to investigate an accident on March 14, 1996. Upon arriving at the scene, he saw a pickup truck that had apparently hit a

retaining wall and stopped by a tree. Mr. Stivers, who was sitting by the truck receiving medical attention, told Officer Como that he had just come from Cash McCool's, that he had been driving, and that he wanted to go home. Mr. Stivers's speech was slurred, his eyes were glassy, and he seemed confused. According to Officer Como, Mr. Stivers could hardly stand, so no sobriety tests were performed. He also smelled strongly of alcohol, and was arrested for DWI and transported to the police station.

While at the police station, Mr. Stivers was advised of his rights but "was too drunk to sign" the rights form. A breathalyzer test was attempted, but even after several attempts a reading did not register on the machine.

For his first argument on appeal, Mr. Stivers contends that neither of his DWI convictions were supported by substantial evidence. Arkansas Code Annotated section 5-65-103(a) (Repl. 1997) provides that it is unlawful for an intoxicated person to be in the actual physical control of a motor vehicle, and "intoxicated" is defined by Ark. Code Ann. § 5-65-102(1) (Repl. 1997) as follows:

> "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians[.]

Regarding his first conviction, Mr. Stivers argues that there was insufficient evidence of intoxication. Specifically, he asserts that the only evidence of intoxication was the fact that he smelled strongly of alcohol, and he attributes his unresponsiveness to injuries suffered in the accident. With regard to the other conviction, he concedes that there was evidence of intoxication, but argues that there was insufficient evidence that he ever exercised control of the truck because there were no witnesses to the accident and there was no evidence that the keys were either found in the ignition or on his person.

■ ■ Testimony regarding the first conviction established that Mr. Stivers was involved in a one-car accident and his truck,

still running, had come to a stop about thirty-five feet off the road. Although the accident occurred in the daytime and in the absence of any adverse driving conditions, there are many reasonable explanations other than intoxication for someone to have a one-car accident. We acknowledge that circumstantial evidence may constitute substantial evidence to support a conviction, but this is only true when the circumstantial evidence rules out every other reasonable hypothesis but the guilt of the accused. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994). The investigating officers testified that appellant was unresponsive, and seemed sleepy to the point of near unconsciousness. However, they also testified that appellant was injured and was taken by ambulance to the hospital. Thus, it is reasonable to infer that his injuries, and not intoxication, could have caused his impaired response. Considering this evidence in the light most favorable to the State, the only evidence that would tend to support appellant's conviction is the fact of the accident and the odor of intoxicants. This, without more, is not substantial evidence of intoxication. Consequently, appellant's conviction for fourth-offense DWI arising out of the January 5, 1996, accident must be reversed.

As for the second conviction arising out of the March 14, 1996, accident, Mr. Stivers was found sitting directly outside the open driver's side door to a truck registered in his name, no other persons were present, and he admitted that he had been driving. This sufficiently established that Mr. Stivers was in control of the vehicle at a time when he was intoxicated.

Mr. Stivers's remaining argument is that the trial court improperly admitted purported judgments of his prior DWI offenses. At the close of the State's case, the prosecuting attorney offered into evidence exhibits 2, 3, 4, and 5, which were represented to be judgments from Little Rock Municipal Court reflecting prior DWI convictions. They were signed and dated by the municipal judge, and on the back of each exhibit was a stamped certificate of authenticity from Pulaski County Circuit Court. Mr. Stivers objected to the introduction of the exhibits because they were not certified by the municipal clerk or file marked, and the trial court sustained the objection but allowed the State a brief continuance. About an hour later, the trial resumed and the State

sought to introduce exhibits 6, 7, 8, and 9. The face of these exhibits were the same as 2, 3, 4, and 5, except that each document now bore the following certification:

> I certify that this is a true and correct copy of the Judgment rendered on the above date by this court against this defendant.
>
> signed S. Johnson
>
> Sue Brooks, Court Clerk
>
> 10-6-97
>
> Date

Mr. Stivers again objected to the admissibility of the documents, but they were received by the trial court.

For reversal on this issue, Mr. Stivers contends that the documents were not authentic, and he cites three rules of the Arkansas Rules of Evidence, which are as follows:

> *Rule 901. Requirement of authentication or identifcation [identification].* — (a) General Provision. The requirement of authentication or identification as a condition precedent to admissiblity [admissibility] is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication of identification conforming with the requirements of this rule:
>
> . . . .
>
> (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
>
> . . . .
>
> *Rule 902. Self-authentication.* — Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . . .
>
> (4) Certified copies of public records. A copy of an official record or report or entry therein, or a document authorized by law to be recorded or filed and actually recorded or filed in a

> public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3), or complying with any law of the United States or of this State.
>
> . . . .
>
> *Rule 1005. Public records.* — The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

We find Mr. Stivers's final contention to be without merit. The above rules of evidence describe circumstances under which a document may be properly admitted into evidence, but they are not exhaustive. Indeed, Rule 901(b) specifically states that the examples of authentication are illustrative and not limiting. In the instant case, the trial court was satisfied that the evidence introduced was what it was purported to be, and we find no error in this decision given that the judgments were signed and dated by the municipal judge and were certified copies. Although Mr. Stivers now argues that the certification was invalid because the signature did not match the clerk's name and the certification date was the same as the date of trial, these arguments were not specifically raised at trial, and he further fails to cite authority to suggest that these factors invalidate the certification. A trial court has wide discretion in evidentiary determinations, *Utley v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992), and finding no abuse of that discretion, we affirm the trial court's admission of the disputed exhibits.

The conviction for fourth-offense DWI arising out of the January 5, 1996, accident is reversed and dismissed. The conviction for fifth-offense DWI arising out of the March 14, 1996, accident is modified to fourth-offense DWI and is affirmed as modified.

STROUD and MEADS, JJ., agree.

Danny Lee WARD *v.* STATE of Arkansas

CA CR 98-374 981 S.W.2d 96

Court of Appeals of Arkansas
Division III
Opinion delivered November 18, 1998

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

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Danny Lee Ward appeals from his convictions of theft by receiving a firearm and possession of a firearm by a felon, for which he was sentenced as a habitual offender to fifteen and ten years, respectively, in the Arkansas Department of Correction. He contends that the trial court erred in denying his motions for directed verdicts of acquit-

tal because neither of the items in question met the statutory definition of a "firearm." We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998). When the sufficiency of the evidence is challenged on appeal from a criminal conviction, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State and will affirm if the finding of guilt is supported by substantial evidence. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Argo v. State*, 53 Ark. App. 103, 920 S.W.2d 18 (1996). For the purposes of both statutes that appellant was convicted of violating, our criminal code provides the following definition:

> "Firearm" means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable, and components that can readily be assembled into such a device.

Ark. Code Ann. § 5-1-102(6) (Repl. 1997).

At trial, Mr. Ralph King, a member of Veterans of Foreign Wars, testified that two M-1 rifles used by the VFW for ceremonial purposes were stolen from his truck on February 25, 1997. Mr. Bill Beck testified that he purchased two rifles from appellant later the same day. On February 26, Mr. Beck met with Mr. King and Detective Tim Smith of the Hot Springs Police Department. Mr. King identified the two rifles purchased by Mr. Beck as the ones that had been stolen from his truck. According to Mr. King, the rifles had been modified to fire only blanks. He testified that, to make the weapons capable of firing live ammunition again, all one would have to do is unscrew the blank adapter and screw on a gas cylinder lock. He testified that the process would require no special tools, just a screwdriver at most, and that the blank adapter on one of the rifles was only "finger tight."

Appellant contends that the trial court should have granted his motions for directed verdicts. In particular, he argues that the evidence is insufficient to support a finding that either of the weapons was a "firearm" because they could not then fire live ammunition and would require "substantial modification" to restore that capability. We cannot agree. Indeed, in light of Mr. King's testimony regarding the ease and quickness with which the weapons could be reconverted to live-fire capability, we have no hesitancy in finding substantial evidence to support the finding that the weapons were firearms within the meaning of the statute.

Affirmed.

AREY and JENNINGS, JJ., agree.

Kaedon STEINERT and Hurricane Express *v.* DIRECTOR, Arkansas Employment Security Department

E 98-20 979 S.W.2d 908

Court of Appeals of Arkansas
Division III
Opinion delivered November 18, 1998

Ball & Mourton, Ltd., by: *David G. Bercaw*, for appellants.

Phyllis Edwards, for appellee.

JOHN F. STROUD, JR., Judge. This is an appeal from the Board of Review's assessment of $31,339.22 for unemployment-insurance taxes based upon its decision that appellants' business constitutes employment subject to the payment of such taxes under Arkansas Code Annotated section 11-10-210(e) (Supp. 1997). Appellants challenge the Board's decision, contending that the Board erred 1) in finding that appellants' payments to drivers were a wage or remuneration for personal services, 2) in finding that drivers were under appellant's control and direction, 3) in

finding that services were performed at appellants' place of business, 4) in finding that drivers were not customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed, and 5) in basing its findings on the facts of a prior case in which appellants were not a party. We affirm.

Arkansas Code Annotated section 11-10-210(e) (Supp. 1997) provides:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, *unless and until it is shown to the satisfaction of the director that*:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; *and*
>
> (2) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; *and*
>
> (3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

(Emphasis added.)

The first sentence of section 11-10-210(e) defines employment for purposes of coverage regarding unemployment-insurance taxes. It provides in part that "[s]ervice performed by an individual for wages shall be deemed to be employment subject to this chapter. . . ." Wages is defined to mean "all remuneration paid for personal services, including, but not limited to, commissions, bonuses, cash value of all remuneration paid in any medium other than cash, the value of which shall be estimated and determined in accordance with regulations prescribed by the director, and tips received while performing services which constitute employment. . . ." Ark. Code Ann. § 11-10-215(a) (Repl. 1996). The remainder of section 11-10-210(e), *supra*, sets out the three

requirements that must be satisfied in order to qualify for an exemption from unemployment-insurance taxes.

In the first point of appeal, appellants contend that the Board erred in finding that the payments to the drivers in the instant case were a wage or remuneration for personal services because, appellants argue, the company merely acted as a clearinghouse for the distribution of payments received from third parties. We disagree.

On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. *Perdrix-Wang v. Director,* 42 Ark. App. 218, 856 S.W.2d 636 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

Here, viewing the evidence in the light most favorable to the Board's findings, Steinert testified that he started Hurricane Express in 1992; that from 1992 until approximately 1995 his business leased trucks to Sioux Transportation; that sometimes Sioux would "cut a check" to the drivers and sometimes he would pay them; that his arrangement with Sioux was that Sioux paid him on a percentage basis, with some routes paying him 80% and with other routes paying him 75%; that out of that settlement he would pay the drivers; that he had a lease agreement with Sioux, the terms of which provided that the drivers were his employees, not Sioux's; that the fact that he paid the drivers was just a "formality to keep Sioux in the clear"; that in 1995 he began a lease-purchase arrangement with the drivers; that it is "very seldom" that the drivers use one of his trucks without also using one of his trailers; that the brokers pay him for the load, and out of that amount the drivers owe him 25% of the total load for the trailer, cargo/liability insurance, permits and fuel taxes, plus their truck payment; that the driver gets what is left over; and that if the drivers have maintenance done to the truck, the cost of the maintenance performed

at his terminal is also deducted from the amount the drivers receive. Steinert described some of the activities at his place of business as follows:

> Well, we do all the mileage, tax reporting, filing and paying on the trucks because, every state, I mean you have to pay mileage tax and fuel tax, and keep it all straight for the trucks and of course the drivers have to get paid. The checks come in from the loads, they come to us, and we have to disperse the money, and the drivers call in.

We find that the Board reasonably concluded that appellants paid the drivers' wages in return for services rendered and that, accordingly, appellants' business constituted "employment" that was subject to the payment of unemployment-insurance taxes, unless the statutory requirements for exemption were satisfied.

For the second point of appeal, appellants contend that the Board erred in finding that appellants did not satisfy the first of the three statutory prongs for exemption because the drivers were under appellants' direction and control. Again, we disagree.

In order to establish the exemption set forth in section 11-10-210(e), *supra*, an employer must prove each of the requirements contained in subsections (1) through (3). *Network Design Eng'g, Inc. v. Director,* 52 Ark. App. 193, 917 S.W.2d 168 (1996). If there is sufficient evidence to support the Board's finding that any one of the three requirements is not met, the case must be affirmed. *Id.* Here, the Board determined that appellants failed to satisfy all three of the statutory requirements for exemption.

In addition to the testimony outlined previously regarding the payment of wages under both the arrangement with Sioux and under the lease-purchase agreement, Steinert testified that it was rare for his drivers to drive for any other companies; that the drivers were limited in what they could transport by whatever Hurricane Express was licensed to transport; that the drivers could haul trailers other than his, but that it would not make any sense because they have to pay him 25% anyway; that even if a driver were to haul a load for free, the driver would still owe him 25% of the fair market value of the load; that he has never had a driver actually end up owning a truck because most drivers don't keep a

truck as long as it takes to pay for it; that all of the trucks have the name, Hurricane Express, on their sides because trucks cannot travel the roads without some name on the side; and that the drivers have brokers that they like to use and they keep their trucks loaded 90% of the time, and he gets them approximately 10% of their loads. Steinert explained:

> [T]he drivers call in. They want to know who to get a load from, we'll give them a number of where their best chance of getting a load would be. Um, of course, we have to qualify the drivers, they come in and we have to qualify them. We have to run all the background checks on them, all the background checks, and see if they're okay, then send them down for drug screen and qualify them. Then, also, we have a shop where we do the trailer maintenance, and if the drivers want it, they can pay for tractor maintenance.

When asked what the arrangement with the drivers was as far as pulling appellants' trailers for any loads that appellants got on the trailers, Steinert responded, "Well, that's where for the 25% they give us, they're getting the use of the trailer, they're getting the use of our authority, all our insurances, and any contacts we have that can help them get loads."

This constitutes substantial evidence to support the Board's finding with respect to the first statutory prong, that the drivers were not free from appellants' control and direction in connection with the performance of their services. Consequently, it is unnecessary to address the remaining two statutory requirements since each of the three prongs must be satisfied in order to qualify for the exemption.

Affirmed.

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

Michelle WILLIAMS *v.* PROSTAFF TEMPORARIES

CA 97-1418 979 S.W.2d 911

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 18, 1998

[Petition for rehearing denied December 23, 1998.]

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Matthews, Sanders & Sayes, by: *Margaret M. Newton* and *Gail O. Matthews*, for appellee.

WENDELL L. GRIFFEN, Judge. Michelle Williams brings this appeal from the Arkansas Workers' Compensation Commission. The Commission found that Williams failed to prove by a preponderance of the evidence: (1) that she was entitled to additional temporary total disability benefits and (2) that she was entitled to medical treatment by Dr. Ted Saer. On appeal, Williams asserts that she did show, by substantial evidence, that she was entitled to additional temporary total disability benefits and that she was entitled to medical treatment by Dr. Ted Saer. We affirm the Worker's Compensation Commission and hold that the Commission's opinion displays a substantial basis for the denial of relief. Appellant failed to prove a causal relationship between her complaints after March 30, 1996, and the October 14, 1995, compensable injury. Further, we believe that the Commission made adequate findings for appellate review.

Williams sustained a compensable back injury on October 14, 1995, while working on assignment from Prostaff Temporaries at Amoco Foam. She had worked for approximately two months making styrofoam plates when she twisted her back while attempting to lift a four-and-one-half-foot-tall stack of styrofoam plates in a bag onto a table.

She reported the injury to her supervisor, who took her to the Hot Spring County Memorial Hospital Emergency Room for treatment. The treating doctor, Dr. William Highsmith, referred her to Dr. Vivian Highsmith, who then referred her to Dr. Bruce Safman, who diagnosed her condition as an inflammation of her back and treated her with an injection.

Prostaff Temporaries referred appellant to Dr. Kevin McLeod, who took x-rays, performed a CAT scan, and prescribed two weeks of physical therapy. Dr. McLeod then referred appellant back to Dr. Vivian Highsmith, who referred her to Dr. Ted Saer. The employer contended that the treatment with Dr. Saer was unreasonable and unnecessary and that appellant was not entitled to temporary total disability benefits.

The Commission found that appellant failed to prove by a preponderance of the evidence that any abnormality she may have experienced since March 30, 1996, was causally related to the relatively minor injuries sustained on October 14, 1995. Acknowledging that an MRI report indicated that appellant sustained a disk protrusion, the Commission's opinion also stated that "even if the protrusion did in fact exist, we find that the claimant failed to prove by a preponderance of the evidence that the protrusion is causally related to her injury on October 14, 1995, or that the protrusion is consistent with her complains (*sic*)."The Commission's findings are adequate for appellate review. The law requires that the Commission render findings adequate for appellate review. *See Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992). This does not require the Commission to render findings on every conceivable point of contention and dispute between the parties.

The only issue for appellate review is whether or not the Commission's decision is supported by substantial evidence. The Commission stated that the appellant's CAT scan did not detect the disk protrusion referred to by the MRI report. The Commission's opinion also favorably discussed Dr. Russell's opinion that appellant had:

> ample time for medical improvement based upon the proposed diagnosis of the lumbar strain. I see no other lesions that could contribute to her pain. Certainly nothing on the MRI scan would relate to a work type accident. Short of a work hardening type program, I see no further therapy indicated . . . and would release her to return to work with no restrictions and no rating impairment.

We view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings and affirm the decision if the findings are supported by substantial evidence. *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). 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).

The issue of whether or not there was objective evidence arises when determining whether an injury is compensable. Ark. Code Ann. § 11-9-102(5)(D) (Supp. 1997); *see also* Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 1996). The law concerning medical treatment and temporary total disability benefits does not concern itself with whether there were objective findings of an injury because that question applies to compensability and impairment determinations. On the record before us, we conclude that there is substantial basis for the Commission's decision that appellant did not prove a causal relationship between her claims for additional medical treatment and temporary liability benefits and the compensable injury.

Affirmed.

ROGERS, CRABTREE and MEADS, JJ., agree.

PITTMAN and AREY, JJ., would reverse.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent because the Workers' Compensation Commission failed to make findings on an outstanding issue. The majority opinion begins with the statement that the Commission found that appel-

lant "failed to prove by a preponderance of the evidence: 1) that she was entitled to additional temporary total disability benefits and 2) that she was entitled to medical treatment by Dr. Ted Saer." That statement is incorrect. Although entitlement to medical treatment by Dr. Saer was in fact placed in issue before the Commission, the Commission made no mention whatsoever concerning that issue in its opinion. As such, we have nothing before us to review with regard to that issue at this time.

The appellant requested two forms of relief before the administrative law judge: temporary total disability benefits, and additional medical treatment by Dr. Saer for pain management. The administrative law judge denied the claim, finding that appellant was not entitled to temporary total disability benefits because objective findings were lacking, and that additional medical treatment for pain would not be reasonable and necessary. This decision was appealed to the Commission, which also denied the claim. In so doing, however, the Commission did *not* adopt the administrative law judge's opinion, and found only that appellant was not entitled to temporary total disability benefits because objective findings were lacking; no findings were made regarding entitlement to additional medical treatment for pain. This is apparent from a review of the Commission's findings, which are reproduced in their entirety below:

> In short, we find that the claimant failed to prove by a preponderance of the evidence that any abnormalities she may have experienced since March 30, 1996, are causally related to the relatively minor injury sustained on October 14, 1995. We realize that the MRI report prepared by Dr. Harshfield indicates that there was a disc protrusion. However, that interpretation was contradicted by Dr. Russell and by the CT scan of November 3, 1995. Consequently, even if the protrusion did in fact exist, we find that the claimant failed to prove by a preponderance of the evidence that the protrusion is causally related to her injury on October 14, 1995, or that the protrusion is consistent with her present complaints.

In short, the Commission found that appellant failed to prove that her disc protrusion (being the only objective finding supporting her injury) was causally related to her work injury. This adequately supports the denial of temporary total disability benefits, because Ark. Code Ann. § 11-9-704(c)(1)(B) requires that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. But what about her claim for additional medical benefits for pain? The Commission certainly did not find that appellant failed to prove she sustained a compensable injury; as the administrative law judge noted, the parties *stipulated* that appellant sustained a compensable injury, and a claimant is not required to prove disability in order to obtain medical treatment. In fact, medical treatment for continued pain has been awarded *after* the end of the healing period. *Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997). Therefore, the Commission's comments regarding the lack of objective findings to support an award of disability benefits tell us nothing about appellant's claim for additional medical treatment for pain. We do not know if this claim was denied because the Commission believed that appellant was not experiencing any pain, or because appellant failed to prove that her pain resulted from her admittedly compensable injury, or because the proposed treatment for her pain was not reasonable and necessary. Of more significance, perhaps, is the fact that, because the Commission never even acknowledged in its opinion that entitlement to continuing medical treatment was an issue before it in the proceeding below, we are unable to say with any certainty that the Commission actually decided this issue. Perhaps they considered it to be barred by some procedural default. Or perhaps they merely overlooked it.

On the record before us, all we can tell regarding this issue of entitlement to additional medical treatment for pain is that the Commission may or may not have decided the issue and that, if the Commission did decide the issue, it may have decided it adversely to appellant for some reason.

I agree with the majority's statement that the Commission is not required to make findings on every conceivable issue. However, the Commission should at least state in its opinion what issues are to be decided, and how those issues were resolved, and why those issues were resolved in that manner. We have said that:

> The Arkansas Workers' Compensation Commission is not an appellate court. It is, instead, the factfinder, and as such its duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence.

White v. Air Systems, Inc., 33 Ark. App. 56, 59, 800 S.W.2d 726, 728 (1990) (citations omitted). In carrying out its duty to find the facts, the Commission is required to:

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

Shelton v. Freeland Pulpwood, 53 Ark. App. 16, 17, 918 S.W.2d 206, 206-207 (1996). The Commission's opinion in the case at bar falls woefully short of these minimum requirements and, consequently, cannot be reviewed by us in any meaningful way. I would reverse and remand for the Commission to make findings of fact sufficient for us to determine whether it resolved this issue in conformity with the law.

I respectfully dissent.

AREY, J., joins in this dissent.

A-1 BONDING *v.* STATE of Arkansas

CA 98-437 984 S.W.2d 29

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1998

[Petition for rehearing denied January 6, 1999.]

Keil & Goodson, by: *John C. Goodson*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Noe Garza was charged with possession of marijuana with intent to deliver, to which he pleaded not guilty on May 29, 1996. His trial was set for October 14, 1996, and he was released from jail on June 12, 1996, after appellant A-1 Bonding posted a $75,000.00 bond. On

October 2, 1996, Mr. Garza was to appear at a preliminary hearing, but failed to do so. Johnny Rockett, a representative of A-1 Bonding who attended the hearing, was directed to find Mr. Garza and return him to jail. A warrant was issued for Mr. Garza's arrest because of his failure to appear, and the prosecuting attorney was ordered to commence forfeiture proceedings on the bond.

A-1 Bonding received a letter on January 8, 1997, advising it that a forfeiture proceeding was set for hearing on May 7, 1997. Mr. Rockett appeared at the May 7, 1997, hearing and explained to the trial court that A-1 Bonding had made numerous unsuccessful attempts to apprehend Mr. Garza, who had apparently absconded to Mexico. Mr. Rockett testified that "[w]e have made five trips to south Texas" and that Gary Kennedy went into Mexico and located Mr. Garza, but they needed more time to extradite Mr. Garza by legal means. Mr. Rockett predicted that A-1 Bonding could have Mr. Garza returned to jail in thirty to forty-five days, and he estimated that around $15,000.00 had already been spent in their attempts at picking him up.

At the conclusion of the May 7, 1997, hearing, the trial court announced that "the bond will be forfeited." It ordered the deputy prosecuting attorney to prepare an order forfeiting the bond, but leaving open the issues of the amount of expenses incurred by A-1 Bonding in attempting to apprehend Mr. Garza, and whether A-1 Bonding would be given credit for those expenditures against the $75,000.00 forfeiture. The trial court then scheduled a hearing for June 25, 1997, for the purpose of determining the extent of any credit for A-1 Bonding's expenses.

On May 20, 1997, A-1 Bonding returned Mr. Garza to the county jail. At that time, Mr. Rockett and a deputy sheriff signed a "Bond Surrender Agreement," which purported to relieve A-1 Bonding of all liability on the bond.

On June 18, 1997, a written judgment for forfeiture of the bond was filed in the circuit clerk's office, pursuant to the directive of the trial court on May 7, 1997. Then, on June 25, 1997, A-1 Bonding filed a motion to amend findings of fact, to set aside judgment, and for new trial. In its motion, A-1 Bonding asked that the judgment be set aside because Mr. Garza was returned to

the county jail before the judgment was filed. A-1 Bonding also requested a new trial, and all other relief to which it may be entitled. The trial court continued the scheduled June 25, 1997, hearing until August 6, 1997, for the purpose of addressing these issues as well as any possible setoff in A-1 Bonding's favor as a result of its expenses incurred in attempting to apprehend Mr. Garza.

At the August 6, 1997, hearing, A-1 Bonding took the position that no judgment was entered on May 7, 1997, and that there was not an effective bond forfeiture prior to Mr. Garza's return on May 20, 1997. Mr. Rockett testified that, after the May 7, 1997 hearing, he was under the impression that they had an extension of time to apprehend Mr. Garza. Mr. Kennedy testified that, had he known the forfeiture was final, he would not have continued to pursue the matter. He then discussed the expenses involved in his efforts, which included several trips to south Texas and Mexico, hotel expenses, cellular phone expenses, and printing expenses for "reward" posters. Mr. Kennedy also indicated that he had to pay informants and the Mexican Federales, and had to employ an International Interdiction Recovery Team at a price totaling 55% of the bond. Although Mr. Kennedy produced no documentation of any expenses, he estimated that they exceeded $60,000.00.

After the August 6, 1997, hearing, the trial court found that while the June 18, 1997, order was not final and appealable, it was only because the issue of setoff expenses had been left open for resolution at a subsequent hearing. The trial court found that the bond had already been forfeited, and that this issue was res judicata. Although the trial court denied all of A-1 Bonding's motions, it allowed a $15,000.00 setoff for funds expended in apprehending Mr. Garza.

A-1 Bonding now appeals from the trial court's decision, and raises two arguments for reversal. First, it contends that, because Mr. Garza was surrendered before a judgment or forfeiture was entered, the trial court was without authority to forfeit the bond. In the alternative, A-1 Bonding argues that the trial court abused its discretion in failing to award the full expenses incurred in its efforts to apprehend Mr. Garza.

For its first argument, A-1 Bonding cites *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), in which our supreme court held that a judgment is not effective until it is "entered" as provided by Ark. R. Civ. P. 58; merely announcing the judgment from the bench is insufficient. A-1 Bonding asserts that, while the trial court announced the bond forfeiture on May 7, 1997, the judgment was not entered until after Mr. Garza had been returned to the county jail, and this fact rendered the judgment ineffective.

Arkansas Code Annotated section 16-84-114 (Supp. 1997) provides, in pertinent part:

> (a)(1) At any time before the forfeiture of their bond, the surety may surrender the defendant, or the defendant may surrender himself, to the jailer of the county in which the offense was committed.
>
> (2) However, the surrender must be accompanied by a certified copy of the bail bond to be delivered to the jailer, who must detain the defendant in custody thereon as upon a commitment and give a written acknowledgment of the surrender.
>
> (3) The surety shall thereupon be exonerated.

Arkansas Code Annotated section 16-84-201 (Supp. 1997) provides:

> (a)(1)(A) If the defendant fails to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the fact to be entered on the minutes, and shall promptly issue an order requiring the surety to appear, on a date set by the court not less than ninety (90) days nor more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond or the money deposited in lieu of bail should not be forfeited.
>
> (B) The one hundred twenty-day period begins to run from the date notice is sent by certified mail to the surety company at the address shown on the bond, whether or not it is received by the surety.
>
> (2) The order shall also require the officer who was responsible for taking of bail to appear, unless:

(A) The surety is a bail bondsman; or

(B) The officer accepted cash in the amount of bail.

(b) The appropriate law enforcement agencies shall make every reasonable effort to apprehend the defendant.

(c)(1) If the defendant is surrendered, arrested, or good cause is shown for his failure to appear before judgment is entered against the surety, the court shall exonerate a reasonable amount of the surety's liability under the bail bond.

(2) However, if the surety causes the apprehension of the defendant, or the defendant is apprehended within one hundred twenty (120) days from the days of receipt of written notification to the surety of the defendant's failure to appear, no judgment or forfeiture of bond may be entered against the surety, except as provided in subsection (e) of this section.

(d) If, after one hundred twenty (120) days, the defendant has not surrendered or been arrested, prior to judgment against the surety, the bail bond or money deposited in lieu of bail may be forfeited.

(e) If, before judgment is entered against the surety, the defendant is located in another state, and the location is known, the appropriate law enforcement officers shall cause the arrest of the defendant and the surety shall be liable for the cost of returning the defendant to the court in an amount not to exceed the face value of the bail bond.

(f) In determining the extent of liability of the surety on a bond forfeiture, the court may take into consideration the expenses incurred by the surety in attempting to locate the defendant and may allow the surety credit for the expenses incurred.

Although A-1 Bonding submits that Ark. Code Ann. § 16-84-114(a)(3) (Supp. 1997) entitles it to complete exoneration, we find otherwise. Arkansas Code Annotated section 16-84-114(a)(1) (Supp. 1997) provides that, to be entitled to complete exoneration, the defendant must be surrendered before forfeiture of the bond, and here that did not occur. Although the judgment against A-1 Bonding was not entered until after Mr. Garza was surrendered, the forfeiture became effective when announced on May 7, 1997. The trial court in this case correctly

complied with Ark. Code Ann. § 16-84-201(c)(1) (Supp. 1997), which provides for the exoneration of a *reasonable amount* of the surety's liability if he is surrendered before judgment is entered. Mr. Garza was surrendered after the forfeiture but prior to entry of the judgment, and the trial court credited A-1 Bonding with $15,000.00 against the $75,000.00 forfeited bond in accordance with the above statutory authority.

A-1 Bonding's remaining argument is that the trial court failed to award the full expenses incurred in its efforts to apprehend Mr. Garza. It notes that, at the August 6, 1997, hearing, Mr. Kennedy estimated these expenses to be more than $60,000.00

Pursuant to Ark. Code Ann. § 16-84-201(f) (Supp. 1997), the trial court took into consideration the expenses incurred by A-1 Bonding, and determined that they totaled only $15,000.00. A trial court's decision in this regard will not be reversed absent an abuse of discretion, *see Liberty Bonding Co. v. State*, 270 Ark. 434, 604 S.W.2d 956 (1980), and in the case at bar we find no abuse of the trial court's discretion. At the May 7, 1997, hearing, Mr. Rockett estimated the expenses at $15,000.00. While Mr. Kennedy later testified that over $60,000.00 was expended in recovering Mr. Garza, he produced no documentation of any of the asserted expenses, and the trial court was not obligated to accept his testimony given that it is its duty to judge the credibility of the witnesses. *See Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996).

Affirmed.

NEAL and CRABTREE, JJ., agree.

Cathy NEEDHAM *v.* HARVEST FOODS

CA 98-70 987 S.W.2d 278

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1998

Gary Vinson, for appellant.

Kilpatrick, Aud & Williams, L.L.P., by: *Michael E. Aud*, for appellees.

JOHN B. ROBBINS, Chief Judge. Appellant Cathy Needham appeals the Workers' Compensation Commission's denial of permanent partial disability, wage loss, and additional benefits pursuant to Ark. Code Ann. § 11-9-505(a) (Repl. 1996), arguing that there is no substantial basis for the denial of the claim. We disagree with her arguments and affirm the Commission.

Appellant worked for appellee Harvest Foods at its store in Batesville, Arkansas, when she suffered a cervical injury at C6-7 in an automobile accident on June 29, 1993. She healed from that

off-the-job injury and returned to work in January 1994. On May 6, 1994, she was injured at work while lifting a twenty-pound bag of dog food. A small compression fracture was located at C7. Though controverted on the basis that it was a recurrence of the old injury, the claim was later determined to be a compensable aggravation of the prior injury, and benefits were awarded that flowed from the claim. During the controversion of compensability, appellee declined to return appellant to work because its position was that this was not work related and that the union contract mandated that employees injured off the job would not be returned to work if they had restrictions. Upon a finding that the injury was compensable, the administrative law judge awarded appellee all reasonably related medical expenses, temporary total disability, permanent partial disability, and wage loss. Though requested, she did not receive additional benefits pursuant to Ark. Code Ann. § 11-9-505(a). She appealed to the Commission, and appellee cross appealed. The Commission reversed the administrative law judge in part, holding that appellant was not entitled to permanent partial disability benefits or wage-loss benefits, but affirmed denial of additional benefits under § 11-9-505(a). She appeals.

■ When reviewing decisions 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 uphold those findings if they are supported by substantial evidence. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result than the one reached by the Commission or whether the evidence would have supported a contrary finding. *Hope Livestock Auction Co. v. Knighton*, 62 Ark. App. 74, 966 S.W.2d 943 (1998). If reasonable minds could reach the result shown by the Commission's decision, we must affirm the decision. *Id.* We find there to be a substantial basis for the denial of appellant's claim.

■ Appellant argues that the Commission erroneously denied her additional compensation. The statute in question is

Ark. Code Ann. § 11-9-505(a), entitled Additional Compensation—Rehabilitation, which states:

> (a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one (1) year.
>
> (2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

Before Ark. Code Ann. § 11-9-505(a) applies, several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment that is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and that the employer's refusal to return him to work is without reasonable cause. *Torrey, supra.*

The Commission denied her these additional benefits because it found that appellee had a good-faith belief that appellant's current injury was a recurrence of the injuries received in her earlier non-work related motor vehicle accident. The Commission further found that appellee was a party to a union contract that contained a provision that an injured employee must be released without restrictions for full duty before being eligible for reinstatement, because light-duty work was limited to employees with work-related injuries. While on appeal the parties argue whether the subject provision of the collective bargaining agreement was properly proven or conceded, inasmuch as the agreement was not made part of the record, we fail to see its relevance.

First, the contract provision as found by the Commission merely requires that light-duty work for injured employees be given only to employees who were injured in job-related inci-

dents. Likewise, § 11-9-505(a)(1) is applicable only to employees who were "injured in the course of employment." Thus, the union contract did not provide any greater cause for refusing to return appellant to a light-duty job than the statute does. Secondly, the requirement of § 11-9-505(a)(2) that the provisions of any collective bargaining agreement must be taken into account in determining whether suitable employment for an injured employee is available only pertains to the matter of seniority. The issue of seniority was not addressed in the union contract provision argued before the Commission. Consequently, the union contract is simply irrelevant for purposes of this appeal.

■ ■ There is, however, substantial evidence in the record to support the Commission's finding that the appellee did not refuse appellant light-duty work without reasonable cause. Although appellee had contested the compensability of appellant's May 6, 1994, injury on the ground that this injury was not incurred in the course of appellant's employment, controversion of the compensability of an employee's injury, alone, does not establish a reasonable cause for refusing to return an injured employee to work as provided by § 11-9-505(a)(1). The reason or reasons for controverting the compensability of an employee's claim must be reasonable. Here, the Commission had before it the report of Dr. C. Lowry Barnes, who examined appellant at the request of appellee within a week of her May 6 injury, which stated:

> I explained to her that I was unsure whether or not this would be covered under workers' compensation, as this seems to be the same problem that she has had previously. She actually said that she did not initially think that it was worker's comp and wanted to see her own doctor, but she was asked to see the "company doctor."

Consequently, we hold that there was substantial evidence before the Commission that supports its finding that appellee had reasonable cause in refusing to return appellant to a light-duty position following her injury, notwithstanding the fact that the injury was subsequently determined to be compensable.

Appellant next argues that there is no substantial basis to support the denial of permanent partial and wage-loss disability benefits. We disagree. Her physician had given her a four percent anatomical rating to the body as a whole due solely to a non-operable herniated disc at C6-7. The car accident, by appellant's testimony, "totaled" her car after being struck from the rear and ruptured a disc in her neck. The doctor's notes indicate: "It is my opinion that Ms. Needham has a partial permanent impairment related to the C6-7 disc. This is a non-operative condition from which she has residuals. Her partial permanent impairment rating would be 4% for a nonoperatively treated herniated disc." "She does have residuals of her herniation and a partial permanent impairment rating of 4% related to a nonoperatively treated cervical herniated disc." "Concerning the causalgia of her current problems, it is a combination of a disc injury followed by a compression fractures [sic]. There are 2 specific injuries." Because this herniation predated the compensable aggravation and because this rating is for the non-work-related event, there was substantial evidence upon which to deny any permanent partial impairment rating.

Because we find that there is a substantial basis to deny permanent partial disability benefits, we need not address appellant's argument regarding wage-loss disability benefits. In order to be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Ark. Code Ann. § 11-9-102(F)(ii)(a); *see Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996).

Affirmed.

NEAL and CRABTREE, JJ., agree.

Gwenda Kaye WAKEFIELD *v.* Joel David WAKEFIELD and Thomas Wakefield

CA 97-860 984 S.W.2d 32

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 2, 1998

David Lewis Clark, for appellant.

James E. Davis, for appellees.

SAM BIRD, Judge. Appellant Gwenda Kaye Wakefield appeals an order from the chancery court of Howard County contending that the chancellor erred by finding her in contempt, ordering her to pay appellees' attorney's fees and expert witness fees, and restraining her from seeking psychological or mental-health treatment for her two minor children without prior approval from the Department of Human Services (DHS). We reverse.

Appellee Joel David Wakefield and appellant were divorced on August 9, 1995, and there was incorporated into their divorce decree a separation, child-custody, and property-settlement agreement. By their agreement, custody of their two children, Heather and Kayla, was awarded to appellant, and Joel David Wakefield was granted visitation privileges. The agreement provided that if Joel David Wakefield did not exercise his visitation rights, then the paternal grandparents had the right to exercise them. Appellee Thomas Wakefield is the children's paternal grandfather. Joel David Wakefield lives with his parents, and appellees' visitations take place at their residence.

Appellant testified that about a year after the divorce became final, she sought counseling for Heather from Yvonne Fellers, a licensed clinical social worker, because Heather, then almost three years old, was having nightmares, becoming aggressive, had regressed from toilet training, and was "sexually acting out." In addition, appellant testified that statements made by Heather to her paternal grandmother and to a babysitter raised questions of possible sexual abuse.

Fellers arranged a meeting with Joel David Wakefield on October 15 and informed him of her suspicions of improper sexual touching by Thomas Wakefield, known to Heather as "Paw-paw." Fellers also reported the suspected sexual abuse to DHS. About a week after Fellers reported the possibility of sexual abuse to DHS, DHS conducted a physical examination of Heather at Arkansas Children's Hospital, and no physical signs of sexual abuse were present.

Appellant states that DHS suggested to her, and that appellant suggested to her ex-husband, that they arrange some kind of supervised visitation for the children. Appellant states that she was told by DHS that if she knowingly exposed her children to potential sexual abuse, she would risk having them removed from her custody and placed in foster care. Because her ex-husband would not agree to supervised visitation, appellant felt she had no choice but to deny visitation.

Appellant moved to restrict visitation to a location away from the father's current residence while the investigation was pending, and appellee Joel David Wakefield moved for contempt charges against appellant because she denied unrestricted visitation on October 19 and 20.

A temporary hearing was held on October 30, 1996, before Chancellor Ted Capeheart. Following the hearing, Chancellor Capeheart announced from the bench that he found no basis for appellant's concerns, found her in contempt for denying visitation on October 19 and 20, and ordered her to pay $500 as appellee's attorney fees, but suspended payment on condition that appellant comply with his orders previously entered.

Pursuant to Fellers's suggestion, appellant had been conducting videotaped play therapy of Heather as part of a group parenting program, and after viewing the videotape, Fellers stated that Heather was near a psychotic breakdown and suggested immediate psychiatric evaluations.

On October 31, Dr. Greg Brown, a child psychiatrist, admitted Heather to Charter Forest Health System for five nights, resulting in another denial of appellees' visitation on November 1 and 2. During the time she was in the hospital, Heather was assessed by a clinical neuropsychologist, and she underwent two physical examinations by pediatricians. Heather was discharged on November 5 and diagnosed with posttraumatic stress disorder with continued concerns about sexual-abuse allegations.

On November 13, Judge Capeheart signed an order setting forth the findings that he had announced from the bench at the October 30 hearing. Also, on November 13, Judge Capeheart

filed a letter addressed to the parties' attorneys stating that he was recusing from the case because he could not be fair to appellant. The chancellor's letter stated,

> I must recuse in this case because I cannot be fair. I suspect the Plaintiff's family has encouraged the Plaintiff to make these accusations to gain an advantage in their visitation dispute. I know too much from past cases involving the family and cannot be fair in this case to Mrs. Wakefield.

On November 14, appellee Joel David Wakefield filed a petition for change of custody and another petition for contempt. Appellant responded with a petition for order of protection, a petition to modify visitation, a petition for contempt due to non-payment of support, and a petition to set aside the earlier finding of contempt.

A hearing was held on November 26 before Judge Robert Lowery. Appellant testified that before she suspected possible sexual abuse, she had never denied visitation. She stated that she denied visitation because she was fearful that Heather had been abused and would be again, and that the appellees would be angry with Heather "because she was talking and I was afraid for her safety."

She testified that on one occasion following a visitation, Heather appeared to be in pain, pointed toward her vaginal area, and would not sit down in the bathtub. Appellant also testified that once, when Heather was playing with her dolls, she would show the "Pawpaw doll" on top of the "Heather doll." She testified that she admitted Heather to the hospital immediately as her doctor recommended and because Heather's safety was at stake.

Dr. Brown testified that during the time he treated Heather at Charter Forest Health System he saw signs of the possibility of sexual abuse. From the abstract, it appears Dr. Brown testified:

> . . . I felt it was important to investigate things further especially with Heather's reporting from her own mouth who the perpetrator was. The reports from the counseling center showed concerns about a possibly sexually abused three year old who was acting out with aggressive behavior, sleep disturbance, nightmares, and play therapy sessions that pointed towards her having

> been sexually abused. Heather told me about the nightmares, the trouble sleeping. Heather herself was able to say that she was touched on her body. She wasn't able to say who it was on the first day . . . . I wrote letters to Judge Capeheart, with copies to DHS and the State Police, saying that I did definitely feel there was evidence that Heather had been sexually abused and had identified her paternal grandfather, Pawpaw . . . . I do not feel it would be in the best interest of the child to visit the grandparent while there were open concerns about what was happening.

Lorili Sellers, an investigator with the Sex Crimes Division of the Arkansas State Police, also testified on appellant's behalf, and did not rule out the possibility of sexual abuse. Yvonne Fellers also testified that although there was no concrete physical evidence, her evaluation was that Heather had been sexually abused.

The appellees presented their own expert witness, Dr. Betty Feir, a clinical psychologist, who diagnosed Heather with post-traumatic stress disorder. Dr. Feir testified that after she watched the videotapes, she felt that Heather's behavior was associated with the upcoming Halloween holiday. Also, she said that Heather's violent behavior was often a repetition of phrases her mother would say, such as, "Do you want me to shut up," which Heather would then repeat, saying, "Shut up." She stated that she had not heard anything or any testimony that would indicate conclusively that there was any abuse. She also testified that the physical examinations Heather had undergone in order to detect possible abuse had been traumatic. She merely suggested that, in her opinion, there were a number of "red flags" that pointed to the possibility that appellant was hysterical and overreacting to reports that Heather had been abused, in the absence of physical evidence.

Dr. Feir stated that she interviewed the appellees and their families and friends when evaluating the possibility of sexual abuse, but she conceded that she had neither evaluated nor interviewed Heather. She testified that even though she did not see any physical signs of sexual abuse, she would not rule out such a possibility. Moreover, she said, "I wouldn't think it would be too abnormal for a mother to be overly worried when she has been told by two experts they feel there is a very good possibility that

sexual abuse has occurred. She was also told by two experts that it hadn't occurred."

Judge Lowery granted a motion to dismiss all of appellant's motions and petitions, stating that the testimony was speculative and tenuous and that no witness had confirmed any sexual abuse. He denied Joel David Wakefield's motion for change of custody. He then revoked the $500 attorney's fees suspension and awarded an additional $1,000 to Thomas Wakefield in attorney's fees. He required appellant to seek court approval prior to pursuing what he found were speculative, spurious, and totally false claims of sexual abuse. A review hearing was set for December 18.

At the review hearing, appellee Thomas Wakefield was permitted to testify as to his court expenses, stating that he had paid Dr. Feir $3,500 and still owed her $1,050. The chancellor ordered that appellant was not to seek psychiatric treatment for the children without approval from DHS, and that appellant was to pay $4,550 for Dr. Feir's testimony and $1,000 in attorney's fees.[1]

Appellant argues that the court erred by finding her in willful contempt, in granting $1,000 in attorney's fees and $4,550 in fees for an expert witness, and in stating that she cannot seek treatment for her children, without DHS approval.

Appellant was found in willful contempt twice. First, she was found in contempt for denying visitation on October 19 and 20 by Judge Capeheart who sua sponte recused the same day he signed the order. We find this order void because the chancellor erred in signing such an order the same day he recused from the case stating he could not be fair.

The Arkansas Supreme Court has held that where a judge exhibits bias or the appearance of bias, this court should reverse. *Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996). In addition, the proper administration of law requires not only that judges refrain from actual bias, but that they also avoid all appearances of unfairness. *Id.* Whether a judge has become biased to

[1] When making oral findings at the end of the hearing on November 26, the chancellor ordered appellant to pay $1,000 in attorney's fees. However, he did not include this $1,000 award in his written order that was entered on December 30.

the point that he or she should disqualify is a matter to be confined to the conscience of the judge because bias is a subjective matter within the knowledge of the judge. *Id.*

In the case at bar, Judge Capeheart entered the order and sent a letter stating that he could not be fair to appellant. He wrote, "I must recuse from this case because I cannot be fair. I suspect the Plaintiff's family has encouraged the Plaintiff to make these accusations to gain an advantage in their visitation dispute." This letter constitutes substantial evidence of bias; therefore, Judge Capeheart's order finding appellant in contempt and ordering her to pay $500 in appellees' attorney's fees if she did not comply with his order is void. Because Judge Capeheart was biased, he should have disqualified himself and withdrawn from the case and should not have entered the order. *Noland v. Noland, supra.*

Appellant also argues that Judge Lowery erred when, in a subsequent hearing, he found that appellant had not acted in compliance with Judge Capeheart's order and revoked the $500 sanction that had been suspended. Because we have held that Judge Capeheart's order was void, we hold that Judge Lowery could not then revoke the suspension of a void order.

Appellant was also found in contempt by Judge Lowery and ordered to pay $4,550 in expert witness fees, and an additional $1,000 in attorney's fees. We also reverse this order.

For a person to be held in contempt for violating a court order, that order must be clear and definite as to the duties imposed upon the party, and the directions must be expressed rather than implied. *Jones v. Jones,* 320 Ark. 449, 898 S.W.2d 23 (1995). In certain cases, a process for contempt may be used to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct. *Butler v. Comer,* 57 Ark. App. 117, 942 S.W.2d 278 (1997). In cases of civil contempt, the objective is the enforcement of the rights of the private parties to litigation. *Warren v. Robinson,* 288 Ark. 249, 704 S.W.2d 614 (1986). Punishment for civil contempt will be upheld by this court unless the trial court's order is arbitrary or against the weight of the evidence. *Dennison v. Mobley, Chancellor,* 257 Ark. 216, 515 S.W.2d 215 (1974).

We do not agree with the chancellor that appellant should be found in willful contempt, and we find his order to be arbitrary and against the weight of the evidence. The evidence does not reflect that the appellant's fears were completely unfounded. Although he did not find any evidence of sexual abuse, the judge himself noted that the mother was doing what she thought was best for her children. Further, it was a medical doctor who ordered that the child be admitted and supervised in a hospital, and we do not believe that appellant was unreasonable in obeying the doctor's order. In fact, as noted, sexual abuse was not completely ruled out by the experts. And appellant's expert witnesses stated that although there was no physical evidence of sexual abuse, they saw signs of sexual abuse.

Even the appellees' expert witness did not preclude the possibility that Heather had been subjected to sexual abuse. Moreover, she stated that it would not be abnormal for a mother to be overly worried when she had been told by two experts that there was a very good possibility that her daughter had been sexually abused. Based upon the testimony presented, there was evidence from which appellant could have reasonably concluded that her daughter might have been sexually abused by her grandfather.[2] Under these circumstances, we cannot say that a mother who is legitimately concerned about the welfare of her child and has acted upon the advice of DHS and qualified professionals is in willful contempt of court.

Further, Judge Lowery stated that the reason the appellant was even in court on December 18 was because she was in direct violation of the November 13 order of Judge Capeheart, who recused the same day the order was signed because he could not be fair. As we have stated above, Judge Capeheart should have recused before entering the order. We do not believe appellant can be in willful contempt of an order that should not have been

[2] We stress that our decision should not be construed as a determination by this court that there was evidence presented that is sufficient to establish that Thomas Wakefield has, in fact, sexually molested his granddaughter. It is our holding only that appellant was justified and reasonable in acting in reliance upon the advice of professionals, and that she was not, therefore, in willful contempt even though her actions had the effect of temporarily depriving appellees of their visitation rights.

entered in the first place because the judge knew he could not be fair.

Because we have found that Judge Capeheart's order is void, we reverse the award of $500 in attorney's fees. And because we hold that Judge Lowery's order finding appellant in contempt and awarding $4,550 in expert witness fees and $1,000 in attorney's fees to be arbitrary and against the weight of the evidence, we reverse that order as well.

Reversed.

STROUD, NEAL, and GRIFFEN, JJ., agree.

ROBBINS, C.J., and ROGERS, J., dissent.

JOHN B. ROBBINS, Chief Judge, dissenting. I agree with the majority's decision that, because Judge Capeheart acknowledged that he could not be fair when he recused from presiding over this proceeding, he should not have found appellant in contempt, and Judge Lowery's revocation of the $500.00 sanction imposed by Judge Capeheart was invalid. However, I disagree with the majority's conclusion that Judge Lowery erred in finding Ms. Wakefield in contempt after she denied visitation on November 1 and 2 of 1996.

In a contempt proceeding, it is the chancery court's duty to determine whether the alleged contemnor willfully disobeyed a previous court order. *Snisky v. Whisenhunt*, 44 Ark. App. 13, 864 S.W.2d 875 (1993). When there are conflicts in the testimony, it is the duty of the appellate court to give the same force to findings of the trial court in contempt proceedings as in other cases when the testimony is conflicting, and every presumption must be indulged in favor of the trial court's judgment. *Dennison v. Mobley, Chancellor*, 257 Ark. 217, 515 S.W.2d 215 (1974).

In the instant case, the chancery court gave great credence to the testimony of Dr. Feir. It was her opinion that there was insufficient evidence of sexual abuse and that visitation should not be restricted in any way. While it may be true that Ms. Wakefield's fears were not completely unfounded, it is undisputed that, prior to deliberately denying visitation, she failed to petition the chan-

cery court for a temporary, emergency waiver of the visitation schedule. Indeed, the chancery court was not notified of her failure to permit the scheduled visitation until Mr. Wakefield subsequently filed a petition for change of custody and motion for contempt.

I am not unsympathetic to a parent's interest in protecting his or her child from what is perceived to be a potentially dangerous situation. However, in my view, if a parent willfully disregards a court order regarding visitation, and does so without any effort to obtain emergency relief from the appropriate chancery court, the parent proceeds at his or her peril. If the evidence adduced at a subsequent hearing reveals to the satisfaction of the chancellor that the child's safety would not have been compromised, then the intentional failure to allow visitation is without justification and an order of willful contempt is the proper sanction. I submit that this is exactly what occurred in this case.

I would affirm Judge Lowery's finding of contempt[1], and would further affirm the $4,550.00 expert-witness fee award and the chancellor's decision to require court approval prior to seeking further psychiatric evaluations. A chancellor has the inherent power to make an innocent party whole from the consequences of another party's contempt, *see Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995), and in the case at bar it is apparent that the retention of Dr. Feir as an expert witness was necessitated by Ms. Wakefield's refusal to permit visitation. This is true because her testimony was elicited to rebut the evidence tending to show that Heather showed signs of being abused by her grandfather, and that as a result the denial of visitation was justified. As for the requirement that any further psychiatric treatment is prohibited without prior court approval, it is important to note that Ms. Wakefield is

[1] While the majority finds that Judge Lowery's finding of contempt was ineffective because it was premised on a violation of visitation orders set by Judge Capeheart in a proceeding in which he should have recused, I disagree with this assessment. Judge Capeheart's order recited that the $500.00 attorney's fee was suspended conditioned on Ms. Wakefield's compliance with orders previously entered. The order does not reflect the imposition of any additional visitation requirements. Therefore, it is apparent that Judge Lowery's finding of contempt was for a violation of visitation orders that were issued prior to the October 30, 1996, hearing before Judge Capeheart.

still able to seek DHS counseling for her children, and she is free to petition the court for further counseling or treatment if more substantial symptoms of abuse surface. This requirement was warranted based on the chancellor's finding that there was insufficient evidence of sexual abuse and Ms. Wakefield was exposing Heather to a potentially damaging situation.

For the reasons expressed above, I respectfully dissent.

ROGERS, J., joins in this dissent.

James E. HAGANS and Bonnie J. Hagans *v.*
Lynn H. HAINES and Bonnie R. Haines

CA 98-301 984 S.W.2d 41

Court of Appeals of Arkansas
Division IV
Opinion delivered December 2, 1998

Lynn Frank Plemmons, for appellant.

Streett Law Firm, by: *Alex G. Streett*, for appellee.

JOHN F. STROUD, JR., Judge. James E. and Bonnie J. Hagans appeal the denial of their complaint for specific performance of a contract for the sale of commercial real estate. They contend that the Pope County Chancery Court erred 1) in permitting extrinsic evidence of a collateral matter to alter the terms of or to attack an executed, integrated agreement; and 2) in finding that there was no enforceable contract. We agree on both points and reverse and remand.

At a hearing before the chancellor, testimony for appellants was given by Mr. Hagans and Rita Gilbreath, a title company employee, regarding a two-page document entitled "Real Estate Contract (Offer and Acceptance)." Appellant James Hagans signed as buyer, and both appellees signed as sellers at the end of the two-page instrument.

Ms. Gilbreath testified that Dr. Lynn Haines contacted her in September 1996 and requested that she find out from a particular individual with the Internal Revenue Service "what it would take" to have an IRS lien released on property that Dr. Haines wished to sell to Mr. Hagans. She learned that she would need to send the IRS an "offer and acceptance." Dr. Haines kept her informed about negotiations between buyer and seller, and on November 26, 1996, she prepared an offer and acceptance based on information from Dr. Haines and from Mr. Hagans, whom she had telephoned earlier that day. She faxed the document to Mr. Hagans, who signed it and faxed it back to her. Dr. and Mrs. Haines then came to her office, and she told them to look over the offer and acceptance to "make sure it was what they wanted to do." The Haineses signed the faxed copy in her presence the

afternoon of November 26. About two weeks later, when Ms. Gilbreath telephoned Dr. Haines regarding closing, he informed her that the parties had not worked out an easement problem.

Mr. Hagans testified that the offer and acceptance incorporated the complete agreement between himself and the Haineses. Before the scheduled closing date in December, however, Dr. Haines told Mr. Hagans that the deal was off unless he agreed to a utility easement across the back of the property that Dr. Haines needed in order to sell an adjacent lot. Mr. Hagans also testified that he and Dr. Haines had a verbal agreement that allowed Dr. Haines to stay in the building and pay rent for his office space. Mr. Hagans did not agree to the easement, there were no more conversations, and the deal never closed.

The two-page document that was the subject of testimony was admitted into evidence and is a part of the record before us. It makes no mention of an easement or of a rental agreement. A merger clause on the second page reads as follows:

> This Agreement, when executed by both Buyer and Seller, shall contain the entire understanding and agreement between the Buyer and Seller and agent with respect to the matters referred to herein and shall supersede all prior or contemporaneous agreements, representations and understanding with respect to such matters, and no oral representation or statement shall be considered a part hereof.

Witnesses for appellees included Bob Taylor, president and CEO of Boatmen's National Bank of Russellville; Cliff Goodin, a real estate broker; and Dr. and Ms. Haines. Additionally, Mr. Hagans was recalled as a witness.

Mr. Taylor testified that he had been involved in Mr. Hagans's negotiations to assume Dr. Haines's loan and to purchase his property. Mr. Taylor learned in December 1996 that Dr. Haines wanted to give the buyer of an adjacent lot an easement across the property. Although Mr. Taylor told Mr. Hagans that the bank had no problem with it, Mr. Hagans told him that he felt the easement was detrimental to the value of the property and that he was out of the deal.

Mr. Goodin testified that he attempted to get an easement across the property for a couple of vacant lots next to it that he sold to another doctor. In December Mr. Hagans told him that "he was through, finished, the price was changed and he was through."

Appellees Lynn and Bonnie Haines testified on their own behalf regarding the document they had signed. Dr. Haines testified that he signed the second page of the document, but that he did not agree to sign it as an offer and acceptance. When he referred to his agreement with Mr. Hagans regarding renting the property, appellants objected as follows:

> Objection, your Honor. We are violating the collateral evidence rule. I ask the court to find the document in question is a contract and any testimony altering the terms of that agreement should be barred by the court.

The court overruled the objection. Dr. Haines then testified that he and his wife signed only the second page because there was no stipulation for rent agreement, that Ms. Gilbreath had told them they needed to sign something in order to negotiate with the IRS, that they signed for the purpose of sending it to the IRS, that he was negotiating to sell the adjacent lots to another doctor, that Mr. Hagans did not want to give an easement, and that he had a verbal agreement with Mr. Hagans to remain in the clinic until at least June 1997. He also stated that Ms. Gilbreath was untruthful in her testimony, that he did not initial the first page because it did not contain information about the rental agreement, and that he specifically told Ms. Gilbreath he would not sign it.

Ms. Haines testified that she signed only the second page because the document had no rental agreement, that she asked Ms. Gilbreath about the absence of the agreement, that there were not two pages attached when she signed, and that when she specifically asked if the agreement was binding, Ms. Gilbreath said, "No." Mr. Hagans testified that he and Dr. Haines had a verbal agreement that Dr. Haines could stay in the building and pay rent for his office space.

I. Whether the trial court erred in permitting extrinsic evidence of a collateral matter to alter the terms of or attack an executed integrated agreement.

Appellants contend that the parol evidence rule was violated by appellees' testimony that they did not intend the instrument to be an offer and acceptance because it contained no rental agreement. Appellants argue that the testimony was inadmissible in that it went to modification of the terms of the contract.

Where a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written contract. *Brown v. Aquilino*, 271 Ark. 273, 608 S.W.2d 35 (Ark. App. 1980). The parol evidence rule is a rule of substantive law in which all antecedent proposals and negotiations are merged into the written contract and cannot be added to or varied by parol evidence. *Id.* In *Cate v. Irvin*, 44 Ark. App. 39, 43, 866 S.W.2d 423,425 (1993), we further discussed the rule:

> The parol evidence rule prohibits the introduction of extrinsic evidence, parol or otherwise, which is offered to vary the terms of a written agreement; it is a substantive rule of law, rather than a rule of evidence, and its premise is that the written agreement itself is the best evidence of the intention of the parties. It is a general proposition of the common law that in the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings and verbal agreements on the same subjects. It is well settled that a written contract may be modified by a later oral agreement. Such testimony is inadmissible if it tends to alter, vary, or contradict the written contract but is admissible if it tends to prove a part of the contract about which the written contract is silent.

(Citations omitted.)

Testimony of an oral rental agreement could properly be admitted to show modification of the terms of a written contract if the agreement was made subsequent to the execution of the written contract, but the testimony here referred to an agreement made before the contract came into existence. Thus, the testimony was inadmissible under the parol evidence rule.

Furthermore, the merger clause in the signed instrument stated that the executed agreement was to contain the entire understanding and agreement between the parties with respect to the matters referred to within the contract; that the agreement was to supersede all prior or contemporaneous agreements, representations and understanding with respect to such matters; and that "no oral representation or statement shall be considered a part" of the agreement. We find that the trial court erred in admitting the testimony of a previous rental agreement, for the testimony was considered in abrogation of the clear and unambiguous terms of the written contract, and in violation of the explicit terms of the merger clause. A lease agreement intended to be applicable after the sale of property has closed is not a necessary part of an offer and acceptance, nor does its omission from the written contract prevent the lease agreement from being enforceable.

The reasoning above also applies to appellees' testimony that their purpose in signing the instrument was only to procure the release of an IRS lien on the property. Testimony of the parties' intent in signing the instrument was not admissible to contradict its plain, unambiguous, and complete terms.

II. Whether the court erred in finding that there was no enforceable contract.

The trial court here found that "the purported contract did not contain all of the agreements of the parties, that there was never a meeting of the minds,[1] and therefore there was no enforceable contract." A meeting of the minds does not depend upon the subjective understanding of the parties, but instead requires only objective manifestations of mutual assent for the formation of a contract. *Thurman v. Thurman*, 50 Ark. App. 93, 900 S.W.2d 221 (1995). The meeting of minds, which is essential to the formation of a contract, is determined by the expressed or manifested intention of the parties. *Dziga v. Muradian Bus. Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989). The ques-

[1] The more modern term for "meeting of the minds" is "an objective indicator of agreement." *Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990); *Shea v. Riley*, 59 Ark. App. 203, 954 S.W.2d 951 (1997).

tion of whether a contract has been made must be determined from a consideration of the parties' expressed or manifested intention — that is, from a consideration of their words and acts. *Id.*

Here, the document admitted into evidence presents a complete understanding setting forth an agreement between buyer and seller, signed by both parties. The only evidence that the document was not a contract was the inadmissible testimony of appellees that the page was signed only for the purpose of sending the IRS something it required and that they did not intend the document to be a contract. Appellees' signing the instrument was an objective manifestation of mutual assent to the formation of the contract and is evidence that a meeting of the minds occurred. Testimony of appellees' intent that the instrument served a different purpose was not admissible to demonstrate their subjective purpose in signing the instrument.

In support of their position that the parties never had a meeting of the minds, appellees cite testimony by Mr. Taylor and Mr. Goodin that Mr. Hagans told them in December that he was "out of the deal." All parties, however, had signed the instrument the previous month, and a contract was in existence at the time of these reported conversations. Thus, the testimony at most could have gone only to show that terms of the contract were modified or rescinded, but appellees have not shown the required mutual consent for modification or rescission. *See Luningham v. Arkansas Poultry Fed'n Ins. Trust*, 53 Ark. App. 280, 922 S.W.2d 1 (1996).

Reversed and remanded for action in keeping with this opinion.

PITTMAN and ROGERS, JJ., agree.

Joseph Erwin WRAY *v.* STATE of Arkansas

CA CR 98-683 984 S.W.2d 45

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1998

John W. Settle Law Firm, by: *John W. Settle*, for appellant.

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

OLLY NEAL, Judge. Appellant Joseph Wray was found guilty of DWI, second offense, and was sentenced to one year in jail, with a nine-month suspension, and fined $2,000 plus court costs. On appeal, appellant contends that the trial court erred in finding that there was sufficient evidence to sustain his conviction when there was no evidence of his arrest date for a prior DWI offense within three years of his present offense.

Appellant was arrested and charged with DWI, second offense, on April 5, 1997. From his conviction in the Fort Smith Municipal Court, he appealed to the Sebastian County Circuit Court. At a jury trial held on October 21, 1997, appellant was found guilty of driving while intoxicated. During the penalty phase of the proceedings, the State introduced a certified document from the Van Buren Municipal Court and the Crawford County Circuit Court. Defense counsel, however, made an objection to the admission of the municipal court document on the basis that it failed to identify the date of appellant's arrest. The trial court allowed the usage of that document to reflect a date of "10/30/94" as the arrest date, but stated that it would note appellant's objection. Thereafter, the court instructed the jury that appellant had a previous DWI conviction for an offense that occurred on October 30, 1994.

Appellant now argues that the trial court erred in allowing the jury to be instructed that he had a prior offense date on October 30, 1994, for DWI.

When the State utilizes a prior conviction to convict a defendant of a second or subsequent DWI offense, the State must show that the offense that resulted in the prior conviction occurred within three years of the date of the second offense.

Wilson v. State, 46 Ark. App. 1, 875 S.W.2d 510 (1994). The date of the offense occurs when the criminal act is committed. *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987). Arkansas Code Annotated § 5-65-111 (1997) provides that:

> (b) any person who pleads guilty, nolo contendere, or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned:
>
> (1) for no less than seven (7) days and no more than one (1) year for the second offense occurring within three (3) years of the first *offense*.

(Emphasis added.) As such, the State must prove each and every element of the crime of DWI, second offense, beyond a reasonable doubt. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

In this case, appellant was arrested and charged on April 5, 1997. Therefore, to meet the requirements of DWI, second offense, the State had to prove that appellant committed his first DWI offense after April 5, 1994. In the copy of a master inquiry of the Van Buren Municipal Court, which was admitted into evidence, a date of "10/30/94" is shown without reference to an offense or arrest date. The same document shows a first court date of "11/9/94" and a scheduled court date of "1/27/95." Along with this information, the State argues that there was substantial evidence to support a second DWI offense because the document also contains the appellant's identity, the ticket number, the charge, the date and time, and vehicle information. A judgment from the Crawford County Circuit Court was the second certified document admitted into evidence by the trial court. The judgment, rendered on January 27, 1995, reflects that its decision was taken from an appeal from the Van Buren Municipal Court.

While appellant contends that the master inquiry is too vague and unclear for the trial court to announce his arrest date as October 30, 1994, we note that circumstantial evidence may constitute substantial evidence to support a jury's verdict of guilt if the circumstantial evidence rules out every other reasonable hypothesis but the guilt of the accused. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994). In resolving the question of the sufficiency of the evidence in a criminal case, we view the

evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision of the trier of fact. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.*

In the present case, we find that there are other reasonable inferences that may be drawn from the "master inquiry" data sheet, and, consequently, there is insufficient evidence of the date of appellant's first offense. First, it is conceivable that if appellant's first appearance before the circuit court was in November of 1994 with a continuance to January 27, 1995, then his first appearance in municipal court could have been on October 30, 1994. Second, we could also assume that the master inquiry was first established on October 30, 1994. Here, where there is room left for speculation, the date of appellant's first offense, which is an element of DWI, second offense, cannot be established beyond a reasonable doubt.

Because the double jeopardy clause precludes a second trial once we have found the evidence to be legally insufficient to support a verdict of DWI, second offense, *see Rogers, supra*, we are required to modify appellant's conviction of DWI, second offense, to DWI, first offense, and remand this case to the trial court for resentencing.

Affirmed as modified and remanded.

ROBBINS, C.J., and CRABTREE, J., agree.

Sheila E. ROBINSON, As the Removed Administratrix of the Estate of Reginald G. Robinson, Sr., Deceased *v.* Linda WINSTON, As the Administratrix of the Estate of Reginald G. Robinson, Sr., Deceased

CA 98-205 984 S.W.2d 38

Court of Appeals of Arkansas
Division II
Opinion delivered December 2, 1998

Daggett, Van Dover, Donovan & Perry, PLLC, by: *J. Shane Baker*, for appellant.

Wilson & Valley, by: *E. Dion Wilson*, for appellee.

MARGARET MEADS, Judge. Appellant Sheila Robinson is the widow of Reginald Robinson, a West Helena fireman who was killed in the line of duty on May 8, 1997. Mr. Robinson died intestate. Appellee Linda Winston is the ex-wife of the decedent and the mother of his daughter, Candrice C. Robinson. On May 20, 1997, appellant petitioned to be appointed administratrix of the estate and listed the decedent's mother and two sons as his heirs. Appellant failed to name Candrice as an heir and did not send notice of her petition to Candrice or the other heirs. On June 20, 1997, the probate judge appointed appellant administratrix of the estate.

On August 27, 1997, appellee filed an objection to appellant's appointment as administratrix; in the alternative, she asked that she be appointed co-administratrix. Appellee alleged that appellant and her attorneys purposely disregarded Candrice as an heir of the decedent and failed to file a claim for death benefits with the State Claims Commission. Appellee also requested that Candrice be declared a legitimate heir of the estate. Appellant objected to appellee's request to be appointed co-administratrix because appellee had no relationship to the decedent and stated: "Linda Winston is an ex-wife of the decease[d]; [she] may have some interest adverse to and in conflict with the estate for some claimed back support or other monies . . . ."

At a hearing held September 26, 1997, appellee testified that she had learned from the decedent's mother of appellant's failure

to name Candrice as an heir on the petition and that when she asked appellant to include Candrice as an heir, appellant told her to have her own lawyer do so. She said that this conversation prompted her to file her objection to appellant's appointment as administratrix. She also stated that she had received no information indicating that appellant had filed a death-benefit claim with the State Claims Commission.

Appellant testified that she had given Candrice's name to her out-of-state lawyer before the petition was prepared. She admitted, however, that, before she signed the petition, she noticed that Candrice's name was missing and that she had not yet amended it. She also admitted that she and the decedent had been separated at the time of his death. She contended that she had already filed a death-benefit claim with the State Claims Commission.

By order filed October 16, 1997, the judge found that appellant's appointment as administratrix had not been published; that notice had not been provided to the known heirs; that Candrice, an heir, had been omitted from the petition; that appellant was aware of this omission at the time she signed the petition; and that appellant had not amended the petition after appellee bought the matter to her attention. The judge found that appellant had failed to perform basic duties required of her as administratrix, including (1) giving public notice after her appointment or providing proof of such notice; (2) providing notice of her appointment to the heirs; (3) filing an inventory; (4) listing all of the known heirs on the petition; (5) marshalling all of the assets of the estate; and (6) amending pleadings when informed of their deficiencies. The judge also noted that "obvious tension exists between the current Administratrix and the heirs-at-law as demonstrated during the hearing on this petition." The judge found appellant unsuitable to serve as administratrix, removed her from that position, and granted appellee's request to be appointed successor administratrix.

Appellant first argues that because appellee is not an "interested person" as defined by the Arkansas Probate Code, the probate court's order removing her and appointing appellee as

successor administratrix is clearly erroneous. She says that the probate code defines "interested person" as any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary, Ark. Code Ann. § 28-1-102(a)(11) (1987), and that appellee's only relationship to the decedent is that of ex-spouse.

Appellee responds that we should not consider this argument on appeal because appellant failed to raise it below. In her reply brief, appellant argues that she did not have to raise this argument below because the probate court was without subject-matter jurisdiction to decide the issue.

Subject-matter jurisdiction is the power of the court to adjudge certain matters and to act on facts alleged. *Leinen v. Ark. Dept. of Human Servs.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994). In *Banning v. State*, 22 Ark. App. 144, 149, 737 S.W.2d 167, 170 (1987), we explained:

> The rule of almost universal application is that there is a distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exercised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power.

Arkansas Code Annotated section 28-48-105 (1987) authorizes the probate court to remove a personal representative for various reasons, either upon the court's own motion or upon the petition of an interested person. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994). Therefore, the probate court had the authority to remove appellant on its own motion, and we cannot agree that the probate court lacked subject-matter jurisdiction of this issue. *See Pickens, supra.*

Because the probate court did not lack subject-matter jurisdiction, the issue of whether or not appellee was an interested person should have been raised at trial. A question not raised in

the court below by the pleadings or arguments of counsel cannot be considered for the first time on appeal. *Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981). Questions left unresolved are waived and may not be relied upon on appeal. *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987). Because appellant's argument was not raised at trial, we do not consider it on appeal.

Appellant also argues that the probate court erred in finding her to be unsuitable to serve as administratrix and in removing her from that position. Arkansas Code Annotated section 28-48-105 (1987) provides among other things that the court may remove a personal representative who becomes mentally incompetent, disqualified, unsuitable, or incapable of discharging his trust, has mismanaged the estate, 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 acknowledged that the probate code does not define the term "unsuitable" but quoted, as it had before in *Davis v. Adams*, 231 Ark. 197, 205, 328 S.W.2d 851, 856 (1959), the definition of that term provided by the Massachusetts Supreme Court in *Quincy Trust Co. v. Taylor*, 317 Mass. 195, 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. In *Vesa*, the supreme court also acknowledged that "family friction" and "continuous bickering" can adversely affect an administrator's suitability. *Id.* at 581-82, 892 S.W.2d at 495.

Here, there was evidence that Candrice's name had been omitted as an heir to the estate, and this omission was not corrected when appellant was informed of the error. We think that was enough for the probate judge to find appellant unsuitable because of a mental attitude toward some person interested in the estate that created a reasonable doubt whether appellant would act honorably, fairly, and dispassionately in her trust. Moreover, appellant hired Wisconsin attorneys for an Arkansas probate matter. Appellant's choice of Wisconsin attorneys was a sufficient ground to believe that appellant's continuance in office would likely render the administration of the estate difficult, inefficient or unduly protracted. Finally, we cannot ignore the probate judge's finding of obvious tension between appellant and the heirs-at-law, which was demonstrated during the hearing on appellee's petition.

An executor of an estate occupies a fiduciary position and must exercise the utmost good faith in all transactions affecting the estate. *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998). Although probate cases are reviewed *de novo* on the record, we will not reverse the findings of the probate judge unless they are clearly erroneous, giving due deference to the probate judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993).

We cannot find that the probate judge was clearly erroneous in removing appellant as administratrix of the estate.

Affirmed.

AREY and GRIFFEN, JJ., agree.

Carl E. RICHARD *v.* STATE of Arkansas

CA CR 97-854 983 S.W.2d 438

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 9, 1998

John Wesley Hall, Jr., for appellant.

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

D. FRANKLIN AREY, III, Judge. The appellant, Carl E. Richard, entered a conditional plea of guilty to a charge of possession of a controlled substance. The Lonoke County Circuit Court suspended imposition of a sentence for five years, placed appellant on probation for three years, and fined appellant $2,000. On appeal, appellant argues that the police made a warrantless entry into his cousin's home without exigent circumstances, so that the evidence gained from their entry should have been suppressed. Because appellant failed to establish his standing to raise this Fourth Amendment challenge, we affirm.

On the morning of November 7, 1996, a confidential informant notified officers at the England Police Department that he could purchase cocaine at 603 Southeast Second Street in England. After the informant was searched and provided with a previously photocopied $20 bill, Officer Andolina rode with the informant to the residence at 603 Southeast Second Street to make the purchase. As the officer watched from the car, the informant approached the residence, gave Johnnie Richard the $20 bill, and waited as Johnnie Richard entered the residence. Johnnie Richard then came back outside and delivered a substance to the inform-

ant. The informant returned to Officer Andolina's vehicle; the officer field-tested the substance, and it tested positive for cocaine.

Officer Cook observed the transaction from a distance; he was in uniform in a marked car. Officer Andolina notified Officer Cook by radio that the substance had tested positive for cocaine. Officer Cook then approached the residence, entered the front door, identified himself as an officer with the England Police Department, and ordered everyone to the floor. At least two other individuals were present besides appellant and his cousin, Johnnie Richard. No other drugs were found inside the residence, but appellant was found in possession of the $20 bill given to the informant.

A hearing was held on appellant's motion to suppress. Appellant argued that Officer Cook's warrantless entry into the residence was unconstitutional, so that any evidence gained as a result of the police search should be suppressed. The State responded that exigent circumstances justified the warrantless entry into the residence.

At the hearing on appellant's motion, Officer Cook testified that he knew Johnnie Richard resided at 603 Southeast Second Street. He testified that appellant is Johnnie Richard's cousin, and that appellant resided in Tucker, about five miles south of England. Officer Andolina also testified that Johnnie Richard was "staying there"; however, Officer Andolina was not positive that the residence was Johnnie Richard's "legal residence." Appellant did not testify at the suppression hearing. At the conclusion of the hearing, the trial court denied the motion to suppress.

On appeal, appellant challenges Officer Cook's warrantless entry into the home. However, we affirm the trial court based upon appellant's failure to establish his standing to raise a Fourth Amendment challenge.

■ ■ Rights secured by the Fourth Amendment are personal in nature, and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128 (1978). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a third person's premises or property. *Id.*; *Rankin v.*

State, 57 Ark. App. 125, 942 S.W.2d 867 (1997). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998); *Rankin, supra.* The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Rankin, supra.*

It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *Ramage, supra; Rankin, supra.* One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *Ramage, supra.* We will not reach the constitutionality of the search where the defendant has failed to show that he had a reasonable expectation of privacy in the object of the search. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996); *Rankin, supra.*

In this instance, appellant presented no evidence upon which we could base a finding that he had standing to contest the search. Appellant did not testify. Officer Cook testified that Johnnie Richard resided at 603 Southeast Second Street; further, he testified that appellant resided in a town five miles south of England. Thus, we have no indication that appellant had any proprietary or possessory interest in the residence, or that he was an overnight guest. *See Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994); *Rankin, supra.* Appellant simply failed to meet his burden of establishing standing to raise a Fourth Amendment challenge. *Ramage, supra.* Therefore, we do not reach the merits of appellant's arguments on appeal. *Id.*; *Rankin, supra.*

Appellant argues that this court must reach the merits of his challenge because the State questions appellant's standing for the first time on appeal. However, as we explained in *Ramage*, an appellate court may affirm the result reached by the trial court, if correct, even though the reason given by the trial court may have been wrong. *Ramage*, 61 Ark. App. at 178 n.1; 966 S.W.2d at 269

n.1. Thus, it is appropriate for this court to affirm the trial court because appellant did not meet his burden of establishing standing to raise a Fourth Amendment challenge.

Affirmed.

PITTMAN, ROGERS, and NEAL, JJ., agree.

GRIFFEN and CRABTREE, JJ., dissent without opinion.

Billie WILSON *v.* Charlie DANIELS,
Commissioner of State Lands

CA 98-333 980 S.W.2d 274

Court of Appeals of Arkansas
Division IV
Opinion delivered December 9, 1998

John L. Kearney, for appellant.

Noel F. Brant, P.A., for appellee Thomas Ruth.

Carol Lincoln, for appellee Charlie Daniels.

JUDITH ROGERS, Judge. This is an appeal from an order dismissing appellant's complaint to set aside the sale of her tax-delinquent land. On appeal, appellant argues that she did not receive proper notice of the sale. We disagree and affirm.

The record reveals that appellant has lived at 1980 Sweet Valley Road, El Dorado Hills, California, 95762, since 1980. She has owned the subject property in Pine Bluff, Arkansas, since 1988. Appellant testified that she has not paid taxes on the Pine Bluff property since 1993. It appears from the record, however, that taxes on the property had not been paid since 1990. The property was certified delinquent in July of 1994. On September 15, 1994, the Land Commissioner mailed a certified letter to appellant's last known address in the tax records notifying her that the taxes on the Pine Bluff property were delinquent, that she could redeem the property, and that the property would be offered for sale on September 17, 1996. The letter was addressed to appellant at 1980 Sweet Valley Road, Folsom, California, 95630. This letter was returned marked "attempted not known." Upon learning of appellant's correct address, a second certified letter was mailed to appellant on June 25, 1996, at 1980 Sweet Valley Road, Eldorado

Hills, California, 95762, notifying her that the property was delinquent, that she could redeem the property, and that a sale date was set for September 17, 1996. This letter was returned "unclaimed or refused."

Appellant denied receiving either of the letters mailed by the Commissioner. She testified that she called the county and state offices to inquire why she had not received her tax statements. She said that she gave the offices her correct address. Appellant did admit, however, that she had visited Arkansas in 1997 and a couple of years earlier, but she did not go to the Commissioner's office or county tax office to inquire why she was not receiving her tax statements.

The trial court found that there was a problem with the address and tax billings from the tax office; however, the court concluded that the first notice that was mailed to the wrong address was cured by the second letter mailed to the correct address. Also, the court noted that appellee took additional effort to provide notice by sending a certified letter to the occupant of the premises in Pine Bluff. The court ruled that the Commissioner fully complied with the applicable statutes.

This court reviews chancery cases *de novo*, reversing the chancellor only when the findings of fact are clearly erroneous or clearly against the preponderance of the evidence. *Sanders v. Ryles*, 318 Ark. 418, 885 S.W.2d 888 (1994); *Ward v. Davis*, 298 Ark. 48, 765 S.W.2d 5 (1989). In cases involving redemption of tax-delinquent lands, we have stated that strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his property. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993); *Trustees of First Baptist Church v. Ward*, 286 Ark. 238, 691 S.W.2d 151 (1985).

Arkansas Code Annotated section 26-37-301 (Repl. 1997) provides that:

> (a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.

(2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.

(b) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale. The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

Appellant argues that she never received notice of her right to redeem or notice of the sale of her property. She contends that the first notice sent by the Commissioner was mailed to the wrong address.

Arkansas Code Annotated section 26-37-301 provides that after receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner of his/her right to redeem, notify that the land will be sold, and notify the owner of the sale date. Under this section, the Commissioner is required to notify the owner, at the owner's last known address by certified mail. After reviewing the evidence, it is clear that the Commissioner, subsequent to receiving the tax-delinquent land, sent certified notice to appellant's last known address. Even though the first notice mailed by the Commissioner was mailed to the wrong address, the Commissioner sent a second notice to the correct address of appellant where she had resided since 1980. We cannot say that the chancellor's decision that the second notice satisfied the statutory requirement was clearly erroneous.

Appellant contends that Ark. Code Ann. section 26-37-301 requires a minimum of two certified notices to the owner of the tax-delinquent property. She argues that the second notice, even if it had been received, was not sent two years before the sale date affording her ample opportunity to act. We disagree.

Appellant has misconstrued the statute. Arkansas Code Annotated section 26-37-301 only requires one notice after the land is received by the Commissioner. We are concerned, however, that the statute does not provide a required time period for notification prior to the sale date. As the statute reads, the Commissioner is only required to give notice after receiving the land.

This requirement could lead to notification a week before the sale date. Unfortunately, we are unable to require more than the statute provides.

Affirmed.

PITTMAN and STROUD, JJ., agree.

Wayne RIFFLE and Charles Mitchell a/k/a M.R. Properties, a Partnership *v.* UNITED GENERAL TITLE INSURANCE COMPANY and Wilson & Associates

CA 98-506 984 S.W.2d 47

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 9, 1998

[Petition for rehearing denied January 13, 1999.]

Grobmyer, Ramsay & Ross, by: *Robert R. Ross*, , for appellants.

Williams & Anderson LLP, by: *Edie Ervin*, for appellee United General Title Insurance Company.

Wright, Lindsey & Jennings LLP, by: *Don S. Mckinney*, for appellee Wilson & Associates.

TERRY CRABTREE, Judge. Wayne Riffle and Charles Mitchell, a/k/a M.R. Properties, a partnership formed for the purpose of obtaining real property for recreational use, entered into negotiations with Helen Kilgallon and Marie Stagmer ("Sellers") for the purchase of property located along the Arkansas River near Scott, Arkansas. M.R. Properties agreed to purchase the property upon securing an easement for ingress and egress. To satisfy this condition, M.R. Properties, pursuant to an agreement between the parties, began by acting as an agent for the sellers and attempted to purchase an easement across neighboring landowners' property, but were unable to do so. M.R. Properties next proceeded as attorney-in-fact for the sellers and instituted suit in Pulaski County Court to have a public road declared across the land of adjoining landowners. During that action, an adjoining landowner produced a quitclaim deed, file-marked July 13, 1971, which granted an easement to and from the sellers' land. Because the quitclaim deed appeared to frustrate M.R. Properties' ability to prove "necessity" for a private road as required by Ark. Code Ann. § 27-66-401(3) (Repl. 1994), M.R. Properties abandoned

that action and began working with Everett L. Martin, an attorney for the sellers, in order to obtain title insurance so that they could go forward with the purchase of the property. After being assured that the title insurance would be issued, M.R. Properties closed on the property on October 12, 1994.

The title insurance was obtained through Wilson & Associates and underwritten by United General Title Insurance Company ("United"), the beneficiary of the policy being M.R. Properties. After the purchase, the adjoining landowner, across whose property the quitclaim deed's easement was described as running, refused to allow M.R. Properties access. M.R. Properties contacted Wilson & Associates to request assistance in obtaining access to the newly purchased property, but Wilson & Associates denied that coverage existed for that particular problem. M.R. Properties then instituted an action against the adjoining landowner seeking a declaratory judgment to enforce the easement found in the quitclaim deed. After a hearing, the Pulaski County Chancery Court determined that the quitclaim deed did not create an appurtenant easement nor an easement by necessity since there had been no common ownership of the property prior to its division, though the court did find that M.R. Properties had proven a need for access to the property. On appeal, the Arkansas Supreme Court affirmed the chancellor. *See Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997).

Demand was then made to United for the face amount of the policy, $20,000, on the theory that the property was a total loss since no access existed. The insurance company denied coverage, asserting, among other defenses, that the policy excluded coverage; and that M.R. Properties had failed to inform the insurance company about the ingress/egress problem. Appellants then brought suit against the insurance companies, resulting in this appeal.

By order of September 10, 1997, the trial court found, among other findings, that: three policy exclusions prohibited M.R. Properties' recovery; M.R. Properties had known about the defect in the right of access, yet went ahead with the closing on the property; the purchase price was reduced due to the lack of

access; and, M.R. Properties suffered no damages. A subsequent order was entered March 9, 1998, awarding United $10,000 in attorney fees.

M.R. Properties appeals from these orders, asserting four points for reversal: (1) that the trial court erred by holding that the appellants created, suffered, assumed or agreed to the defect of lack of access to the property and that by so doing were excluded from coverage under the policy; (2) that the trial court erred in holding that the defect in the lack of access to the property was not known to the company, but known to the plaintiffs, and not disclosed in writing to the company prior to the date the claimant became an insured under the policy; (3) that the trial court erred in holding that no loss or damage resulted to the insured claimant; and, (4) that the trial court abused its discretion by awarding attorney fees to United General Title Insurance. We reverse in part and affirm in part.

Since this was a bench trial, in order for this Court to reverse, we would have to either determine that the trial court erred as a matter of law or decide that its findings were clearly against the preponderance of the evidence. *See Taylor v. Richardson, d/b/a Richardson Construction Co.*, 266 Ark. 447, 585 S.W.2d 934 (1979); Ark. R. Civ. P. 52.

Addressing appellants' last argument first, that the trial court abused its discretion by awarding attorney fees to United pursuant to Ark. Code Ann. § 23-79-208(a) and (b) (Repl. 1992), we note that United's brief concedes this argument to appellants in light of the recent Arkansas Supreme Court decision, *Village Market, Inc. v. State Farm Gen. Ins. Co.*, 334 Ark. 227, 975 S.W.2d 86 (1998), a holding making it clear that attorney fees cannot be awarded to an insurer under section 23-79-208. While acknowledging that *Village Market, Inc.* was handed down subsequent to the trial court's grant of attorney fees in United's favor, we are nonetheless bound to reverse the trial court on this point.

In regard to appellants' remaining points, because we find that appellants suffered no loss or damage by the failure to attain ingress to and egress from the property they purchased, we need only address one as the others are rendered moot.

The parties agree that there are no Arkansas cases that provide a measure of damages for litigants whose suits are founded upon disputes over title insurance claims and have arisen as a result of the litigant's inability to secure access to and from their recently purchased property. In this case, appellants presented evidence at trial showing that their cost for purchasing and acquiring the real estate amounted to $22,650. In addition, appellants testified that, at the time of the purchase and in order to protect their interests, they caused a title insurance policy, in the amount of $20,000, to be issued with themselves the named beneficiaries. After presenting this testimony, appellant Riffle then explained from the stand that, without access, the property was useless. Riffle placed the value of the property at zero dollars.

The trial court found that appellants purchased property that did not have a right of access to begin with, that the access problem was taken into account when negotiating the purchase price, and that appellants nonetheless went forward with the purchase, knowing that the problem of access had not been resolved. As a result, the trial court failed to find that appellants suffered any loss or damage.

Appellees argue that appellant Riffle admitted at trial that the property retains value by the fact that it could be reached by boat via the Arkansas river and that the property was purchased for recreational purposes and not for commercial development. Furthermore, appellees argue that the policy itself required the parties to calculate damages and that the $20,000 policy limit could not be recovered unless appellants proved that some defect reduced the value of the land. Stated simply, appellees contend that appellants failed to prove that they suffered damages. We agree.

■ While an owner of property may, in appropriate circumstances, testify as to the value of his/her property, *Minerva Enter., Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992), and while the right of access, in itself, may carry value, *see, e.g. Arkansas State Highway Commission v. Marshall*, 253 Ark. 212, 485 S.W.2d 740 (1972), the evidence of damages must be such as to allow findings from established facts and not by conjecture. *Christmas v. Raley*, 260 Ark. 150, 539 S.W.2d 405 (1976).

Appellants were well aware of the access problem when they decided to move ahead and purchase the property at issue. In fact, as the trial judge found below, the purchase amount tends to reflect due regard for the problem of access. Appellants received what they bargained for and cannot now claim that they have suffered damages. Furthermore, appellants acknowledged that they do have access, though only by boat. Thus, in terms of calculating value based on access, this property does retain some value. Appellants have failed to present this Court with convincing proof, or argument, to support their contention that the chancellor's finding was erroneous as a matter of law or clearly against the preponderance of the evidence.

Finally, we note that the Pulaski County Chancery Court found appellants to have a need for a private road, thereby evidencing their satisfaction of an important element of Ark. Code Ann. § 27-66-401, authorizing the establishment of legal access. Thus, while appellants knew what they were getting into, they may still avail themselves of alternative statutory remedies and be relieved of the burden of not having access.

Reversed in part; affirmed in part.

NEAL and ROAF, JJ. agree.

AREY, JENNINGS, and ROGERS, JJ. dissent.

JUDITH ROGERS, Judge, dissenting. The appellants in the case at bar purchased property, and only after extensive litigation was it determined that they had no right of access to it. I must respectfully dissent from the affirmance of the trial court's finding that coverage for this loss was excepted under the terms of the title insurance policy.

Before discussing my reasons for dissenting, I must first clarify what the issue before us is, and what it is not. The policy in question insured against loss or damage sustained or incurred by the insured by reason of the "lack of a right of access to and from the land." The policy excluded from coverage defects, liens, encumbrances, adverse claims, or other matters "resulting in no loss or damage to the insured claimant." In its ruling, the trial court found only that appellants' claim was excepted because of this

exclusion, reasoning that appellants "purchased the property for $20,000 knowing it had no access." The trial court did not find that appellants had failed to meet their burden of proof as to the *amount* of damages they had sustained. Our focus on review is thus directed toward this exclusion, and the issue is *whether* appellants did or did not suffer any "loss or damage" by reason of this defect. The issue does not concern the proper measure of damages or whether appellant's proof was legally sufficient to support its claim as to the monetary amount they might be entitled to recover. This distinction is one of significance because it is the insurer, not the insured, which bears the burden of proving that the insured's claim falls within an exclusion found in the policy. *Reynolds v. Shelter Mutual Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993). At this juncture, I must add that, although appellee contends in its brief that appellants' proof of damages was insufficient, the trial court made no alternative finding on that basis, and we cannot make such a finding ourselves on appeal, since we do not review circuit court cases *de novo* on the record. *See Charleston School District No. 9 v. Sebastian County Board of Education*, 300 Ark. 242, 778 S.W.2d 614 (1989).

Turning now to the merits of this case, the trial court's determination that appellants suffered no loss or damage is based on its view that appellants "got exactly what they paid for, a piece of property with no right of access by land." The trial court also stated in its order that it "rejects the Plaintiffs' argument that discovery of an old Quitclaim Deed obviated the application of the exclusions above. Plaintiffs' written (agreed upon) acknowledgment in the Offer and Acceptance that the property had no right of access is not cured by any belief Plaintiffs may have had about the affect [sic] of the old deed." The trial court's findings and conclusions are erroneous because they are not supported by the evidence or the law that pertains to this subject. For these reasons, I must dissent.

In negotiating the purchase of this property, appellants were advised that the land had no "permanent legal easement." For that reason, the offer and acceptance contained a special condition that gave the appellants the authority to acquire an easement, and the right to rescind the offer if they were unable to obtain an ease-

ment in six months, or if the cost of obtaining an easement exceeded $5,000. Pursuant to this agreement, appellants attempted to purchase a right of access from the surrounding landowners, without success. They then pursued an action in county court. During the course of that proceeding, one of the landowners produced a 1971 quitclaim deed, filed of record, which purported to convey a right of ingress and egress to the property.

Upon the discovery of this deed, appellants went forward with the purchase of the property. After consummation of the sale, however, appellants were denied access over the right of way granted in the deed. They then filed suit, on their own, to enforce the provisions of the deed against the landowner.[1] After receiving an adverse determination, they appealed to the supreme court, which affirmed the decision that the conveyance in the deed was personal, and did not run with the land.

There is no dispute in the evidence that appellants purchased the property in reliance on the 1971 deed. The appellants did not, and I repeat, did not, purchase a piece of property believing or knowing that there was no right of access. There is no evidence in this record even to suggest that appellants had any reason to believe that the deed would not provide them with access. Even a title examiner, who worked for Wilson & Associates, testified that anyone who looked at the deed would conclude that access was available to the property. Inexplicably, the trial court's ruling was made as if the facts were frozen in time, limited to the state of affairs as they existed when the offer and acceptance was negotiated. However, the subsequent discovery of the deed, appellants' reliance on it, and their efforts to enforce it are facts that cannot be ignored or deemed insignificant.

The simple truth is that appellants relied on the deed as providing access to the property. Their innocence or good faith reliance on the deed is strengthened by the fact that they filed suit to enforce its provisions and pursued that action all the way to the supreme court.

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[1] Appellants' counsel forwarded an advance copy of the complaint for declaratory judgment to Wilson & Associates, which advised appellant's counsel that the claim was in the nature of a tort, a loss not covered under the policy.

The only evidence that might arguably support the trial court's finding is appellant Riffle's testimony that the property was purchased at a discount. However, that reasoning is fallacious because the offer and acceptance was premised on access eventually being acquired, and it also took into account the cost of obtaining an easement. In order for a price reduction to take on any meaningful significance, there should be proof that the purchase price reflected the value of an unimproved piece of property in the area, without access. This record leaves us to speculate, since appellee, which bore the burden of proof, offered no evidence to support this assertion. The trial court's finding that appellants purchased the property knowing that it was without access is clearly erroneous.

The trial court gave no explanation for its conclusion that appellants had no right to rely on the deed. As discussed above, on this record it can only be said that appellants' reliance on the deed ultimately proved to be mistaken. Under the law, however, appellants had the right to rely on the professional judgment of their title insurer. As we said in *Bourland v. Title Ins. Co. of Minn.*, 4 Ark. App. 68, 627 S.W.2d 567 (1982):

> The purpose of title insurance is to protect a transferee of real estate from loss through defects clouding his title. The issuance of the policy is predicated upon an examination of the public records as to the insured title for when a person seeks title insurance he expects to obtain a professional title search and opinion as to the condition of his title. Accordingly the insurer had a duty to search the records for clouds and other defects before issuing its policy.

Id. at 73, 627 S.W.2d at 570 (citations omitted). Since appellants had the right to rely on the insurer's expertise, they cannot be faulted for placing reliance on the title examination. Although an exclusion can insulate the insurer from liability where the loss results from the insured's own intentional, illegal, or inequitable conduct, *Mattson v. St. Paul Title Co. of the South*, 277 Ark. 290, 641 S.W.2d 16 (1982), the trial court made no finding that appellants were guilty of such conduct.

The policy issued by appellee insured against loss or damage resulting from the lack of a right of access. Appellants are without

access by land to the property they purchased, through no fault or contrivance of their own. It is absurd to say that appellants have sustained no "loss or damage" resulting from this defect. As written in a letter by the insurer's own general counsel, "If the appeals court affirms the trial court's decision, we would likely face a loss of full policy limits with few alternatives. The statutory procedure through county court to establish a road of necessity is not a guaranteed solution and the costs would likely approach policy limits." The trial court's decision is clearly erroneous and should be reversed.

I am authorized to state that Judges AREY and JENNINGS join in this opinion.

R.H. BUSSELL *v.* GEORGIA-PACIFIC CORPORATION

CA 98-667 981 S.W.2d 98

Court of Appeals of Arkansas
Division II
Opinion delivered December 9, 1998

John Richard Byrd, Sr., for appellant/cross-appellee.

Rose Law Firm, A Professional Association, by: *Mark Alan Peoples*, for appellee/cross-appellant.

MARGARET MEADS, Judge. This is the second appeal of this workers' compensation case. The initial claim was brought by appellant, R.H. Bussell, who fell on September 7, 1986, when a stair broke in appellee's power plant causing him to fall a distance of approximately four feet and to land flat on his back on the floor. As a result of his injuries, appellant was assessed an anatomical rating of forty percent to the body as a whole. Appellee accepted responsibility for only twenty percent, and appellant filed a claim alleging that appellee controverted his claim and also that he had been injured as a result of a safety violation, entitling him to a twenty-five percent increase in compensation.

In an opinion entered March 19, 1993, an administrative law judge (ALJ) ordered appellee to pay appellant an amount representing a twenty-five percent anatomical impairment plus a twenty-five percent increase in "compensation provided for by Ark. Code Ann. § 11-9-501 (a)–(d) pursuant to Ark. Code Ann. § 11-9-503" for the safety-violation claim. Appellee was further ordered to pay all reasonable related medical, hospital, nursing, and other apparatus expenses arising from appellant's compensable injury. In an opinion entered October 18, 1993, the Commission

found that appellant failed to prove by clear and convincing evidence that his injury was substantially occasioned by a safety violation and reversed the ALJ in this regard.

Appellant appealed to this court, and in *Bussell v. Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995), we held that Ark. Code Ann. § 11-9-503 (1987)[1] provides for a twenty-five percent increase in compensation where it is established by clear and convincing evidence that an injury is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, and that appellant had established a safety violation. We reversed and remanded to the Commission for an award of benefits "consistent with our holding." On remand, the Commission entered an order on May 10, 1995, stating that because this court found appellant proved the safety violation "we find that the compensation which is provided for in Ark. Code Ann. § 11-9-501(a)–(d) and awarded to the claimant in the prior awards of this Commission shall be increased by twenty-five percent (25%)."

Appellee submitted to appellant certain checks dated June 26, 1995, which it claimed satisfied the award. Appellant did not agree and contended that he was entitled to a twenty-five percent increase on all compensation as a result of the safety violation and for attorney fees based upon the same amount. Appellee maintained that the checks represented timely and appropriate payment and that any attempt to alter the formula used to calculate the payments was barred by *res judicata.* In an opinion entered March 21, 1997, the ALJ held that appellant was entitled to a twenty-five percent increase in the payment of all indemnity benefits incurred as a result of his September 7, 1986, injury and an award of attorney fees based upon the twenty-five percent increase to the temporary total, permanent partial, and permanent total disability benefits due appellant.

In an opinion entered February 18, 1998, the Commission found that appellant was entitled to a twenty-five percent increase in the compensation rate for appellant's permanent disability

[1] The 1993 Act rewrote this section.

compensation in excess of the twenty percent anatomical impairment which had been accepted and paid by appellee. The Commission found, however, that the doctrine of *res judicata* barred application of the twenty-five percent penalty to appellant's temporary total disability compensation or to the twenty percent anatomical impairment accepted and paid by appellee prior to the first hearing on appellant's claim. According to the Commission, the plain language of its May 10, 1995, order held appellee liable for the twenty-five percent increase on indemnity benefits "*awarded to the claimant.*" The Commission held that the twenty percent anatomical impairment accepted by appellee was never "awarded to the claimant in the prior awards of the Commission" because it had been accepted by appellee, and if appellant had felt aggrieved by the Commission's May 1995 order, the proper remedy would have been an appeal. Because appellant failed to appeal from that order, the Commission held him to be bound by it.

Appellant appeals from the order entered February 18, 1998, contending that he is entitled to have all benefits payable under Ark. Code Ann. § 11-9-501(a)–(d) (1987), including temporary total and permanent total disability, increased by the twenty-five percent penalty for the safety violation and that attorney fees should be assessed on the entire award for the safety violation. Appellee has filed a cross-appeal contending that the safety violation penalty does not apply to the wage-loss portion of appellant's permanent total disability.

Appellant argues that he has been denied benefits to which this court held him entitled, and asks that we reverse the Commission's February 18, 1998, opinion and direct an order for payment of benefits. Appellee responds that the Commission's May 10, 1995, order determined the method of calculating benefits due appellant; that appellant failed to appeal from that order; and that appellant is now barred from reopening or relitigating this issue. Appellee says that the Commission correctly found appellant's challenge to its May 10 order barred by *res judicata.*

It is true that the doctrine of *res judicata*, which is applicable to the decisions of the Commission, forbids the reopening of matters once judicially determined by competent authority.

Tuberville v. International Paper Co., 18 Ark. App. 210, 711 S.W.2d 840 (1986). However, in the first appeal of this case, we issued a mandate reversing the Commission's finding that appellant failed to show that his injury was caused in substantial part by a safety violation. We cited Ark. Code Ann. § 11-9-503 (1987) and stated that it provides for a twenty-five percent increase in compensation where it is established by clear and convincing evidence that an injury is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, and we remanded for an award of benefits consistent with our holding.

Whatever is before the supreme court and disposed of in the exercise of its appellate jurisdiction must be considered settled, and the lower court must carry that judgment into execution according to its mandate. *Fulkerson v. Thompson*, 334 Ark. 317, 974 S.W.2d 451 (1998). The trial court, and by analogy the Commission, has no power to change or extend the mandate of the appellate court. *Carroll Elec. Coop. Corp. v. Benson*, 319 Ark. 68, 889 S.W.2d 756 (1994); *Morrison v. Tyson Foods, Ind.*, 11 Ark. App. 161, 164, 668 S.W.2d 47, 48 (1984).

In *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843), the supreme court held:

> Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate and settle such matters as have been remanded, not adjudicated by the Supreme Court . . . . The principles above stated are, we think, conclusively established by the authority of adjudged cases. And any further departure from them would inevitably mar the harmony of the whole judiciary system, bring its parts into conflict, and produce therein disorganization, disorder, and incalculable mischief and confusion. Besides, any rule allowing the inferior courts to disregard the adjudications of the Supreme Court, or to refuse or omit to carry them into execution would

> be repugnant to the principles established by the constitution, and therefore void.

5 Ark. at 202 (citations omitted). *Fortenberry* applies to the court of appeals as well as the supreme court. *National Cashflow Sys., Inc. v. Race*, 307 Ark. 131, 817 S.W.2d 876 (1991).

In the first appeal of this case, we reversed the Commission's finding regarding appellee's safety violation. Our mandate cited Ark. Code Ann. § 11-9-503 (1987) and stated that it provides for a twenty-five percent increase in compensation, and we remanded for an award of benefits consistent with our holding. Neither the statute nor our mandate contain any words of limitation which would restrict the penalty to amounts "awarded to the claimant in the prior awards of the Commission." The Commission had no authority to vary our mandate or to add any conditions. The mandate is imperative and leaves nothing to the discretion of the trial court. *See Watkins v. Acker*, 195 Ark. 203, 111 S.W.2d 458 (1937).

Because the Commission was without authority to vary our mandate, it acted outside its authority by doing so; thus, its May 10, 1995, order was void. As such, the decision is not *res judicata*, and appellant did not have to appeal from that order. *See Childress v. McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984) (it is not necessary to appeal from a void order because it never became effective); *Taylor v. O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932) (where court had no authority to render judgment, it is void). Therefore, we reverse and remand this case to the Commission to enter an order awarding appellant a twenty-five percent increase in all compensation payable to appellant under the provisions of Ark. Code Ann. § 11-9-501.

With regard to appellant's argument concerning attorney fees, attorney fees are to be computed only on the amount of compensation controverted and awarded, increased by the safety-violation penalty. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988). Here, appellee controverted appellant's impairment in excess of twenty percent to the body as a whole and controverted the entire safety violation. Therefore, attorney fees are to be calculated on the additional five percent anatomical

impairment awarded by the law judge and on the entire twenty-five percent increase in compensation payable under Ark. Code Ann. § 11-9-501.

Appellee's argument on cross-appeal, as we understand it, is that the Commission erred in finding that the safety-violation penalty applies to the wage-loss portion of appellant's permanent total disability because it was never controverted by appellee. However, appellee controverted the safety violation, and as we have already said, the safety-violation penalty applies to all compensation payable under the statute.

Reversed on direct appeal; affirmed on cross-appeal.

GRIFFEN and AREY, JJ., agree.

Billy PHILLIPS and Tina Phillips *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 98-1274 980 S.W.2d 276

Court of Appeals of Arkansas

Opinion delivered December 9, 1998

[redacted]

Christine Horwart, for appellants.

No response.

PER CURIAM. [redacted] We hereby grant the motion of the appellants to proceed *in forma pauperis* and write simply to say that by granting the motion, we are not granting attorney fees. In *Webber v. Arkansas Dept. of Human Services*, 334 Ark. 527, 975 S.W. 2d 829 (1998), the supreme court refused to allow attorney fees because the appellant in that case failed to cite any authority in support of the petition for attorney fees in an appeal from juvenile court. We would, of course, follow its mandate. However, the decision in *Post v. State*, 311 Ark. 510, 845 S.W. 2d 487 (1993), a case involving attorney fees for indigent criminal defendants, mandated payment of reasonable attorney fees for appointed attorneys in criminal cases. Though the nature of the proceedings is different, i.e., one is criminal and one civil, the juvenile code requires an appointment of counsel in termination cases. The cases appear in conflict and only the Supreme Court can give guidance to attorneys as to whether or not they will be paid for their appellate representation of indigent parents who lose their parental rights.

C. Don BICE *v.* William Robert GREEN, *et al.*

CA 98-497 981 S.W.2d 105

Court of Appeals of Arkansas
Division I
Opinion delivered December 16, 1998

Taylor, Halliburton, Ledbetter & Caldwell, by: *Mark Ledbetter*, for appellant.

Snellgrove, Laser, Langley, Lovett & Culpepper, by: *David N. Laser* and *Todd Williams*; and *Randall W. Ishmael*, for appellees.

JOHN B. ROBBINS, Chief Judge. Appellant C. Don Bice appeals a directed verdict that was granted appellees in the Craighead County Chancery Court. Appellant, a radiologist, had sued appellees, a group of radiologists with whom he had worked, for breach of an alleged partnership agreement and for the commission of several torts against him in connection with breach of the alleged partnership agreement. The sole issue tried to the chancery court was whether there was a partnership agreement between appellant and appellees, all of whom practiced radiology together as Associated Radiologists, Ltd. At the close of appellant's presentation of his case-in-chief, appellees moved for directed verdict on the basis that he had failed to prove the existence of a partnership agreement. The chancery court granted appellees' directed-verdict motion, and appellant has appealed.

We affirm the chancery court's grant of the appellees' motion for directed verdict.

In early 1988, appellant Bice left a two-doctor partnership practice of radiology in El Dorado, Arkansas, to come to work as a radiologist with appellees, who were the members of Associated Radiologists, Ltd. In February 1988, appellant signed an agreement with appellees styled "New Physician Employment Agreement." This agreement set forth the terms and conditions of appellant's work as a radiologist. Among its provisions, this employment agreement contained two references to appellant becoming "a full partner" in his third year of employment with appellees. In February 1990, appellees sent appellant a letter of reprimand that stated, in pertinent part, "We are delaying your becoming a full partner in Associated Radiologists, Ltd. until April 1991." On April 4, 1991, appellant signed a second employment contract styled, "Contract of Employment," with appellees. As did appellant's initial employment contract, the April 4, 1991, contract set forth the terms and conditions of his employment. On January 24, 1996, appellees met and voted to fire appellant, effective the next day.

In March 1996, appellant filed a complaint against appellees in Craighead County Circuit Court. In April 1996, appellant amended his complaint. In his amended complaint, appellant alleged that appellees had wrongfully terminated his employment with Associated Radiologists, Ltd., by engaging in the following tortious conduct: (1) negligent infliction of mental distress; (2) intentional interference with a prospective business or economic relationship; (3) intentional infliction of mental distress; (4) termination of an employment relationship contrary to the public policy against the formation of monopolies in the practice of medicine; and (5) engagement in concerted action to exclude appellant from the practice of radiology. In his amended complaint, appellant also alleged that appellees had breached a partnership agreement with him and had failed to properly account for partnership funds. Appellant alleged further that appellee's wrongful conduct had caused him $13,050,000 in damages.

In December 1996, appellees filed a motion to dismiss appellant's complaint, pursuant to Ark. R. Civ. P. 12(b)(6), for failure to state facts upon which relief can be granted. The circuit court granted appellee's Rule 12(b)(6) motion, in part. The circuit court dismissed all of appellant's tort-based allegations for failure to state facts upon which relief can be granted. However, the circuit court denied appellees' motion to dismiss appellant's complaint insofar as it alleged the existence of a partnership agreement between appellees and him. Furthermore, the circuit court transferred appellant's complaint to Craighead County Chancery Court.

In September 1997, trial was held in chancery court. Appellant and appellee Dr. William Green testified. Through these two witnesses many records pertaining to the operation of Associated Radiologists, Ltd., were introduced into evidence, as well as other documentary evidence. At the conclusion of appellant's presentation of his case in chief, appellees moved for a directed verdict, which the chancery court took under consideration. On October 21, 1997, the chancery court caused to be entered an order granting appellees' motion for a directed verdict and dismissing appellant's complaint. In this order, the chancery court incorporated by reference a letter opinion that it had sent to the parties on October 3, 1997. In this letter opinion, the chancery court focused its analysis on whether appellant had proved that he had entered into a partnership agreement with appellees. With regard to this partnership issue, the chancery court set forth the following findings of fact and conclusions of law:

> It is undisputed and the evidence shows that in some of the documents introduced that the term partner was used. It is undisputed that the individual defendants referred to each other from time to time as partners. On the other hand, to rebut the evidence that a partnership was intended or actually carried on, the following items were admitted into evidence:
>
> > (1) Associated Radiologists, Ltd. was incorporated and Articles of Incorporation were admitted (D-2) and later amended. (D-3)

(2) The corporation received a Certificate of Registration from the Arkansas State Medical Board in the corporate name. (D-4)

(3) Certificates of Stock in the corporation were actually issued and registered by the corporation. (D-5)

(4) A pension plan was adopted (D-6) and later amended (D-7) in the corporate name.

(5) Corporate Minutes were kept. P-5, P-11, and P-12. Some of these are handwritten and while they may appear to be imperfect to an experienced corporate draftsman's eye, nevertheless, they show an intention to keep a record of corporate business.

(6) The corporation adopted By-Laws. (P-10)

(7) A Joinder Agreement was entered into between the corporation and plaintiff.

(8) Plaintiff's tax returns (P-4) for the years he was engaged in the relationship with the defendants clearly reflect that he was reporting his income as an employee of Associated Radiologists, Ltd.

(9) The Contract of Employment (D-10), which was entered into on April 4, 1991, shows that it is between Associated Radiologists, Ltd. as employer and Calvin Don Bice, M.D. as employee.

Plaintiff's argument is based upon the New Physician Employment Agreement, which does state that if he meets all of the conditions under that agreement he will become a "full partner" at the end of the second year. He also bases his argument on the fact that he had an equal share of the profits of Associated Radiologists, Ltd., that he was referred to as a partner, that there are Minutes of some of the meetings which mention the word partner as well as some correspondence which mention that word. In sum and substance, however, the thrust of the argument has to rely upon the intent of the parties and that intent is not to be gathered from the standpoint of only one participant in the litigation. To the contrary, the intention of the parties has to be what both sides of the agreement intended as well as the surrounding facts and circumstances of the case.

> The Court finds and concludes that plaintiff has failed in his burden to prove that a partnership agreement was entered into and has failed to prove that he was engaged in a partnership venture with the defendants. To the contrary, the plaintiff was an employee of Associated Radiologists, Ltd., an Arkansas corporation. The motion for a directed verdict will, therefore, be granted.

Appellant asserts that the chancery court erred in granting the appellees' motion for directed verdict because of his proof of the existence of a partnership agreement with appellees. By granting the appellees' directed-verdict motion, the chancery court determined that appellant had not presented a *prima facie* case proving the existence of a partnership agreement. We conclude that the chancery court did not err.

The supreme court has recently set forth the analytical framework that a chancery court is to follow when evaluating a defendant's motion for directed verdict. A chancery court is to evaluate the motion by deciding whether, if the proceeding were a jury trial, the evidence would be sufficient for the case to go to the jury. *See Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998). In its evaluation of the plaintiff's case, the chancery court is not to assess the credibility of the testimony presented by the plaintiff's witnesses. *Id.* To determine whether the plaintiff has presented a *prima facie* case, the trial court must view the evidence in the light most favorable to the plaintiff, as the nonmoving party, and give the evidence its highest probative value, taking into account all reasonable inferences deducible from the evidence. *Bradford v. Verkler*, 273 Ark. 317, 619 S.W.2d 636 (1981); *Suzuki of Russellville, Inc. v. Mid-Century Ins. Co.*, 14 Ark. App. 304, 688 S.W.2d 305 (1985). If the evidence, viewed in the light most favorable to plaintiff, is insubstantial, the trial court should grant the defendant's motion for directed verdict. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). Evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other or if it does not force a conclusion to pass beyond suspicion or conjecture. *Id.*; *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998).

To present a *prima facie* case that Associated Radiologists, Ltd., was a partnership, appellant had to introduce evidence showing that Associated Radiologists, Ltd., was "an association of two (2) or more persons to carry on as co-owners a business for profit." Ark. Code Ann. § 4-42-201(1) (Repl. 1996). A partnership has also been defined as a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in a lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them. *Wymer v. Dedmon*, 233 Ark. 854, 350 S.W.2d 169 (1961). Except for certain instances not pertinent to this case, a partnership is not a "legal person" separate and apart from its members and remains no more than the aggregate of the individual partners. *Pate v. Martin*, 13 Ark. App. 182, 681 S.W.2d 410 (1985). The primary test to determine whether there was a partnership between the parties is their actual intent to form and operate a partnership. *Boeckmann v. Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995); *Culley v. Edwards*, 44 Ark. 423 (1884). The parties' sharing of the net profits of an undertaking is *prima facie* evidence that they were partners, unless the money received was paid as wages. Ark. Code Ann. § 4-42-202(4)(b) (Repl. 1996); *Zajac v. Harris*, 241 Ark. 737, 410 S.W.2d 593 (1967). The intention of the parties to form a partnership is discovered by examination of the contract into which they entered, construed in the light of all the pertinent facts and circumstances. *Stephens v. Neely*, 161 Ark. 114, 255 S.W.2d 562 (1923); *Wilson v. Todhunter*, 137 Ark. 80, 207 S.W. 221 (1918); *Malone v. Hines*, 36 Ark. App. 254, 822 S.W.2d 394 (1992). When construing a contract that purports to create a partnership, a court should consider the contract as a whole. *Mehaffy v. Wilson*, 138 Ark. 281, 211 S.W. 148 (1919). Moreover, in determining whether the parties formed a partnership, the issue turns on what the parties have agreed to do, not on what they have agreed to call themselves. *See Central States Life Ins. Co. v. Barrow*, 190 Ark. 141, 77 S.W.2d 801 (1935).

In his brief, appellant sets forth several reasons why the chancery court erred in granting the appellees' motion for directed verdict. However, most of these arguments are not preserved for

our review. For example, in his brief, appellant asserts that Associated Radiologists, Ltd., was a partnership, not a corporation, because the appellees did not manage their radiology practice by strict adherence to its corporate bylaws. Appellant also maintains that Associated Radiologists, Ltd., was a partnership because all of the radiologists who made up the group shared in the profit that their collective radiology practice generated. Appellant also argues that the appellees should be estopped from maintaining that Associated Radiologists, Ltd., is a corporation because the appellees fraudulently induced him to leave his former job as a radiologist. Appellant also argues that the employment contracts that he signed with Associated Radiologists, Ltd., were void, *ultra vires* acts because they were not specifically authorized by a vote of the appellees, as shareholders of Associated Radiologists, Ltd. Appellant also maintains that the employment agreement that he signed on April 4, 1991, is invalid because the appellees breached its terms in that they did not conduct "annual productivity audits." Appellant also asserts that the April 4, 1991, employment contract is void because it contains a provision contrary to public policy, which is the provision that prohibited him from practicing radiology in the county in which Associated Radiologists, Ltd., is located if he continued to receive compensation from his accounts receivable after leaving Associated Radiologists. Appellant raised these issues before the chancery court. However, in its order granting appellees' motion for a directed verdict, in which the court incorporated its letter opinion of October 3, 1997, the court addressed none of these numerous legal theories that appellant had argued to the court and argues in his brief on appeal. In its letter opinion, the chancery court addressed only one issue: whether appellant and appellees had the intention to enter an employer/employee relationship or had the intention to form a partnership.

Appellant is procedurally barred from obtaining our review of the many arguments he raises in his brief, noted above, because he failed to have the chancery court address each of these legal theories in its order (which includes the court's letter opinion) granting the appellees' motion for a directed verdict. It was up to appellant to obtain a ruling giving the basis for the chancery court's decision. *Equity Fire & Casualty Co. v. Needham*, 323 Ark.

22, 912 S.W.2d 926 (1996). The appellant must obtain a ruling from the chancery court setting forth the basis for its decision because the burden is on appellant to bring up a record sufficient to demonstrate error. *Id.* An appellant must obtain a basis for the chancery court's ruling even when it grants a motion made by the other party. *Id.* (case decided on basis of appellee Needham's countermotion for summary judgment).

Appellant did make one argument to the chancery court, which the chancery court addressed, and, therefore, is preserved for our review. Appellant argued to the chancery court, and argues on appeal, that the appellees intended to enter into a partnership with him. As noted above, in its letter opinion, the chancery court specifically rejected this contention. Appellant argues that the appellees' intention to enter into a partnership with him is proven by the following facts: (1) the appellees regularly referred to him as a "partner," both orally and in letters and other documents; (2) his initial employment contract with appellees (February 3, 1988) states: "[Appellant] will be a full partner the third year. . ."; (3) on February 28, 1990, appellees sent appellant a letter that stated, in pertinent part, "We are delaying your becoming a full partner in Associated Radiologists, Ltd. until April 1991"; (4) his second employment contract (April 4, 1991) stated, in pertinent part, "The total compensation of [Appellant] shall be equal to the highest amount of total compensation paid to any other physician employee of [Associated Radiologists, Ltd.]"; (5) the appellees did not consider themselves and appellant to be "employees" for the purpose of obtaining workman's compensation insurance; (6) the appellees and he were compensated equally and had an equal vote in the management of Associated Radiologists, Ltd.; and (7) his belief that, after April 4, 1991, he was a full partner in Associated Radiologists, Ltd. According to appellant, the chancery court should have, on the basis of this evidence, inferred the parties' intention to enter into a partnership and, having inferred this intention, denied the appellees' directed-verdict motion. For several reasons, we conclude that the chancery court did not err in granting the appellees' motion for a directed verdict.

■ ■ To the degree that appellant's contention that he and appellees intended to form a partnership rests on his sharing

equally with the appellees in the profits generated by their radiology practice, it is well established that mere profit sharing by the members of an enterprise does not prove that the enterprise was a partnership. *Zajack v. Harris, supra.* Moreover, the great emphasis that appellant places on the appellees' use of "partner" to refer to him and them both orally and in documents and the use of "full partner" in his initial employment agreement is contrary to the case-law rule that in determining whether the parties intended to form a partnership, the issue turns on what the parties have agreed to do, not on what they have agreed to call themselves. *See Central States Life Ins. Co. v. Barrow, supra.* Appellant's argument based on the use of "partner" rests entirely at the superficial level of what appellees called him and themselves. The inference that appellant urged on the trial court, and urges on us, to draw from the appellees' use of "partner" — that the parties intended to form a partnership — is unreasonable. In evaluating the appellees' directed-verdict motion, the chancery court was required to view the evidence in the light most favorable to appellant as the non-moving party, and was to take into account all reasonable, not unreasonable, inferences deducible from the evidence. The unreasonableness of the inference that appellant urges has been recognized in other jurisdictions. With regard to the strength of the inference as to intent to form a partnership to be drawn from the use of "partner" by lay persons, a leading treatise on the law of partnership states, "The strength of the inferences from the various indicia of subjective intent [to form a partnership] depends on the circumstances. The courts sometimes give little weight to use by lay people of the word 'partner' since they sometimes use the term very loosely, often not intending the precise legal relationship of partnership." 1 Alan R. Bromberg and Larry E. Ribstein, BROMBERG AND RIBSTEIN PARTNERSHIP § 2.05(b) at 2:53 (1997). *See, e.g., Chaiken v. Employment Security Comm'n*, 274 A.2d 707, 709 (Del. Super. Ct. 1971) ("mere existence of an agreement labeled 'partnership' agreement and the characterization of signatories as 'partners' does not conclusively prove the existence of a partnership"). It is true that the phrases "[appellant] will become a full partner" and "[appellant] will be a full partner" appear in the initial employment agreement between appellant and appellees; however, when construing a contract that purports to create a

partnership, a court should consider the contract as a whole. *Mehaffy v. Wilson, supra.* The inference that appellant wants drawn from the "full partner" phrases is not reasonable when the entire initial employment agreement is considered.

We conclude that this evidence is overwhelming in that it compels the conclusion that the parties did not intend to form a partnership. While we will not recite all of this evidence, we will note the most cogent points.

In the first place, Associated Radiologists, Ltd., received Articles of Incorporation from the State in January 1973, and received Amended Articles of Incorporation from the State in September 1986. Moreover, in 1973 Associated Radiologists, Ltd., received from the Arkansas State Medical Board a Certificate of Registration as a medical corporation. In December 1975, the doctors who were practicing together as Associated Radiologists, Ltd., adopted corporate bylaws. In 1988, Associated Radiologists, Ltd., sold stock to appellees who were then practicing medicine there. On April 4, 1991, when appellant signed his second employment agreement with appellees, appellant also purchased 100 shares of stock in Associated Radiologists, Ltd. At this time, appellant signed a document entitled "Joinder Agreement of [appellant] to Stock Purchase Agreement," and this document referred to Associated Radiologists, Ltd., as the "corporation" and referred to appellant and the appellees as "stockholders." In addition, examination of the tax returns that appellant filed during the years he worked as a radiologist as a member of Associated Radiologists, Ltd., shows that he consistently reported the income that he received from Associated Radiologists, Ltd., as "wages" received from his "employer." Finally, we note that examination of the two employment agreements that appellant signed with appellees compel the conclusion that the parties did not intend to enter into a partnership. Examination of the entire initial employment agreement reveals that Associated Radiologists, Ltd., is consistently referred to as "the corporation" and appellant's relationship with it is consistently described as "employment." Examination of the entire second employment agreement reveals that Associated Radiologists, Ltd., is described as a "professional corporation" and is consistently referred to as "the Employer" and that

appellant is consistently referred to throughout the agreement as "the Employee." More importantly, the second employment agreement contains the following provision:

> All fees received or collected as a result of professional services rendered by the Employee, together with all other emoluments . . . shall be property of the Employer. Accordingly, the Employee acknowledges that his employment does not confer upon him any ownership interest in or personal claim upon any fees charged by the employer for his services, whether said fees are collected during his employment or after the termination thereof. The Employee expressly agrees that the compensation and benefits received by him or payable to him under this agreement shall satisfy and discharge in full all his claims against the Employer for the Employee's services.

This second employment agreement also contains a provision that states: "The Employee will abide by the rules . . . and standards of the Employer now existing and which may be adopted by the Employer in the future, together with, to the extent applicable, the articles of incorporation and bylaws of the Employer . . . ." Nowhere in this second employment agreement do the words "partner" or "partnership" appear. Finally, we note that the second employment contract contains the following general provision relating to termination of appellant's employment:

> All action of the Employer's Board of Directors as stated in this contract shall be the action of the Employer or the Employer's Board of Directors upon a majority vote of the Employer's Board of Directors in accordance with the corporation's bylaws or such action being authorized by a vote of the stockholders representing a majority of the shares of the Employer's stock outstanding. In the event of action of the Board of Directors in a decision to terminate the Employee's employment for cause, such majority vote required shall be a majority of all of the directors except the Employee if such Employee is a member of the Employer's Board of Directors.

Our review of all of this evidence that was before the chancery court leads us to conclude that the court did not err in granting the appellees' motion for directed verdict on the issue of whether the parties intended to form a partnership. The chancery court correctly decided that all of the evidence, even when viewed

in the light most favorable to appellant, would not have sufficient force to compel a jury to reasonably conclude that the parties intended to form a partnership.

For the reasons set forth above, we affirm the Craighead County Chancery Court's grant of appellees' motion for directed verdict.

Affirmed.

NEAL and CRABTREE, JJ., agree.

William Lamont TURNER *v.* STATE of Arkansas

CA CR 98-391 984 S.W.2d 52

Court of Appeals of Arkansas
Division IV
Opinion delivered December 16, 1998

William F. Cavenaugh, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Ass't Att'y Gen., and *Sharon Taylor*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with residential burglary and theft of property. After a bench trial, he was convicted of those offenses and sentenced to twenty years in the Arkansas Department of Correction. From that decision, comes this appeal.

For reversal, he contends that the trial court erred in denying his motion for a directed verdict and in denying his motion to suppress an eyewitness's identification of his hat. We affirm.

We first address appellant's contention that the trial court erred in denying his motion for a directed verdict.

> Motions for directed verdict are treated as challenges to the sufficiency of the evidence. When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the state. Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other. Only evidence supporting the verdict will be considered.

Bailey v. State, 334 Ark. 43, 972 S.W.2d 239 (1998) (citations omitted). Appellant was convicted of residential burglary and theft of property. Residential burglary is committed when a person "enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997). Theft of property is committed when a person "knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof." Ark. Code Ann. § 5-36-103(a)(1) (Repl. 1997). Appellant argued in his motion for a directed verdict that the State had failed to prove that he unlawfully entered an occupiable structure with the purpose to commit a crime therein; that the State failed to prove that he knowingly took the property of another with the purpose of depriving the owner thereof; and that the State failed to prove the value of the items taken.

Viewing the evidence, as we must, in the light most favorable to the State, the record shows that an eyewitness telephoned the police department on April 30, 1997, to report that two black males were removing a television, stereo, and VCR from a house across the street from his on West 17th Street and placing the items in a green trash can. One of the men was wearing a gray hat. He testified that the men then pulled the trash can down the street, placed it near a vacant house, and began walking up 17th Street toward Maple. Finally, the eyewitness testified that, about fifteen minutes after he reported the incident, the police returned with

two suspects, one of whom was wearing a hat like the one he had seen on the burglar.

The victim testified that, on the day in question, she returned to her home on West 17th Street and found that the door had been broken, and that a television, stereo, and VCR were missing. She further stated that the remote controls for those devices were also missing.

Officer Jim Tankersley, a patrolman with the Little Rock Police Department, testified that he and another police officer were dispatched on April 30, 1997, to investigate a burglary in progress on West 17th Street. He stated that he was informed that the eyewitness had described one of the burglars as wearing a gray shirt, tan short pants, and a black hat, while the other was described as wearing a white t-shirt and tan pants. Officer Tankersley further testified that, when he was approximately one and one-half blocks south of the burglary scene, he observed two men walking southbound dressed in a manner virtually identical to that described by the eyewitness. The officers stopped the two men and noticed that appellant had a remote-control unit sticking out of his pants pocket. When appellant was patted down for weapons, two more remote control units were found in his pockets. Appellant was wearing a hat that Officer Tankersley described as either black or dark gray. When asked by Officer Tankersley to identify himself, appellant gave a false name and date of birth. Appellant and the other man accompanied the police officers to the burglary scene; while en route they found and inspected the trash can that had been pulled up to the vacant house. Inside the trash can the officers found a GE television, a Sharp stereo, and an Emerson VCR. The brand names on these items matched the brand names on the remote-control units that were found on appellant.

■ ■ We think that the testimony recounted above is sufficient to show that appellant exercised unauthorized control over the victim's property for the purpose of depriving her thereof, and that he did so by means of entry into an occupiable structure. His possession of remote-control units matching the items found in

the trash can, his dress and description, and his proximity in time and space to the crime scene constitute circumstantial evidence of guilt, but circumstantial evidence may constitute substantial evidence when it excludes every other reasonable hypothesis. *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993). Furthermore, appellant's use of a false name when asked to identify himself is evidence of his consciousness of guilt. *Id.* We think that the trier of fact in the case at bar could conclude, on this record, that the evidence presented excluded every other reasonable hypothesis but guilt, and we hold that the trial court did not err in denying appellant's motion for a directed verdict.

Appellant next contends that the trial court erred in denying his motion to suppress an eyewitness's identification of his hat because it raised a substantial possibility of irreparable misidentification. We find no error. At a pretrial suppression hearing, the trial judge suppressed the eyewitness's identification of the appellant's person as unduly suggestive because the eyewitness could not identify appellant as the individual he observed committing the burglary, but only as the individual he saw in the police car afterwards, wearing a hat like that worn by the burglar. However, the trial judge did permit the eyewitness to testify that he saw appellant wearing a similar hat at a later time and, on appeal, appellant argues that this was error. We do not agree. In so holding, we are persuaded by the reasoning of the court in *Johnson v. Ross*, 955 F.2d 178 (2d Cir. 1992), which held that the identification of clothing is not a procedure so inherently conducive to irreparable misidentification as to constitute a denial of due process.

Affirmed.

ROGERS and STROUD, JJ., agree.

Frankie SAPP *v.* PHELPHS TRUCKING, INC.

CA 98-207 984 S.W.2d 817

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 16, 1998

Denver L. Thornton, for appellant.

Laser, Wilson, Bufford & Watts, P.A., by: *Thomas L. Diaz* and *Brian A. Brown*, for appellee.

D. FRANKLIN AREY, III, Judge. The Workers' Compensation Commission determined that appellant Frankie Sapp failed to prove entitlement to additional permanent partial disability benefits over and above a 5% physical impairment rating to his lumbar spine. On appeal, appellant argues that the Commission's decision is not supported by substantial evidence. We affirm.

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 sup-

ported by substantial evidence. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). In cases where a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). The question is not whether the evidence would have supported findings contrary to those 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. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

We recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Service Chevrolet, supra.* 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. *Oak Grove Lumber Co., supra.*

Appellant sustained a compensable injury on November 17, 1993, when he was struck by a tree during the course of his employment as a logger. Appellant was initially treated by Dr. D'Orsay Bryant, an orthopedist, who diagnosed a cervical and lumbosacral strain with possible disc disease. Dr. Bryant referred appellant to Dr. Richard Pillsbury, an otolaryngologist, for appellant's complaint of loss of hearing in his right ear. Dr. Pillsbury did not detect any permanent hearing problems, but referred appellant to Dr. Shailesh Vora, a neurologist. Dr. Vora treated appellant for complaints of headaches, anxiety, depression, and memory loss. Appellant gave Dr. Vora a history of being rendered unconscious by his compensable injury. Although appellant's tests were normal, Dr. Vora assigned him a 25% impairment rating for epilepsy, and a 5% physical impairment rating for the lumbar disc.

Appellant did attempt to go back to work. He drove a log skidder for another logger, but was eventually laid off. Appellant then drew unemployment compensation. He testified that he did not know of any other job that he could do, because he had only worked in the logging woods, and that he had not really tried to find another job.

On January 15, 1996, an independent medical evaluation was performed by Dr. Reginald Rutherford, a neurologist. Dr. Rutherford reported that appellant's neurological investigations proved normal, with the history provided by appellant and a review of the medical documentation failing to substantiate the allegation of cerebral concussion. Dr. Rutherford did not believe that appellant would benefit from further attempted medical or psychological intervention. He opined that there was no objective evidence to substantiate the diagnosis of epilepsy.

Appellant received temporary total disability benefits, medical benefits, and permanent partial disability benefits for a 5% impairment rating to his spine. He sought an additional 25% impairment rating for posttraumatic epileptic seizures, and additional permanent partial disability benefits for loss of earning capacity.

In its opinion denying additional benefits, the Commission noted that the objective medical evidence of record did not substantiate a finding that appellant sustained some type of epileptic or seizure disorder as a result of his compensable injury. It observed that there were no objective medical findings to substantiate Dr. Vora's rating, and that Dr. Rutherford testified in his deposition that there were no objective findings for the alleged epilepsy diagnosis. Therefore, the Commission believed the only physical impairment rating was a 5% rating to appellant's lumbar spine, which had been accepted as compensable and paid in full.

■ ■ 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. *Oak Grove Lumber Co., supra.* This medical evidence constitutes substantial evidence in support of the Commission's decision denying appel-

lant an additional 25% impairment rating for posttraumatic epileptic seizures.

Regarding additional wage loss disability, the Commission found that appellant was not a credible witness and that he failed to present credible testimony that he was entitled to any additional benefits beyond the 5% impairment rating previously paid. The Commission noted that, although appellant testified that he was unable to work, the record indicated that he worked for at least six months after being released by Dr. Vora once his workers' compensation benefits ceased. He then drove a log skidder until he was laid off by his employer. Appellant testified that he was capable of working as a skidder driver and implied that he would have continued to do so had he not been laid off. The Commission also noted that appellant drew unemployment benefits after being laid off, which implied that appellant held himself out as being physically capable of working. The Commission concluded, due to appellant's ability to return to work for a six month period, his negative attitude in seeking or searching for further employment after being laid off, and his relatively minor physical impairment rating for his injury, that appellant failed to prove that he suffered from a decrease in his ability to earn wages.

Arkansas Code Annotated § 11-9-522(b)(1) (Supp. 1997) provides:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Bradley v. Alumax,* 50 Ark. App. 13, 899 S.W.2d 850 (1995). In making this determination, the Commission may consider factors such as a claimant's lack of motivation to return to work or failure to attempt to seek work. *See id.*

In this instance, the Commission's determination turned on its view of the appellant's credibility and the weight to

be given the evidence. The Commission specifically noted that appellant failed to present any credible testimony that he was entitled to any additional benefits over and above the 5% physical impairment rating previously paid. We believe the Commission's decision is supported by substantial evidence.

Affirmed.

PITTMAN, BIRD, and GRIFFEN, JJ., agree.

NEAL and ROAF, JJ., dissent.

OLLY NEAL, Judge, dissenting. While I agree with the majority's determination that appellant failed to prove entitlement to an additional 25% impairment rating for posttraumatic epileptic seizures, I disagree with the determination that appellant is not entitled to additional permanent partial disability benefits due to a loss in his wage-earning capacity.

The majority adequately sets forth our standard for conducting an appellate review of a workers' compensation case. However, we must remain mindful that although we review the evidence in the light most favorable to the Commission's findings, our function on appeal is not merely to rubber stamp the Commission's decisions. Although appellant asserts that he is entitled to permanent partial disability due to a loss in his wage-earning capacity, the majority glosses over the factors that the Commission considers in determining a claimant's entitlement to permanent partial disability, where a loss in the claimant's ability to earn wages comparable to those earned prior to a compensable injury has occurred.

It is well settled that a worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). 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. *Eckhardt v. Willis*

Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998). Moreover, a worker may be entitled to additional wage-loss disability even though his wages remain the same or increase after the injury. *Bragg v. Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985).

At the time of his injury, appellant was approximately forty years old. He could not read, write, or count money, and had been employed in logging since the age of fourteen. Although appellant returned to work for a period of time after his injury, it is undisputed that the reason for his return to work was that he had no money. It is also undisputed that appellant was laid off from work as a skidder operator because he complained of back pain to his supervisor. After appellant was laid off, he applied for and received unemployment compensation benefits, while making himself available for employment.

It puzzles me how the Commission could conclude, and the majority agree, that appellant has a negative attitude in seeking or searching for further employment, where the evidence shows that he sought employment and became employed, only to be laid off because he informed the employer that he was experiencing back pain. The majority seems to focus on the fact that appellant was assigned only a 5% permanent anatomical impairment rating in determining that his compensable injury did not render him permanently disabled.

The substantial evidence standard of review requires that we affirm a decision of the Commission if a reasonable mind would accept the evidence before the Commission as adequate to support a conclusion. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d (1992). It is my view that no reasonable mind could conclude that a forty-year-old who cannot read, write, or count, who has only worked in logging, and is not able to continue to work in logging, has not suffered a permanent impairment to his ability to earn wages.

Professor Larson makes the following analysis of a compensable disability:

> Compensable disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the claim-

> ant's qualifications and training. The degree of disability depends on impairment of earning capacity, which in turn is presumptively determined by comparing pre-injury earning with post-injury earning ability . . .
>
> Total disability may be found, in spite of sporadic earnings, if the claimant's physical condition is such to disqualify him for regular employment in the labor market. Conversely, when the claimant is unable to obtain employment because of his physical condition, medical evidence that he could perform such work if he could get it will not detract from his status of total disability.
>
> Workmen's compensation benefits fall initially into two categories; benefits to the workman for physical injury, and benefits to dependents in case of death. Benefits for physical injury, in turn, are of two kinds: wage-loss payments based on the concept of disability, and payment of hospital and medical expenses occasioned by any work-connected injury, regardless of wage loss or disability.

4 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 57 (1997).

In *Glass v. Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961), the supreme court held that the legislature's use of the term of "loss of the use of the body as a whole" does not mean merely functional disability, but also includes, in varying degrees in each instance, loss of use of the body to earn substantial wages. In so holding, the court relied on the following passage from Professor Larson's treatise on workers' compensation law:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.
>
> The two ingredients usually occur together, but each may be found without the other: A claimant may be, in a medical sense utterly shattered and ruined, but may by sheer determination and

> ingenuity contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage loss as the test would deprive the claimant in the former illustration of an award, thus not only penalizing his laudable effort to make the best of his misfortune but also fostering the absurdity of pronouncing a man nondisabled in spite of the unanimous contrary evidence of medical experts and of common observation. The proper balancing of the medical and wage-loss factors is, then, the essence of the "disability" problem in workmen's compensation.

233 Ark. at 787, 346 S.W.2d at 686-87 (quoting LARSON ON WORKERS' COMPENSATION LAW, § 57.10).

The decision announced by the majority highlights the error that occurs when courts adhere to a rigid policy of focusing its decision regarding wage-loss disability on whether the injured claimant is capable of performing some type of work, instead of focusing on whether, given a claimant's physical condition, education, age, and work experience, he will be able to earn wages comparable to those earned prior to the compensable injury. In the present case, the majority ignores the fact that appellant is functionally illiterate, choosing instead to focus on the fact that he returned to work for approximately six months after his compensable injury, as conclusive proof that he is able to work. If we were allowed to review workers' compensation cases involving wage-loss disability solely on the basis of whether a claimant is capable of doing some type of work, then this court might correctly conclude that because appellant was able to return to work for six months after sustaining a compensable injury, he is not permanently disabled. However, such is not the case and the appellate court considers factors such as a claimant's age, education, and work experience in determining entitlement to permanent disability benefits. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d

850 (1995). As recited earlier, the claimant is in his forties, unable to read, write, or count, and has no formal education. His only work experience has been in logging since the age of fourteen. When appellant obtained employment after his compensable injury, his employment was with a previous employer who had been informed of claimant's back injury. There was testimony to the effect that appellant was hired because of his history of being a good worker. However, as soon as appellant complained of back pain the employer laid him off from work.

Bob White, a vocational expert, conducted a vocational assessment of appellant. His report concluded that appellant could return to work if light-duty work was available; however, his evaluation also noted that appellant has no skills and probably has no ability to benefit from further technical or educational training.

The record clearly establishes that appellant is only qualified, based upon his education, skills, and work experience, to perform heavy manual labor. The Commission found that appellant had sustained a 5% permanent impairment to the body as a whole. It is my contention that any impairment to his body necessarily impairs his earning capacity.

It is clear that appellant will not be able to secure future employment in the area in which he is qualified. He will not be able to operate a chainsaw or heavy machinery without aggravation of his compensable back injury; this was proven when he attempted to work following the compensable injury. It is highly unlikely that employers will hire him after learning of the injury to his back. Moreover, it was proven that in the unlikely event that he is able to obtain employment, he will be discharged as soon as he makes complaints regarding his back.

The cold, hard truth of the matter is that the majority, in failing to consider factors relating to wage-loss disability, in affirming the Commission's decision, has refused to acknowledge that there is not substantial evidence in the record to support the Commission's finding that appellant is not entitled to wage-loss disability compensation.

I respectfully dissent.

ROAF, J., joins in this dissent.

Edward John MIKUS III *v.* Marie MIKUS

CA 98-313 981 S.W.2d 535

Court of Appeals of Arkansas
Division III
Opinion delivered December 16, 1998

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

Phillip J. Taylor, P.A. by: *Phillip J. Taylor*, for appellee.

SAM BIRD, Judge. This is an appeal from a decision of the Sebastian County Chancery Court awarding the proceeds of a life-insurance policy on Edward John Mikus, Jr. (Mikus Jr.), to his surviving spouse, appellee Marie Mikus. The appellant, Edward John Mikus, III, is Mikus Jr.'s son. The appellee is administratrix of the estate of Mikus Jr., but not the mother of appellant. Mikus Jr. died in a motorcycle accident on April 23, 1994.

Mikus Jr. and Marie Mikus banked at First National Bank of Roland, Oklahoma, and had loans that were collateralized by an assignment to the bank (to the extent of the loan balances) of the proceeds of life-insurance policies they owned on each other. The forms by which the assignments were effected were furnished by the bank. Appellee's life-insurance policy was for $100,000 and designated Mikus Jr. as primary beneficiary and her parents as contingent beneficiaries. Mikus Jr.'s life-insurance policy was for $250,000 and designated Marie as primary beneficiary and appellant, who was thirteen when the insurance policies were purchased in 1988, as his contingent beneficiary. The policies

contained the following provision regarding beneficiary designations:

> The Beneficiary will be as shown in the application, unless changed by written request filed with the Company; provided, however, that if any beneficiary is to be irrevocable, the Company may require the contract for the change to be made. If at the time of the Insured's death, there is no beneficiary then living, the proceeds will be payable to the Estate of the Insured.

In 1992, when they were about to move their lock and safe business to a new location, Mikus Jr. and Marie decided to change banks to one nearer their business. The Mikuses moved their banking business to Citizens Bank of Lavaca, which subsequently changed its name to River Valley Bank & Trust. They also refinanced their loans with Citizens/River Valley (River Valley) and River Valley sought to collateralize the loans by an assignment of their life-insurance policies as had been done at their previous bank. However, River Valley did not supply its own assignment forms. Instead, the loan officer they dealt with at River Valley told Marie to call her insurance company for the proper forms and to tell the insurance agent to call him (the loan officer) if the insurance agent had any questions about what they wanted to do.

Marie testified that she called their insurance agency, BHC Life & Group Specialists (BHC), and told whoever answered the phone what she needed. Someone at the agency sent Marie change-of-beneficiary forms with instructions to sign them in blank and send them back to the agency. The following instruction appeared on the back of the forms:

> This request, when completed and recorded or endorsed upon the policy, is in substitution of all previous beneficiary designations. Be sure to rename all previous beneficiaries who are to receive any of the proceeds of the policy.

Marie testified that she and Mikus Jr. signed the forms in blank as instructed and returned them to the agency. Then someone at the agency (the record doesn't reveal who) filled in the forms, including inserting the name of "Citizens Bank of Lavacca/ Barling Lender," as the beneficiary of the policies, and then sent a copy of the forms to the Mikuses, but mistakenly mailed them to

the address of Mikus Jr.'s parents. Marie testified that she did not read the forms, but that she noticed the incorrect address on them, which she struck through and wrote in their correct address. She then put the forms in the safe. When the policies were later received, she also put them in the safe where they stayed until the day Mikus Jr. was killed.

It was not until after Mikus Jr. died that Marie or anyone at River Valley Bank realized the mistake in the beneficiary designation forms. Because of the error, the entire proceeds of Mikus Jr.'s $250,000 life-insurance policy were paid by the insurance company to River Valley Bank. After applying it to pay off the balance of the Mikuses' loans, approximately $68,000 was left, which the bank placed in an interest-bearing account and petitioned the court to decide to whom it should be paid. Marie then filed suit, personally and as the administratrix of Mikus Jr.'s estate, against River Valley Bank, BHC insurance agency, the insurance company that issued the life-insurance policy, and appellant, seeking a declaration that the entire amount of Mikus Jr.'s life-insurance policy in excess of the balance of the loans owed to River Valley belonged to her.

Marie contended that the change-of-beneficiary forms were not supposed to have divested the original beneficiaries; rather, they were supposed to have simply assigned the proceeds of the life-insurance policy to River Valley Bank to the extent of the outstanding balance of the loans. She contended that the balance of the insurance proceeds remaining after payment of the loans belonged to her as the designated beneficiary of the policy. Before or during the trial, the insurance agency and the insurance company were dismissed from the suit, and River Valley Bank, which made no claim to the balance of the proceeds, was retained as a party only for the purpose of obligating it to pay the balance to the proper beneficiary as determined by the court. Thus, the suit went forward to determine whether Marie or the estate was to receive the balance of the policy proceeds and the accrued interest.

At trial, appellant contended that Marie and Mikus Jr. had separated and were in the process of getting a divorce at the time of Mikus Jr.'s death. Marie admitted that she and Mikus Jr. had

separated and that she had filed for divorce. However, she contended that they were in the process of reconciliation when Mikus Jr. was killed. She testified that only three months before Mikus Jr.'s death, she and Mikus Jr. had gotten a loan together and had purchased a prefabricated home to move onto property they jointly owned, and that, when the house was ready, they were going to live in it together.

On radically conflicting evidence, the chancellor found that the change-of-beneficiary forms that Marie and Mikus Jr. had signed were not the proper way to collateralize the loans and that the true intent of the parties, Mikus Jr., BHC, and River Valley Bank, was to assign to the bank only that portion of the policy proceeds necessary to discharge the balance of the loans, but not to change the designated beneficiary of the policy. The chancellor looked to the assignments as they previously existed as collateral for the Mikuses' loans before they were refinanced, observing that Marie was designated as Mikus Jr.'s primary beneficiary and appellant as Mikus Jr.'s contingent beneficiary. The chancellor also noted the high improbability that the decedent or any reasonable person would intentionally sign a form that gave the entire proceeds of his life-insurance policy to the bank.

Furthermore, the chancellor noted the unlikelihood that the decedent was knowledgeable and clever enough to know that if he designated the bank as the sole beneficiary of his life insurance, that under the law and the language of the policy, his son would receive most of the balance of his life insurance through his estate. In this regard, the chancellor questioned why Mikus Jr. would not have simply executed a new change-of-beneficiary form in favor of appellant if that had been his intent, and what motive he would have had to try to deceive his wife if, as appellant claimed, Mikus Jr. and Marie were irreconcilably separated. And, finally, the chancellor was persuaded by the fact that Marie had signed the same type of change-of-beneficiary form as Mikus Jr. had signed, in the mistaken belief that she had not changed her life-insurance beneficiary but had merely effected an assignment to the bank as security for the loans. Other evidence considered by the chancellor supported Marie's contention that she and Mikus Jr. had rec-

onciled, including a note and flowers sent by Mikus Jr. to Marie on Valentine's Day, 1994, only two months before he was killed.

The chancellor concluded that the evidence was clear and convincing that Mikus Jr., by executing the beneficiary designation in favor of River Valley Bank, intended only to give to the bank a security interest in his life-insurance-policy proceeds to the extent of his indebtedness, and that he did not intend to remove Marie as the primary beneficiary of his policy. Therefore, the chancellor reformed the beneficiary designation document to reflect what he found to be Mikus Jr.'s intent.

Appellant argues on appeal that there must be fraud in order for the court to reform an instrument and that there was no fraud shown. He further contends that Mikus Jr. did not intend to reunite with Marie, that Mikus Jr. actually had at least one (and maybe more) girlfriends, and that Mikus Jr. was living alone in an apartment at the time of his death. With this evidence appellant argues that the balance of the proceeds of the life-insurance policy should be paid to his father's estate in accordance with the policy provision set out above.

On the other hand, Marie presented extensive evidence that the change in the insurance beneficiary was a mistake, and that it was intended to be merely an assignment of the policy proceeds to the bank as collateral for the loans. She also produced evidence indicating that she and Mikus Jr. had reconciled, and that they had obtained a home mortgage on January 24, 1994, just three months before Mikus Jr.'s death, that covered their jointly owned land and the prefabricated home that was to be moved onto it.

On appeal, we review chancery cases de novo, but we will not reverse the chancellor's findings unless they are clearly erroneous or clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a); *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993). Appellant contends that the chancellor erred in reforming the instrument because no fraud was shown. However, equity is not limited to reforming written instruments only upon a showing of fraud. Equity will reform written instruments in two

cases: (1) Where there is a mutual mistake — that is, where an agreement was actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto, and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. *Falls v. Utley*, 281 Ark. 481, 665 S.W.2d 862 (1984); *Turney v. Roberts*, 255 Ark. 503, 501 S.W.2d 601 (1973); *Arnett & Arnett v. Lillard*, 245 Ark. 939, 436 S.W.2d 106 (1969); *Acklin v. Riddell*, 42 Ark. App. 230, 856 S.W.2d 322 (1993). A mutual mistake is one that is reciprocal and common to the parties, each alike laboring under the same misconception in respect to the terms of the written instrument. It is a mistake shared by the parties to the instrument at the time of reducing the instrument to writing. *Yeargen v. Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980). It need not be the mistake of one of the parties to the written instrument. It is only required that the writing fails to reflect the parties' true understanding. *Kohn v.* Pearson, 282 Ark. 418, 670 S.W.2d 795 (1984) (citing D. DOBBS, REMEDIES § 4.3, (1973)). Evidence of mutuality must relate to the time of the execution of the instrument and show that the parties then intended to say one thing and by mistake expressed another thing. *Yeargen v. Bank of Montgomery County, supra.* In *Weiss et al v. Turney*, 173 F.2d 617, 619 (8th Cir. 1949), the court interpreted Arkansas law and said:

> To warrant reformation on the ground of mutual mistake it must appear that by reason of the mistake both have done what neither intended; in other words, the instrument must do violence to the understanding of both parties. Each must have labored under the same misconception in respect to the terms of the written instrument. *Fagan v. Graves*, 173 Ark. 842, 293 S.W. 712 [1927].

In the case at bar, although the chancellor did not specifically state that he had found a mutual mistake by the parties in executing the wrong form to effect an assignment to the bank as collateral for the loans, it is obvious from his order that he did.

A court of equity may grant relief for a mutual mistake in the writing of an insurance contract that results in the written

terms not expressing the clear intent and understanding of the parties. *American Casualty Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961); *Equity General Agents, Inc. v. O'Neal*, 15 Ark. App. 302, 692 S.W.2d 789 (1985). Many cases support the granting of reformation when an insurance policy is not reflective of the parties' agreement and intentions. For instance, in *Phoenix Assurance Co. v. Boyette*, 77 Ark. 41, 90 S.W. 284 (1905), it was undisputed that the insurance policy issued by the appellant insurance company to the appellee did not express the real agreement and intention of the appellee and the agent of the appellant insurance company. The Arkansas Supreme Court upheld the chancellor's order for reformation of the policy. *See also Pennsylvania Millers Mutual Ins. Co. v. Walton,* 236 Ark. 336, 365 S.W.2d 859 (1963); *Calvert Fire Ins. Co. v. Hardwicke*, 232 Ark. 466, 338 S.W.2d 329 (1960); *Inter-Southern Life Ins. Co. v. Holzhauer*, 177 Ark. 927, 9 S.W.2d 26 (1928); *Granite State Ins. Co. v. Bacon*, 266 Ark. 842, 586 S.W.2d 254 (Ark. App. 1979).

The chancellor's finding that there was clear and convincing evidence of a mutual mistake and his reformation of the beneficiary designation to reflect the true intent of the parties was not clearly erroneous. Consequently, the order reforming the instrument to reflect the true intent of the parties, with the effect of granting the balance of the proceeds of the deceased's life-insurance policy to his widow, as designated beneficiary of the policy, was not error.

Affirmed.

JENNINGS and ROAF, JJ., agree.

Doyce WINNINGHAM, *et al.* *v.* Tim HARRIS and Kelly Harris

CA 98-239 981 S.W.2d 540

Court of Appeals of Arkansas
Division II
Opinion delivered December 16, 1998

Joe Don Winningham, for appellants.

Henry & Henry, by: *Clifford J. Henry*, for appellees.

SAM BIRD, Judge. In September 1988, appellees Tim and Kelly Harris purchased 160 acres in Conway County from appellants Doyce and Peggye Winningham, who retained an adjacent tract of land. As part of the transaction, appellees gave the Winninghams a recorded easement, which provided:

> THAT TIM HARRIS AND KELLY HARRIS, HUSBAND AND WIFE, for good and valuable considerations receipt of which is hereby acknowledged does [sic] grant, to DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, husband and wife the right to enter upon said lands of TIM HARRIS AND KELLY HARRIS, husband and wife situated in Conway County, Arkansas, to-wit:

> A right of way over and across the North 30 feet of the SW1/4 of Section 4, Township 8 North, Range 15 West described as beginning at the Northwest corner of said SW1/4 and run along the North line of said SW1/4 to the Northeast Corner of said SW1/4. This 30 foot right of way to be used for road purposes.
>
> TIM HARRIS AND KELLY HARRIS, Husband and wife covenants [sic] that they are the owners of the above described lands and there are no restrictions or impediments to its grant of the right of way easement contained herein.
>
> That DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, Husband and wife their heirs and assigns forever shall hold harmless TIM HARRIS AND KELLY HARRIS, their heirs and assigns against loss, damage or injury resulting from the use of the above described right of way easement and the rights granted herein.
>
> DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, Husband and wife by accepting the right of way easement, does [sic] for themselves, their successors and assigns hereby agree that in the event that it shall abandon or terminate its use of the right of way easement granted hereby or use for purposes other than such grant, that the right of way easement granted hereby and any and all rights appurtenant thereto shall thereupon terminate and revert to TIM HARRIS AND KELLY HARRIS, Husband and wife.

In June 1997, Doyce and Peggye Winningham sold the property adjacent to appellees to appellants Denny Lee and Rebecca Winningham. After appellees refused to permit Denny Lee and Rebecca Winningham to make improvements to the easement, appellants filed this action in the Conway County Chancery Court, seeking a declaration that the easement given to Doyce and Peggye Winningham was appurtenant to the land and therefore transferrable to their successors in title.

At trial, appellees argued that the easement could not be conveyed because it was an "easement in gross" and, therefore, personal to Doyce and Peggye Winningham. The chancellor found the easement to be ambiguous and permitted the introduction of extrinsic evidence to establish its meaning.

Doyce Winningham testified that he had intended to be able to transfer the easement whenever he sold the property. He admitted that he had caused the easement to be prepared and that he was experienced in real estate deals. Denny Lee Winningham testified that he would not have agreed to purchase the property if he had not believed that he could use the easement across appellees' property. Tim Harris testified that they had granted the easement to the Winninghams for their personal convenience and had not intended to convey any rights to any subsequent owners of Doyce and Peggye Winningham's property.

The chancellor found the easement to be in gross and personal to Doyce and Peggy Winningham and that it did not, therefore, pass with the land. On appeal, appellants argue that the chancellor's finding of an easement in gross is erroneous.

■ ■ An appurtenant easement runs with the land and serves a parcel of land known as the dominant tenement, while the parcel of land on which the easement is imposed is known as the servient tenement. *Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997). An easement in gross, however, is personal to the parties; it does not have a dominant tenement because it benefits a person or an entity, and not the land. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995); *Merriman v. Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987). When an easement is annexed as an appurtenance to land, whether by express or implied grant or reservation, or by prescription, it passes with a transfer of the land, even though it may not be specifically mentioned in the instrument of transfer. *Carver v. Jones*, 28 Ark. App. 288, 773 S.W.2d 842 (1989); *Wallner v. Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987). An appurtenant easement is incapable of existence separate and apart from the particular land to which it is annexed. *Carver v. Jones, supra.*

■ ■ Interpretation of a deed is required if it does not specify whether an easement is appurtenant or in gross. *Riffle v. Worthen, supra.* When interpreting a deed, the court gives primary consideration to the intent of the grantor. *Id.*; *Sides v. Beene*, 327 Ark. 401, 938 S.W.2d 840 (1997); *Wilson v. Brown, supra.* When the court is called upon to construe a deed, we will examine the

deed from its four corners for the purpose of ascertaining that intent from the language employed. *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998). The court will not resort to rules of construction when a deed is clear and contains no ambiguities, *Barnes v. Barnes*, 275 Ark. 117, 627 S.W.2d 552 (1982), but only when the language of the deed is ambiguous, uncertain, or doubtful. *Bennett v. Henderson*, 281 Ark. 222, 663 S.W.2d 180 (1984). When a deed is ambiguous, the court must put itself as nearly as possible in the position of the parties to the deed, particularly the grantor, and interpret the language in the light of attendant circumstances. *Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974). The determination of the intent of a grantor is largely a factual one, and the appellate court will not reverse a chancellor's determination of a factual matter unless it is shown to be clearly erroneous or clearly against the preponderance of the evidence. *Wylie v. Tull*, 298 Ark. 511, 769 S.W.2d 409 (1989).

The distinction between appurtenant easements and easements in gross normally depends upon the unique facts of each individual case. In *Rose Lawn Cemetery Ass'n, Inc. v. Scott*, 229 Ark. 639, 642, 317 S.W.2d 265, 267 (1958), the grantor conveyed his interest in property "EXCEPT a strip of land 25 feet wide . . . which is reserved as a roadway for use of the parties hereto." The supreme court held that the language created an easement in gross that was personal to the parties.

In *Merriman v. Yutterman, supra*, the supreme court held that "[T]he forty (40) foot driveway from Free Ferry Road, three hundred (300) feet Northward, shall be kept open for the common use of the devisees in this will" created an easement that was personal to the parties; it did not run with the land.

In *Wilson v. Brown*, the statement, "Grantor reserves unto himself a parking and driveway easement," was held to create an easement that was appurtenant to the land. The court stated: "It stands to reason . . . that a development company would reserve the easement to run with the restaurant property so as to enhance its marketability. Indeed, it is illogical, as the chancellor concluded, to think that a development company was interested in an easement solely for personal use." 320 Ark. at 245, 897 S.W.2d at

548. In *Fort Smith Gas Co. v. Gean*, 186 Ark. 573, 55 S.W.2d 63 (1932), and *Field v. Morris*, 88 Ark. 148, 114 S.W. 206 (1908), the supreme court held that easements limited to certain individuals were easements in gross.

In the instant case, the chancellor explained his reasoning:

> After carefully reviewing the Post-Trial Briefs filed by the parties' respective attorneys and having researched the issue of whether the easement in question is appurtenant or in gross, and based primarily upon the decision of the Arkansas Supreme Court in *Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997), due to the lack of words of inheritance in the granting clause of the Easement Document, the Court finds that an easement in gross was created and thus did not run with the land in the conveyance from Doyce and Peggye Winningham to Denny Lee and Rebecca Winningham. The use [of] the term "heirs and assigns" in the third paragraph of the Easement Document pertains to holding harmless the grantors against loss, damage or injury resulting from the use of the subject right of way and extends the liability of the grantees to their heirs and assigns. Likewise, the fourth paragraph of the Easement Document regarding the termination of the easement, merely extends the agreement regarding termination or abandonment to grantees, heirs and assigns.

In *Riffle v. Worthen*, *supra*, the Arkansas Supreme Court noted that the language of a quitclaim deed was clear and unambiguous when it stated, "Grantors also convey to the Grantees the right of ingress to and egress from said public road across the Grantors' intervening lands." However, the actual conveyance of the land stated, "Grantors . . . do hereby grant, convey, sell and quitclaim unto . . . Grantees, and unto their heirs and assigns forever, all our right, title, interest and claim in and to the following lands lying in Pulaski County, Arkansas[.]" The Arkansas Supreme Court held that the use of the words "heirs and assigns forever" included in the granting clause of the conveyance of the land but absent in the clause conveying the easement indicated that the intent of the grantors was to convey only a personal right of access or an easement in gross.

In the instant case, the clause granting the easement across the Harris property contains the words "grant, to DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, husband and wife the right to enter upon said lands . . . ." However, clauses later in the easement specifically name "DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, Husband and wife their heirs and assigns forever . . . ." and "DOYCE WINNINGHAM AND PEGGYE WINNINGHAM, Husband and Wife . . . does for themselves, their successors and assigns hereby agree . . . ." Because these words of inheritance are included in some of the subsequent clauses in the easement but are missing in the actual granting clause indicates that the easement was intended to be personal to Doyce and Peggye Winningham. Thus, we find that the chancellor's decision is not clearly erroneous or clearly against the preponderance of the evidence, and we affirm the decision that the easement at issue is an easement in gross.

Affirmed.

PITTMAN and GRIFFEN, JJ., agree.

Peggy ARNOLD *v.* TYSON FOODS, INC.

CA 98-616 983 S.W.2d 444

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 16, 1998

Lisle Law Firm, P.C., by: *Donnie Rutledge*, for appellant.

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

OLLY NEAL, Judge. Appellant, Peggy Arnold, appeals from a decision of the Workers' Compensation Commission finding that she failed to prove by a preponderance of the evidence that her carpal tunnel syndrome was causally connected to her employment with appellee, Tyson Foods, Inc. Appellant argues that the Commission's finding is not supported by substantial evidence. We disagree, and therefore affirm the Commission's decision.

Appellant has continuously worked for appellee since 1978. She worked as a production line worker for several years until she advanced to the position of Cryovac packing superintendent in 1989. Several months before appellant's term as superintendent, a night shift was added that required her to work regularly on the production lines. Appellant testified that, in 1989, she began to notice a tingly or numb feeling in her hands while performing her job of rerunning chickens. This task required her to retrieve a chicken out of the tank filled with ice while grasping it with her left hand. She then used both hands to squeeze the chicken out of a shrunken bag to avoid damage to the chicken.

In 1991, appellant informed the company nurse that her hands were causing her pain. Thereafter, she was given splints to wear. In May of 1996, appellant complained to appellee that she had no feeling in her hands. She sought treatment from Dr. Donald Bailey, who ordered nerve conduction tests when he noticed that appellant was wearing splints. The results of the tests revealed that appellant suffered from moderately severe carpal tunnel syndrome in both wrists, which required surgery. Dr. Peter Heinzelmann, who recommended surgery for appellant, and Dr. Bailey both opined that appellant's injury was work-related.

At a hearing on March 4, 1997, the administrative law judge found that appellant sustained a compensable injury based on objective medical evidence, that her injury was work-related, and

that appellant had proven that she was entitled to temporary total disability for the periods she had not worked after the injury was discovered by Dr. Bailey. The Workers' Compensation Commission reversed the decision of the ALJ, finding that appellant failed to prove her contention that she had worked 75% on the production line during her supervisory position. The Commission further found that because appellant was involved in such activities as racquetball, walleyball, and volleyball after she became superintendent, she failed to meet her burden to show that a causal connection existed between her injury and her employment. From these findings, appellant brings this appeal.

When the Workers' Compensation Commission denies a claim because of a claimant's failure to meet her burden of proof, the substantial-evidence standard of review requires that the appellate court affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion. *Id.* The appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirms that decision if it is supported by substantial evidence. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). 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*. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

In this case, appellant argues that the Arkansas Supreme Court decision in *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998), is controlling. She contends that it is unnecessary for her to prove that her carpal tunnel syndrome involves rapidity and repetition and that the Commission erroneously focused on the percentage of time she worked on the production line as a superintendent. Although this statement of the Arkansas law is correct, we note that both the pre-Act 796 and

Act 796 law require the claimant to prove that her injury arose "out of and in the course of employment." Ark. Code Ann. § 11-9-401(a)(1) (1987 and Repl. 1996). Even though it is virtually undisputed that appellant suffers from carpal tunnel syndrome, she still bears the burden of proof by a preponderance of the evidence that her injury occurred from her employment with appellee, and not from any other source.

The evidence presented by appellant in this case showed that she began to notice problems with her hands in 1989. Shortly after, she received splints to wear from the company nurse. However, from 1989 to 1996, appellant made several visits to her personal physician without once mentioning that she was having problems with her hands. Appellant testified that when she received splints from the company nurse, she did not express to any on-staff medical personnel that the pain in her wrists and hands were work-related. Moreover, while appellant argues that the Commission failed to mention the medical evidence that concluded that her injury was causally connected to her workplace, we note that the Commission took into account that in 1996, appellant was initially seen by Dr. Bailey for a wholly unrelated problem than her hand problem. Further, appellant's testimony does not reveal that she told Dr. Bailey or any of her other treating physicians that her injury was work-related. 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. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). The Commission has the duty to use its experience and expertise in translating evidence of medical experts into findings of fact. *Id.*

The Commission noted several facts in finding that the evidence failed to prove that appellant's injury was causally related to her workplace. First, two supervisors who worked directly under the supervision of appellant testified that appellant worked no more than thirty minutes at a time on the production line. Second, the Commission stated that appellant's injury could be causally related to the sporting activities she maintained during the time she worked for appellee. There was testimony by Billy Joyce Reed, the complex personnel manager, who testified that she

would estimate that she and appellant played volleyball, racquetball, and walleyball a "hundred times." Glenda Kirk, the company nurse, testified that when appellant came to her office in 1991, appellant stated that her hands were hurting and that she would have to stop playing volleyball and racquetball. Finally, appellant was a superintendent during the time that she first noticed a problem with her hands. There was evidence that the responsibilities of a superintendent included training supervisors in production and administration of policies and regulations, monitoring safety and ergonomics, and working with the new-hire training program. Yet, the record indicates that appellant never told anyone that her injury was work-related, despite the fact that her position required her to maintain safety regulations and to report any work-related injuries.

■ We have stated on many occasions that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998); *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997).

■ Based on the foregoing reasons, we find that substantial evidence exists to support the Commission's finding that appellant failed to prove by a preponderance of the evidence that the carpal tunnel syndrome she sustained was causally related to her employment with appellee.

Affirmed.

PITTMAN, AREY, BIRD, and GRIFFEN, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand because I believe that the Commis-

sion's decision that Ms. Arnold had not met her burden of proof as to the causal connection between her carpal tunnel injury is not supported by substantial evidence. The concluding paragraph of the decision is entirely speculative, and is not supported by any evidence, medical or otherwise. The conclusion, "If claimant's carpal tunnel syndrome were related to her job with respondent, *one would expect* the symptoms to develop at a time when the claimant was actually performing the *majority* of her work on a production assembly line . . ." is unfounded, contradicts the medical opinions given by two physicians, and strongly suggests that the Commission's decision was based on conjecture. (Emphasis added.)

The evidence clearly establishes that Ms. Arnold worked for Tyson Foods for a number of years, commencing in 1967 and continuously after 1978, and that she first worked on the production line and continued to do so even after she became a supervisor, working 8 or 9 months on the lines in 1989, and filling in as needed thereafter. Although she played racquet sports, by even Tyson Foods' account she reported symptoms in *both* wrists in 1991 and was provided splints for *both* wrists by Tyson Foods at that time. Although the evidence is in conflict as to how much time she actually spent on the line after 1989, two of the Tyson Foods' own witnesses, s supervisory personnel, even acknowledged that supervisors did work on the line "30 minutes at a time . . . a couple of times a night, three or four times a week on average," and for an "hour at a time." It is thus uncontradicted that Arnold continued to regularly work on the line throughout her tenure with Tyson Foods.

The Commission concluded that there was *no causation whatsoever*, and thereby specifically avoided the question of whether the injury was to be governed by Act 796, and thus whether the requirement of "major cause" needed to be met. The Commission opined, again without support in the record, "The hand grip required to play racquetball and the jarring force on both hands and wrists when playing these sports are just as likely as claimant's

occasional work on the line to be the cause of claimant's condition."

To the extent that this is a finding upon which the Commission's decision is based, there is not one scintilla of evidence in the record to support it. This court has often said that administrative agencies, such as the Workers' Compensation Commission, are better equipped by specialization, insight, and experiences to analyze and determine the issues that come before them, such as the appropriate rate of pay for nursing services, *see Teague v. C & J Chem. Co.*, 55 Ark. App. 335, 935 S.W.2d 605 (1996), and whether a claimant made a false statement about his physical condition on an employment application, *see DeFrancisco v. Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982). However, I cannot find where we have ever found that the Commission possessed the expertise to reach this kind of scientific conclusion without medical evidence or other relevant expert testimony.

Of course, the majority opinion finds that Arnold's failure to timely report the injury or to raise it to any of the physicians she saw between 1991 and 1996 is evidence that causation is absent. However, we do not conduct a *de novo* review of Workers' Compensation cases, and the Commission made other, significant, findings without any support in the record. Moreover, the evidence clearly establishes that Arnold first experienced symptoms no later than 1991 when she was issued *bilateral* splints by her employer. Her carpal tunnel syndrome was not *diagnosed* until 1996, after which she timely made her claim. And, the Commission disregarded the only objective evidence before it as to causation, the evidence provided by two physicians. Even more troubling, it came up with its own scenario regarding the etiology and mechanics of Arnold's injury without any medical or other expert evidence in the record to support its conclusions. I would therefore reverse and remand for further proceedings to determine whether the injury is governed by Act 796, and to resolve the issue of compensability accordingly.

Curtis ASHLOCK *v.* STATE of Arkansas

CA CR 98-157 983 S.W.2d 448

Court of Appeals of Arkansas
Division II
Opinion delivered December 16, 1998

Robert C. Marquette, for appellant.

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

WENDELL L. GRIFFEN, Judge. Curtis Ashlock appeals from his convictions of kidnapping and rape in Crawford County Circuit Court on July 11, 1997. He argues on appeal that: 1) the trial court erred by failing to declare a mistrial when a witness volunteered evidence of other bad acts; 2) the trial court erred by failing to declare a mistrial when a juror, less than one hour into deliberations, reported an inability to be impartial; 3) the court erred by failing to declare a mistrial after a juror became ill and was unable to continue deliberations; and, 4) the trial court erred by usurping the role of the jury in determining sentence. We disagree and affirm.

After her work shift ended on the morning of August 28, 1996, and she missed her ride home, RKP began walking along Interstate 40 in Shawnee, Oklahoma, toward her home. Ashlock offered RKP a ride. She accepted. When he stopped at the McLoud exit, Ashlock asked RKP to help him remove a vacuum cleaner from the back of the truck's cab. When she attempted to remove the item, Ashlock struck her repeatedly, threatened her with a knife, bound her with duct tape and rope, covered her mouth and eyes, and left her on a mattress in the back of the cab. Ashlock then drove from Oklahoma to Utah, Idaho, and Wyoming. During this trek, Ashlock forced RKP to perform various sex acts and tied her up between each incident. On various occasions the two were around other parties, including a brief encoun-

ter with a police officer after Ashlock was stopped for a traffic violation. RKP was also left alone at times but did not attempt to escape or cry for help. She testified that she did not attempt escape because of threats that Ashlock made against her and her family. Ashlock eventually returned to Arkansas where they switched from his truck to a car and he forced her to have sex with him again while blindfolded and bound. He then took her to the Arkansas River, forced her underwater, threw rocks at her, and left her in the river.

RKP managed to make her way to the bank of the river and work her hands free. She hid in soybean fields until she found a dwelling where other persons took her to the nearest hospital. There, RKP discovered that she was in Van Buren, Arkansas, and told police what had transpired. Based on these facts, Ashlock was charged with attempted capital murder, kidnapping, and rape.

The jury found Ashlock guilty of kidnapping and rape on July 11, 1997. Before the jury could reach a verdict on the charge of attempted capital murder one juror became ill, so a mistrial was declared on that charge on July 14, 1997. Over appellant's objection, the court dismissed the jury and sentenced Ashlock to fifty years' imprisonment on the kidnapping charge and sixty years' imprisonment on the rape charge, with the sentences to be served consecutively.

Testimony of Appellant's Prior Time in Prison

After Ashlock returned to Arkansas with RKP, Officer Ron Brown of the Alma Police Department stopped him on September 1, 1996, for a traffic violation. During direct examination by Ashlock's counsel, Officer Ron Brown testified that Ashlock talked about time he spent in prison during the traffic stop. The questioning proceeded as follows:

> Q: Obviously, there was nothing in this meeting or confrontation, there was nothing in this time or during your conversation with Mr. Ashlock, out of the ordinary, as far as you said in your report, or made any notion about [—]
>
> A: The only unordinary thing, was when I asked him about his papers on his vehicle, he told me and we talked about the

> form at a traffic stop is for a warning — it was kind of a lengthy traffic stop and we just engaged in conversation. He told me he had spent ten years of his life in prison, and that he was —

Counsel objected, and requested that the court instruct the jury to ignore and disregard the comment about Ashlock's prison record, stating that he was "not going to suggest that this witness had [made] that comment on purpose." The trial court agreed and instructed the jury to disregard the comment. After Officer Brown completed his testimony, Ashlock moved for a mistrial. Now Ashlock argues that the trial court committed reversible error by denying his motion.

Rule 404(b) of the Arkansas Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The trial court is given discretion in admitting or rejecting these matters, to be reversed on appeal where there is a manifest abuse of discretion. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996); *Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992). A mistrial is a drastic remedy, which should only be used when the error is so prejudicial that justice cannot be served by an admonition. *Id.* Motions and objections must be made at the time the objectionable matter is brought to the jury's attention, or they are otherwise waived. *Johnson v. State*, 325 Ark. 197, 926 S.W.2d 837 (1996).

Here, Ashlock argues that Officer Brown's testimony was prohibited by Rule 404 and that an admonition was insufficient. However, the motion was not made until after the witness completed his testimony having been cross-examined and even questioned further on redirect. Thus, Ashlock's motion for mistrial was untimely. We also hold that the motion was waived when appellant asked for an admonition and nothing more at the time of the objection.

The Impartial Juror

Less than an hour into deliberations, the jury foreman sent the judge a note that read: "We have one jurror [sic] that after

seeing people in the court room, feels like they cannot be impartial." The trial judge expressed to counsel a desire to conduct an inquiry of the jury, but counsel for Ashlock stated that he was opposed to an inquiry until after deliberations ended, rather than before further deliberations occurred. Accordingly, the trial judge did not investigate but admonished the jury as follows:

> Well, ladies and gentlemen, of course you've gone through the *voir dire* process. You have been accepted as jurors. You have taken an oath to follow the law and the evidence. It's a little bit late at this hour to begin talking about being impartial. You have agreed to be impartial by being accepted on the voir dire process. You will need to go and deliberate.

The jury then retired for deliberations.

It is clear that when a juror admits inability to remain impartial the integrity of the trial process is called into question. "Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case." *Rhoden v. Stephens*, 239 Ark. 998, 1000, 395 S.W.2d 754, 755 (1965) (quoting *Anderson v. State*, 200 Ark. 516, 139 S.W.2d 396 (1940)). The Arkansas Supreme Court has stated:

> Courts and Judges must always see that every person receives a fair and impartial trial before a fair and impartial jury. The Courts are the last bulwark of freedom and justice.

Smith v. State, 227 Ark. 332, 340, 299 S.W.2d 52, 56 (1957). The appellant is entitled to a trial by twelve impartial and unprejudiced jurors who base their decision on the evidence as presented at trial. *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985). When actual bias, as opposed to implied bias, is called into question, the qualification of the juror is within the discretion of the court, because the trial judge is "in a better position to weigh the demeanor of the prospective juror's response to the questions on voir dire." *Boyd v. State*, 318 Ark. 799, 803, 889 S.W.2d 20, 22 (1994); *see Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987). The test is whether "the prospective juror can lay aside his impression or opinion and render a verdict based upon the evidence in court." *Breedlove v. State*, 62 Ark. App. 219,

223, 970 S.W.2d 313, 315 (1998). The trial court's decision will not be reversed absent an abuse of discretion. *Id.*

Here, the juror was not polled or questioned by the judge to determine whether the report of bias or prejudice was unfounded or, if founded, could be set aside. However, this failure to investigate the source of the reported juror bias resulted from the appellant's refusal to accept the trial court's offer to investigate, and not from the court's failure to protect appellant's right to a fair trial. Ashlock now claims that the trial court's acquiescence in his position was reversible error, and that the trial court erred by not declaring a mistrial after the jury returned adverse verdicts. Having received all the relief requested, Ashlock cannot complain on appeal that he did not receive a fair trial. *See Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998). Appellant cannot seriously argue that the court was under a duty to investigate the jury bias regardless of his request, as there is no plain-error rule in Arkansas. *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992). We certainly do not hold that the court abused its discretion by denying the motion for mistrial where appellant objected to an investigation of reported juror bias during the trial.

Juror Sickness

During jury deliberations one juror began suffering cardiac distress. After medical personnel were sent into the jury room to attend that juror, the following exchange took place:

THE COURT:	It has been reported to this court that this [juror] is in need of medical attention . . . For now I am going to continue this until Monday at 9:00 a.m. and then we will make an inquiry at that time as to her health. . .
MR. MARQUETTE (*Counsel for Ashlock*):	Your Honor, we would request at this time with the juror having an indication of cardiac arrest or cardiac problems and being removed to the hospital, that the Court grant a mistrial in this matter and declare a hung jury.

THE COURT: Well, I am going to make an inquiry and see what her health is on Monday and we may well do that.

The foreman indicated that a verdict had been reached on the kidnapping and rape counts before the excused juror became ill. When the foreman indicated that a verdict was reached on the kidnapping count, the court asked counsel if there were any questions about the verdict. Appellant's counsel asked if the verdict was agreed to by all twelve jurors, to which the foreman responded, "Yes, it was." Appellant's counsel did not ask any questions about the verdict of guilty on the count of rape. Appellant's counsel made no objection when the trial court accepted the State's suggestion that the verdicts be accepted on the first two counts and the case continued on the third. Now Ashlock argues that the trial court committed reversible error by refusing to declare a mistrial and by accepting the guilty verdicts.

Arkansas Code Annotated § 16-89-126(a) (1987) states:

> When the jury has agreed upon their verdict, they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they appear, their foreman must declare their verdict.

Although the statute appears to mandate that the verdict be delivered by the foreman if all members of the jury appear in court, appellant did not raise the statutory noncompliance issue below and his counsel did not request that the jurors be polled. Appellant's motion for mistrial was based solely upon the juror's sickness and was made before the verdicts were read and accepted. The appellant may not voice a general objection, but must make a specific objection in order to preserve an issue for appeal. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). This is so that the trial court may be apprised of the nature of the error of which the appellant complains. *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996). Appellant's mistrial motion was not based upon the failure to follow statutory procedures. His argument was not raised below and will not be considered for the first time on appeal. *See Beyer v. State*, 331 Ark. 197, 962 S.W.2d 751 (1998).

Trial Court's Imposition of Sentence

After the guilty verdicts on the rape and kidnapping counts were read and accepted, the court recessed until the following Monday to determine whether the excused juror would be able to resume deliberations. When court resumed, the trial judge announced that the stricken juror would not be able to continue in deliberations. The trial judge then discharged the jury and proceeded to the sentencing phase. Appellant objected by renewing his motion for mistrial based on the sick juror, arguing that the jury had not deliberated on the sentence and become deadlocked or unable to impose sentence. The court did not rule on the objection, and simply stated, "All right, let's proceed." The State argued that, under both statutory and case law, Arkansas allows for the court to impose sentence. Again, the court stated, "All right, let's proceed."

Initially, it should be noted that there is no constitutional right to be sentenced by a jury; furthermore, sentencing is strictly controlled by statute. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988); *see Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988). The statute in Arkansas allows for the court to impose punishment when

> a jury finds a verdict of guilty and fails to agree on the punishment to be inflicted, or does not declare the punishment in its verdict, or if it assesses a punishment not authorized by law, and in all cases of a judgment on confession[.]

Ark. Code Ann. § 16-90-107(a) (1987); *see* Ark. Code Ann. § 5-4-103 (1987). In *Johnson v. State*, 328 Ark. 526, 944 S.W.2d 115 (1997), our supreme court held that where a jury found the defendant guilty but was unable to agree on punishment, the trial court correctly exercised its statutory authority under Ark. Code Ann. § 5-4-103(b), to fix punishment. Furthermore, the court stated in *Johnson* that it would consider a jury "deadlocked" (thus allowing the court to impose sentence) when one juror was tainted by prejudicial information or was unable to be impartial. The court based its decision on *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997), when only eleven jurors agreed on a forty-year sentence and one wanted a life sentence.

In this case, appellant objected to the trial court's imposing sentence. Even so, the statute clearly authorized the court to fix punishment. There would have been no difference whether the excused juror had been present for sentencing and disagreed with the others, or if the jury, as here, agreed on the guilty verdicts but did not set punishment.

Affirmed.

PITTMAN and BIRD, JJ., agree.

Vick L. PANNELL *v.* Linda K. PANNELL

CA 98-421 981 S.W.2d 531

Court of Appeals of Arkansas
Division III
Opinion delivered December 16, 1998

Davidson Law Firm, Ltd., by: *Brandon L. Clark*, for appellant.

Daggett, Van Dover, Donovan & Perry, PLLC, by: *J. Shane Baker*, for appellee.

ANDREE LAYTON ROAF, Judge. Vick L. Pannell appeals an order from Garland County Chancery Court modifying the amount of child support that he was obligated to pay to his ex-wife, Linda K. Pannell, for his son Jody. On appeal, Vick argues that the chancellor erred in: 1) not dismissing the modification petition because Linda failed to submit an affidavit of financial means; 2) using a means of calculating his income that was not recognized or authorized by Arkansas law; and 3) ruling in favor of an increase in support based on the evidence adduced at the hearing. We affirm.

Jody, who was born on January 22, 1980, is the Pannells' only child. In a divorce decree entered on June 23, 1982, Linda was awarded custody of Jody, and Vick's support obligation was set at $70 per week. The decree was modified by an order dated October 20, 1982, which raised Vick's support obligation to $336.30 per month, beginning on October 1 of that year. Linda sought no further increases in support until 1997.

On February 10, 1997, Linda filed a petition for an increase in child support commensurate with Vick's current earnings from River City Sales and Marketing, a subchapter S corporation that he established in 1988, and in which he is the sole shareholder. In the hearing on the petition, Vick requested of Linda the support affidavit required by child-support guidelines promulgated by the supreme court. When Linda's trial counsel admitted that he had not prepared the affidavit, Vick objected to the introduction of any testimony regarding her income or expenses, and the trial court sustained the objection.

Vick's income tax return for 1996 was entered into evidence without objection. Because the return was jointly filed with Vick's current wife and because the income reflected therein was earned through Vick's wholly-owned S corporation, the parties disagreed as to the characterization of the income for the purposes of calculating support.

Vick testified that although prior to 1997, his present wife drew no salary, she worked sixty hours per week in the corporation. Additionally, while he did not dispute that he had a good year in 1996, he testified that his year-end projections for 1997

were considerably less due to several reversals in his business. Vick valued the loss in business at $367,012. He also testified that while the company made $162,028 in 1996, his CPA only projected profits of $3,734 in 1997. Vick also claimed that of the $184,000 in pre-tax profit that his company showed in 1996, he actually kept none of it. He also claimed that he kept the full $100,000 in after-tax income in his business and essentially only realized his $25,000 per year salary, which yielded $384.70 per week in take-home pay. Vick, however, admitted that his corporation had purchased approximately $100,000 worth of registered quarter horses that he personally rode, an airplane that he piloted, and a Porsche and a succession of BMWs for his company cars.

An accountant for the firm that prepared the tax returns for Vick's corporation, Arlene Baltz, testified that although Vick's company made $184,000 in pre-tax profit, that total was calculated on the "accrual" basis and that the after-tax profit was tied up in inventory and accounts receivables. She admitted, however, that Vick had complete control over the amount of these earnings that would be retained by the company. She also testified that Vick claimed $42,000 in depreciation of business assets in 1996, and estimated that $51,000 would be claimed in 1997. Baltz further testified that Vick's corporation paid $178,275 in compensation to officers, which all went to Vick as its only corporate officer. According to Baltz, based on his 1996 tax return, after subtracting taxes and social security payments from his gross income and dividing by 52, Vick had weekly compensation of $4,758.77. She stated, however, that the profit projections were very meager for 1997. Vick's income for child-support purposes in 1997 was projected to be only $21,550.

In his order filed on December 22, 1997, the chancellor raised Vick's support to $1,457.11, beginning with the month of February 1997, when the petition for increase was filed. The order also recited that the payments were to continue through May of 1999, the month that Jody is expected to graduate from high school. The decree incorporated by reference the chancellor's findings announced from the bench, which included his method of calculating the amount of support. The chancellor started with Vick's after-tax income in 1996, $247,456.32, which

was derived from the total income listed on Vick's personal income tax return, $406,150, less $158,753.68 that he paid in federal and state income taxes and FICA. Although the chancellor stated that he suspected that Vick might have manipulated the estimated earnings for 1997, he added Vick's projected after-tax income for 1997, $21,550, to the 1996 total, and divided by two. He then took thirteen percent[1] of that total and calculated the monthly portion to arrive at Vick's monthly support obligation. The chancellor also specifically rejected Vick's argument that support should not have been calculated based on the 1996 tax return, because it was a joint return, finding that if Vick's current wife had been an employee, her income would have been reflected on a W-2 or 1099.

Vick first argues that the plain language of section IV of the supreme court's per curiam order, *In re Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1997), hereinafter "support guidelines," mandates that the Affidavit of Financial Means shall be used in all cases where a level of support is being set. Further, citing *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988), he contends that the relative income of the parties is a relevant consideration for the trial court, and he asserts that the Affidavit of Financial Means is designed to promote the consideration of all relevant factors. Accordingly, he argues that the chancellor's failure to require the exchange of the affidavit prior to the hearing constitutes reversible error. This argument is without merit.

Section VI of the support guidelines states:

> The Affidavit of Financial Means shall be used in all family support matters. The trial court shall require each party to complete and exchange the Affidavit of Financial Means prior to a hearing to establish or modify a support order.

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[1] We note that the version of the support guidelines in effect at the time of the hearing mandated that fifteen percent be used in this calculation. *In re Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998). However, Linda did not object to the use of thirteen percent at the hearing, and she has not put this issue before us in a cross appeal.

It is true that the plain language of this section imposes a duty on the chancellor to require that the parties exchange affidavits, but this fact is not dispositive of this issue. As noted above, when Linda's trial counsel admitted that he had not prepared an affidavit, Vick objected to the introduction of any testimony regarding her income or expenses, and the trial court sustained the objection. It is worth noting that Linda's trial counsel offered to quickly prepare an affidavit, but Vick did not pursue the offer. Accordingly, Vick is entitled to no relief on appeal because he was the prevailing party on this issue in the trial court and because he received all the relief he requested. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).

Citing *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993), Vick next argues that it is "axiomatic" that a child-support obligation must be based on the current net income of the obligor. Vick contends that the chancellor ignored "overwhelming" evidence of the cyclical nature of his business and failed to consider the plummet in gross revenues occasioned by the loss of several major accounts. He further asserts that in this court's *de novo* review it should look to the support guidelines in force at the time the order was entered, find that the proper level of support is only $338 per month, and because it only represents a $2 increase over what he was currently paying, dismiss the petition because there has been no material change in circumstances since the filing of the last support order.

In the alternative, Vick argues that if this court finds no error in the chancellor's averaging methodology, we should find that the chancellor erred in considering undistributed income retained by his wholly owned S corporation because it gives a completely distorted view of his annual disposable income. Citing *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998), as authority, he asserts that the chancellor erred in not excluding undistributed retained earnings. Based on this approach, he contends that his annual disposable income for 1996 should have been found to be $146,486.32, and when averaged with his 1997 income of $21,550, his support obligation should be calculated based on

$84,018. He contends that this court should lower his support obligation to fifteen percent of this sum, which is $1050.23. Neither argument has merit.

■ ■ The amount of child support a chancery court awards lies within the court's sound discretion, and we will not disturb the chancellor's child-support award absent an abuse of discretion. *Jones v. Jones, supra.* Regarding the calculation of income of a self-employed payor, section III c. of the support guidelines state:

> For self-employed payors, support shall be calculated based on *last year's federal and state income tax returns and the quarterly estimates for the current year.* Also the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc.

(emphasis added). Furthermore, the support guidelines authorize the court to impute income if the payor is working below full earning capacity. Support guidelines sec. III d.

■ ■ Regarding Vick's argument that the chancellor erred by averaging his 1996 and 1997 incomes, we hold that this methodology does not constitute an abuse of discretion. The plain language of the guidelines requires the court to calculate support based on the previous year's tax returns and the current year's estimates. It is undisputed that the chancellor did exactly that. The support guidelines are, in essence, rules promulgated by the Arkansas Supreme Court, and court rules are construed using the same means, including canons of construction, that are used to interpret statutes. *Anderson v. Anderson, supra.* Because the support guidelines are remedial in nature, they must be broadly construed so as to effectuate the purpose sought to be accomplished by its drafters. *See Files v. Arkansas State Hwy. & Transp Dep't,* 325 Ark. 291, 925 S.W.2d 404 (1996). The intent of the drafters is determined from the ordinary meaning of the language used. *Leathers v. Cotton,* 332 Ark. 49, 961 S.W.2d 32 (1998). Common sense tells us that if the supreme court did not want the previous years' income tax returns to be at least part of the basis for calcu-

lating support obligations for self-employed payors, it would not have made consideration of them mandatory.

Furthermore, Vick's reliance on *Jones v. Jones, supra,* is misplaced. In that case, we rejected the appellant's argument concerning entitlement to an income-tax refund for the year prior to the entry of the support order because the appellant failed to bring up a record that demonstrated trial court error. *Jones* did not involve construction of the support guidelines.

We similarly reject Vick's invitation to recalculate his support obligation after excluding his corporation's retained earnings. Our decision in *Anderson v. Anderson, supra,* does not control here. In *Anderson,* we affirmed a chancellor's decision not to deduct from his income the income tax a support obligor paid on the retained earnings of an S corporation in which he held only a twenty-five percent interest. The chancellor had ruled that the obligor's prorated share of the S corporations's retained earnings would not be counted as income for the purpose of calculating the support obligation. The issue in the instant case is clearly different. Moreover, while it is true that in *Anderson v. Anderson, supra,* we affirmed a chancellor's determination of a support obligation that was calculated after he excluded an S corporation's retained earnings, the chancellor in that case nonetheless found that retained earnings constituted income for child-support purposes, but also found that the payor "rebutted the presumption that the amount reflected by the child-support chart after including income from retained earnings is the just amount of child support to order in this particular case." In the instant case, the chancellor also found that the retained earnings were income, but found no reason to deviate from the support guidelines. Furthermore, unlike the minority shareholder obligor in *Anderson,* Vick is the sole owner of his S corporation and, as such, has complete control over the retained corporate earnings.

Finally, Vick argues that merely presenting evidence of the specified change in the obligor's income is insufficient to establish a material change in circumstances warranting an increase in child support. He contends that there was no substantial evidence apart

from financial documents and evidence of an affluent lifestyle to warrant an adjustment of his support obligation. He again points to Linda's failure to submit a support affidavit as a reason for her failure to prove such an entitlement. Furthermore, he asserts that Linda wholly failed to present any proof as to his income at the time the current support order was entered in 1982, and, citing *Ritchie v. Frazier*, 57 Ark. App. 92, 940 S.W.2d 892 (1997), he contends that this failure of proof should have been fatal to Linda's petition. We disagree.

■ ■ Vick's reliance on *Richie v. Frazier, supra*, is misplaced. In *Richie*, the appellee moved to dismiss the appellant's petition to increase child support, alleging a failure to prove what appellee's income was at the time the existing support order was entered. *Id.* In the instant case, Vick made no such motion. Consequently, we hold that he is raising this argument for the first time on appeal and consistent with our well-settled law, we decline to consider it. *Irvin v. Irvin*, 47 Ark. App. 48, 883 S.W.2d 862 (1994). Moreover, Ark. Code Ann. § 9-14-107(c) (Repl. 1998) provides that "[a]n inconsistency between the existent child support award and the amount of child support that results from the application of the family support chart shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart."

Affirmed.

JENNINGS and BIRD, JJ., agree.

Ellen RICHISON, Executrix of the Estate of Stanley R. Richison, Deceased *v.* BOATMEN'S ARKANSAS, INC., and Consumer Protective Life Insurance Co.

CA 98-418 981 S.W.2d 112

Court of Appeals of Arkansas
Division III
Opinion delivered December 16, 1998

[Petition for rehearing denied January 20, 1999.]

Roy Danuser and *Sandy S. McMath & Associates, P.A.*, by: *Sandy S. McMath*, for appellant.

Huckaba Law Firm, P.A., by: *Frank J. Huckaba*; and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Marshall S. Ney* and *Mark N. Halbert*, for appellees.

ANDREE LAYTON ROAF, Judge. This is an insurance case involving the tort of bad faith. Appellant, Ellen Richison, executrix of the estate of Stanley Richison, deceased, sued appellees, Boatmen's Bank of Arkansas, Inc. (Boatmen's Bank) and Consumer's Protective Life Insurance Company (Consumer's) for breach of contract and bad faith for denying payment of a $2500 credit life insurance policy issued to her late husband. Mrs. Richison appeals from the trial court's grant of partial summary judgment to appellees, dismissing her bad-faith claim and her request for punitive damages. On appeal, she contends that the trial court erred in granting summary judgment because 1) there was evidence that Consumer's engaged in the unethical practice of post-claim underwriting and arbitrarily and without guidelines denied the claim; 2) Consumer's failed to present evidence that her husband's alleged misrepresentation about his health was material to either the risk or to the hazard assumed; 3) there was no proof that her husband's asthma, if disclosed, would have been the basis for denying him coverage; and 4) the practice of post-claim underwriting is prima facie evidence of bad faith. For her fifth point, Mrs. Richison argues that the trial court erred in denying her motion for reconsideration because additional evidence from Consumer's 1993 annual report revealed disproportionately high earnings resulting from unethical claims practices. We find no merit to any of Mrs. Richison's points, and affirm.

Stanley Richison financed the $2500 purchase of a used pick-up truck on June 26, 1992, through Boatmen's Bank. The bank, acting as agent for Consumer's, issued Richison a credit life insurance policy insuring the amount of the debt throughout the finance period. Consumer's had trained the finance officer at Boatmen's Bank to complete the applications for the policies.

Although Richison was not asked details about his physical condition, the following statement appeared on the application form immediately above his signature: "I am now in good health, mentally and physically. I know of no physical impairment or disease now affecting my health." If an applicant disclosed a medical condition or problem at this point, an additional medical check list, inquiring about specific conditions, was to be completed and submitted with the application. Because Richison signed the "good health" statement and did not disclose that he was asthmatic, he was not asked to complete the additional questionnaire.

On July 30, 1993, approximately thirteen months later, Richison died as a result of a fatal asthmatic reaction to the drug Toradol, that was prescribed by his dentist during root canal treatments. Other than for periodic refills of his prescribed medications, Richison had not sought medical treatment for his asthmatic condition for over four years. Affidavits and deposed testimony from several witnesses established that Richison was not impaired by his asthmatic condition.

After Richison's death, Mrs. Richison made claim on the credit life insurance policy. Consumer's conducted an investigation and discovered that Richison's death certificate stated that the cause of his death was "hypoxia due to or as a consequence of asthma." Consumer's denied the claim on the ground that Richison had misrepresented his health on the insurance application. Consumer's further stated that had Richison indicated that he suffered from asthma, they would have denied coverage. Mrs. Richison filed suit against Consumer's and Boatmen's Bank, alleging breach of contract and bad faith in the denial of her claim. Consumer's moved for partial summary judgment on the claim of bad faith, asserting that Richison had failed to establish a prima facie case for the tort of bad faith. The trial court granted partial

summary judgment and dismissed the bad-faith claim and request for punitive damages. Mrs. Richison appeals from an Ark. R. Civ. P. 54(b) order dismissing this claim.

Summary judgment is an extreme remedy that should be allowed only when it is clear that there is no genuine issue of material fact to be litigated. *Hawkins v. Heritage Life Ins. Co.,* 57 Ark. App. 261, 946 S.W.2d 185 (1997). The burden of sustaining a motion for summary judgment is on the moving party. *Id.* On appeal, we view the evidence in the light most favorable to the nonmoving party, and decide if summary judgment is appropriate based on whether the evidentiary items by the moving party in support of the motion left a material question of fact unanswered. *Id.*

The elements for recovery under the tort of bad faith require the establishment of affirmative misconduct by an insurer, without a good-faith defense, which is dishonest, malicious, or oppressive in an attempt to avoid liability under a policy. *Southern Farm Bureau Casualty Ins. Co. v. Allen,* 326 Ark. 1023, 934 S.W.2d 527 (1996). A claim for bad faith cannot be based upon good-faith denial, offers to compromise a claim, or for other honest errors of judgment by the insurer. *Id.* Neither can the claim be based upon negligence or bad judgment so long as the insurer is acting in good faith. Actual malice means that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge; it may be inferred from conduct and surrounding circumstances. *Id.*

Three of Mrs. Richison's arguments on appeal relate to the alleged practice of "post-claim underwriting," a concept that has to date not been addressed by an Arkansas appellate court. Mrs. Richison contends that Consumer's engaged in post-claim underwriting, and that they arbitrarily and without guidelines denied her claim. She further contends that there was no evidence that Consumer's would have denied Richison's credit life coverage had Richison disclosed his asthmatic condition. Lastly, she argues that the practice of post-claim underwriting constitutes prima facie evidence of bad faith.

Although Mrs. Richison provides no authority for or even a definition of post-claim underwriting, the term is perhaps self-explanatory. Consumer's has cited two Mississippi cases which discuss the practice. In Mississippi, post-claim underwriting has been defined as "an insurer's waiting until after the insured makes a claim to determine whether the claimant is eligible for insurance according to the risk he presents." *Wesley v. Union National Life,* 917 F. Supp 232 (S.D. Miss. 1995)(citing *Lewis v. Equity Nat'l Life Ins. Co.,* 637 So.2d 183 (Miss. 1994)) Mrs. Richison argues in essence, that this is precisely what Consumer's did. She contends that Consumer's waited until after Richison died and claim had been made, then investigated his death and denied the claim based upon a condition for which it had no written policy providing for the exclusion of coverage and would not have denied coverage had the condition been disclosed. Mrs. Richison also contends that post-claim underwriting is considered an unethical practice in the insurance industry.

Mrs. Richison points out as evidence to support her arguments the deposition of Consumer's part-time underwriter, Jack Hewett, in which he testified that had determined from review of Richison's death certificate and medical records that Richison he suffered from asthma, that it led to his death, that he failed to disclose this preexisting illness on his insurance application, that had he done so, the policy would not have been issued, and that the claim should be denied on these grounds. Hewett further testified that he spent only thirty minutes reviewing the claim, that he based the denial on his personal opinion and experience without reference to the underwriting manuals he customarily used, that Consumer's had no written policy with regard to asthma, and that he did not know of any applications for insurance that had been denied by the company as a result of asthma. Hewett also acknowledged that post-claim underwriting was like "making a decision at the time whether the policy would have been or should have been issued in the first place," and that it is considered unethical by the insurance industry warranting disciplinary action.

Mrs. Richison also submits the affidavit of her expert, Dr. John O'Connell, a professor of insurance, who opined that asthma was not a condition which would have excluded Richison from

being issued a policy of credit life insurance with Consumer's, that Consumer's was engaging in post-claim underwriting as a corporate policy, and that Richison's failure to disclose that he had asthma did not constitute a misstatement with regard to his response to Consumer's "good health" question. In response, Consumer's denies that it engaged in post-claim underwriting and contends that by attesting to his good health on the initial application, Richison bypassed any further underwriting inquiry by Consumer's.

Of course, the issue of whether Mrs. Richison should prevail on the breach-of-contract action is not before us. The question to be resolved is whether she has provided evidence of affirmative acts committed by Consumer's that would constitute bad faith as defined by our appellate courts, whether the actions are labeled post-claim underwriting or not. A review of the cases addressing the issue of bad faith indicates that she has failed to meet this burden.

We conclude that the allegations that Consumer's failed to fully investigate the cause of Richison's death beyond a cursory review of the death certificate and medical records will not support a claim of bad faith. In *Findley v. Time Ins. Co.*, 264 Ark. 647, 573 S.W.2d 908 (1978), the insured alleged, among other things, that the insurer failed to contact her physician or to investigate fully the diagnosis by her treating physician before denying a claim for medical insurance benefits based on false statements on the application for the policy. The supreme court stated that "had [Findley] claimed that after the investigation by [the insurer] it was determined that claim was valid and [the insurer] nevertheless refused to pay or . . . refused to make any investigation at all, and that [the] refusals were in bad faith with an intent to cause further damage to [Findley] a different question would be presented." The court stated that Findley had not asserted any *affirmative* action on the part of the insurer that would constitute bad faith or fraud.

We also conclude our case law does not support a finding that, with regard to the Richison claim, Consumer's actions constituted bad faith. In *Employer's Equitable Life Ins. Co. v. Williams*,

282 Ark. 29, 665 S.W.2d 873 (1984), the court affirmed a jury verdict and an award of punitive damages for the tort of bad faith where the insurer altered insurance records so that it appeared that a policy on a bad risk had lapsed when it had not. The insurer further deceived the insured into signing a statement acknowledging that his premium payment was not timely received, under the guise of allowing the company to continue his coverage, and then canceled the coverage. In *Southern Farm Bureau Cas. Ins. v. Allen, supra*, the court again affirmed a jury verdict for punitive damages based on bad faith, finding that the jury could have concluded that, in two conversations with the insured, the company lied about coverage available under the insured's policy and actively concealed the coverage from him.

Here, Mrs. Richison has failed to submit evidence of or even allege any such affirmative acts of misconduct as were present in these cases. Although she takes issue with Consumer's reliance upon its application in denying her claim, and contends that its adjuster was acting in bad faith in basing the denial on an undisclosed asthmatic condition, the evidence she presented does not support her contention. Hewett testified that he based the denial on his expertise in the field of insurance underwriting and further stated that, while working for Consumer's, about ninety percent of his time was spent reviewing applications for insurance and only ten percent of his time was spent reviewing medical records after a claim was made. Moreover, the opinion of Mrs. Richison's expert that Consumer's was engaged in the "practice" of post-claim underwriting is conclusory at best and was based only upon review of the Richison claim.

Mrs. Richison also argues that it was impossible for Consumer's to have a good-faith defense for its denial because it presented no evidence that Richison's alleged misrepresentation was material either to the risk or to the hazard assumed. She correctly contends that, to be material, the misrepresentation must be causally related to the loss for recovery to be barred under Ark. Code Ann. § 23-79-107 (Repl. 1992) in dealing with misrepresentations, omissions, and incorrect statements in life and disability insurance applications. The short answer to this argument is that, while the questions of whether Richison's undisclosed asthma was

material to the acceptance of the risk by Consumer's and whether there was a causal relationship between the misrepresentation and the hazard resulting in the loss are disputed issues to be addressed in the breach-of-contract portion of her case, there is no dispute that Richison had an asthmatic condition that he failed to disclose, and that his condition contributed at least in part to his death. Consumer's actions in disputing this claim cannot be said to rise to the level of "affirmative acts of misconduct" as set forth in our case law. The only authorities cited by Richison in this argument, a concurring opinion in *Southern Farm Bureau Life Ins. Co. v. Cowger*, 295 Ark. 250, 748 S.W.2d 332 (1988), and *National Old Line Ins. Co. v. People*, 256 Ark. 137, 506 S.W.2d 128 (1974), *overruled by Southern Farm Bureau Life Ins. Co. v. Cowger, supra*, are cases in which the insured, like Richison, failed to disclose preexisting conditions in response to "good health" statements in the insurance application. However, both are simply breach-of-contract cases in which the only issue was whether the insured would recover on the policy; they contain no discussion of the tort of bad faith and are clearly inapplicable to the issue before us. Failure to cite convincing legal authority for a point on appeal will result in affirmance of that point. *Mills v. Crone*, 63 Ark. App. 67, 973 S.W.2d 823 (1998); *Morse v. Morse,* 60 Ark. App. 215, 916 S.W.2d 777 (1998).

Likewise, the argument that Consumer's failed to offer any credible evidence that it would have in good faith denied coverage to Richison if his condition had been disclosed cannot be dispositive of the issue of bad faith. Mrs. Richison points to the lack of a clear exclusionary policy or underwriting guidelines, the failure to include asthma in its medical questionnaire, and her assertion that asthma is no longer considered a basis for denial of coverage by the life insurance industry. She relies on *Old Republic Ins. Co. v. Alexander,* 245 Ark. 1029, 436 S.W.2d 829 (1969), another breach-of-contract case, involving denial of a claim based on misrepresentation in the application by the insured. In *Old Republic, supra,* the court upheld the chancellor's finding of coverage, and stated that "it is significant that [the company] produced no record of its own underwriting standards nor did it attempt to show general standards in the underwriting profession or insurance

trade by disinterested witnesses. It relied solely on the self-serving declaration of its underwriter." Again, Richison's reliance on this authority is clearly misplaced, because it pertains not to a claim for the tort of bad faith, but rather to a claim only for insurance benefits.

Finally, Mrs. Richison argues that the trial court erred in refusing to grant her motion for reconsideration in view of the additional evidence submitted by affidavit that accompanied her motion. In this affidavit, Richison provided expert opinion that Consumer's 1993 annual report reflected a disproportionate ratio of earnings to premiums and commissions collected, that Consumer's was engaged in the wide-spread practice of post-claim underwriting, and that "one can only assume" that the practice of post-claim underwriting has a substantial impact on revenues. The affidavit further stated, incorrectly, that Consumer's admitted that its standard operating procedure was for claims to be underwritten after they had been made.

First, this affidavit is duplicative of the opinion provided by Dr. O'Connell except with respect to the financial information provided. Moreover, in her motion, Richison merely asserts that she had obtained "new evidence previously unavailable in the form of an executive review and opinion concerning the defendant's year-end financial statement of 1993." She does not even contend on appeal that the new evidence was unavailable, cites no authority, and does not state why or how the trial court erred in denying the motion. Arkansas Rule of Civil Procedure 59(a)(7) provides that a new trial may be granted where there is newly discovered evidence material for the party applying, which he could not with reasonable diligence, have discovered and produced at the trial. *See also Roetzel v. Brown*, 321 Ark. 187, 900 S.W.2d 185 (1995). Richison died in July 1993, and the complaint was filed on July 28, 1995. Consumer's motion for partial summary judgment was filed on October 11, 1996. The trial court granted the motion by order entered January 24, 1997. Under these circumstances, we cannot say that the trial court abused its discretion in denying the motion. *Roetzel, supra.*

Affirmed.

JENNINGS and BIRD, JJ., agree.

Toby Patrick CRAIG *v.* STATE of Arkansas

CA CR 98-187 983 S.W.2d 440

Court of Appeals of Arkansas
Opinion delivered December 16, 1998

Honey & Honey, P.A., by: *Charles L. Honey*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

PER CURIAM. The appellant was convicted of first-degree murder and filed an appeal. After the record on appeal was lodged, appellant asserted that the transcript of the proceedings did not accurately reflect the trial judge's ruling on his motion to dismiss at trial. Appellant filed a motion for a writ of certiorari to complete the record, identifying the portion of the transcript he alleged to be inaccurate and attaching several affidavits to support his allegation. We granted this motion and, on June 17, 1998, remanded the matter to the trial court with directions to settle the record. On receipt of our order, the trial judge reviewed the transcript, listened to the recording from which the transcript was made, and found that the transcript of the proceedings was accurate. This finding was incorporated in an order settling the record dated July 20, 1998.

Appellant filed a second motion for writ of certiorari to complete the record on October 15, 1998. In it, he again asserts that the transcription of the record was inaccurate and requests that the matter be remanded for the record to be settled. As grounds for his motion, appellant asserts that the trial court's order settling the record was contrary to the affidavits filed by appellant,

and argues that a hearing was necessary in order to "really"settle the record. We deny this motion for the reasons set out below.

The appellant has not alleged that the transcript of the record omits the trial judge's ruling on his motion to dismiss; instead, appellant asserts that the record as transcribed misstates that ruling. Rule 6(e) of the Arkansas Rules of Appellate Procedure—Civil provides that:

> *Correction or Modification of the Record.* If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court on proper suggestion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the appellate court.

Rule 6(e) does not expressly require that a hearing be held in order to settle the record. Although there are undoubtedly cases where a hearing would be helpful, and perhaps necessary, to determine whether the transcription of the record contains a misstatement of what transpired below, appellant in the case at bar never requested a hearing in his initial motion.[1] To the contrary, appellant's initial motion requested only that "the Court Reporter should be ordered to review and correct those errors in the transcript." We granted the relief requested and, in the absence of any allegation of bias or wrongdoing on the part of the trial judge, we see no significance in the fact that on remand the transcript was reviewed by the trial judge rather than the court reporter. Appellant having been afforded the relief he requested in his initial motion for writ of certiorari to complete the record, the present motion is denied.

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[1] There is, in addition, no indication that appellant requested the trial judge to conduct a hearing after we granted his initial motion and the case was remanded.

Motion denied.

BIRD, AREY, NEAL, GRIFFEN, and ROAF, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully dissent from the action of this court in denying appellant's second motion for writ of certiorari to complete the record.

A recitation of background information is necessary for an understanding of the reason for my dissent. The record before us reveals that appellant has perfected an appeal from Nevada County Circuit Court where he was convicted of first-degree murder and sentenced to a term of forty years in the Arkansas Department of Correction. After the record on appeal was lodged, appellant's counsel detected what he apparently perceived to be an inconsistency between the transcript of the proceedings and his personal recollection of a statement made by the trial judge in ruling on appellant's motion to dismiss. Consequently, appellant's attorney filed in this court a motion for writ of certiorari to complete the record. In his motion, appellant quoted the portion of the transcript that he believed to be inaccurate and requested a writ of this court requiring the court reporter to review and correct the record. Attached to the motion were several affidavits of persons, one of whom is a newspaper reporter, who state that they attended appellant's trial and that they agree with counsel for appellant that the transcript is inaccurate.

After considering appellant's motion, on June 17, 1998, we ordered that the matter be remanded to the trial court to settle the record. Without notice to anyone, and without a hearing, the trial judge apparently took it upon himself to listen to the court reporter's official recording of the disputed part of the record and compare it with the transcript. The trial court thereafter entered an order that provided, in pertinent part, as follows:

> . . . This court has reviewed the transcript and the recorded version from which the transcript was made. The Court finds that the Court Reporter has, in fact, correctly recited . . . the exact ruling of this Court recited in open court . . . .
>
> . . . In this instance, the part of the record sought to be corrected by appellant, is not a statement that was incorrectly transcribed by

> the Court Reporter. Instead, it is a statement that was made by the Court and this statement is verified as to correctness by the recorded portion of the record.

As a result of the entry of this order by the trial court, appellant filed his second motion for writ of certiorari to complete the record. It is this second motion that has been denied by a majority of this court and that is the subject of my dissent.

In his second motion, appellant alleges that in settling the record pursuant to this court's June 17, 1998, order, the trial court did not conduct a hearing to consider any testimony, and that his order was contrary to the only evidence before the court, namely, the affidavits that were attached to appellant's first motion. He alleges that in order to settle the record it was necessary for the court to conduct a hearing so that additional witnesses could be called and additional evidence considered.

Obviously the nature of the proceedings necessary to settle a record in the trial court will vary from case to case, depending upon the nature of the dispute about the record. While I do not agree with appellant's contention that, in settling the record, it is necessary for the court to permit appellant to call witnesses and present additional testimony, I believe it was at least necessary in this instance for the court to convene the parties and their attorneys in open court, after notice, and conduct an on-the-record hearing of the proceedings and steps taken relative to the settlement of the record. To suggest that the trial judge, in carrying out this court's directive to "settle the record," should be permitted to do so in the privacy of his office without notice to or the presence of others interested in the matter is foreign to any notion of due process, especially where the dispute over the content of the record relates to what the judge himself said or did not say.

The case of *Butler v. State*, 261 Ark. 369, 549 S.W.2d 65 (1977), involved the settlement of the record in a criminal case where the reporter's tape recording of the testimony had been destroyed by fire before it was transcribed. At a hearing conducted by the court to settle the record, the defendant's attorney was present, but the judge refused the defendant's request that he be allowed to be present in person. In remanding the case, the

supreme court said that the defendant was "constitutionally entitled to be personally present at every substantive step of the proceedings. Hence he should have been present when the record was settled, for he might have remembered some error or omission that no one else noticed." The trial court was directed to give the defendant an opportunity to examine the court reporter's transcript of the testimony and to personally present to the court any objections he might have.

More recently, in *Akins v. State*, 328 Ark. 676, 945 S.W.2d 362 (1997), when the trial court was unable to comply with the supreme court's deadline to supplement the record because one of the tapes was missing, the case was remanded to the trial court with instructions to the court reporter to search through the tapes in storage until the missing tape was discovered, failing which, the trial court was directed to "conduct a hearing to attempt to settle the record on this issue."

I wish to emphasize that, by taking this position, I am not suggesting that I do not accept as totally accurate the statements contained in the trial judge's order to the effect that he has reviewed the transcript and the recording from which the transcript was made, and that he has determined that the record constitutes an accurate transcription of the tape recording. However, in my opinion, matters such as this, involving disputes over what was said by the judge, should be examined on the record, in an open courtroom with the interested parties present, rather than in the seclusion of the judge's chambers with no one present but the judge.

The majority states that Rule 6(e) of Arkansas Rules of Appellate Procedure—Civil does not expressly require that a hearing be held in order to settle the record, and asserts, as a reason for its denial of appellant's present motion, that appellant did not request a hearing in his initial motion. However, the majority does acknowledge that there may be some cases where a hearing would be helpful or necessary. In granting appellant's first motion to settle the record, we obviously recognized the need for action in the trial court to resolve a dispute about the accuracy of the record. I submit that a dispute about the accuracy of the record

that relates to what the judge said or did not say presents a case in which a hearing is necessary, and that appellant should not have been required or expected to specifically request a hearing to settle the dispute. No one would have expected the judge to resolve that issue sua sponte, without giving the parties an opportunity to at least compare the disputed record to the court reporter's official tape recording of the proceeding.

It has long been the law in this state that so-called "off-the-record" proceedings are not permissible. *Armer v. State*, 326 Ark. 7, 929 S.W.2d 705 (1996); *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987); *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985); *Fountain v. State*, 269 Ark. 454, 601 S.W.2d 862 (1980). I see no distinction between the off-the-record proceedings that were condemned by the supreme court in the above-referenced cases and the off-the-record proceeding conducted by the judge in the case at bar. As the supreme court said in *Farley v. Jester*, 257 Ark. 686, 520 S.W.2d 200 (1975), "Court proceedings must not only be fair and impartial — they must also appear to be fair and impartial."

For the foregoing reasons, I would grant appellant's second motion for certiorari to complete the record and remand this matter to the trial court with instructions to conduct an on-the-record hearing. At the hearing, the parties and their attorneys should be permitted to listen to the court reporter's tape recording of the disputed portion of the transcript and compare it to the reporter's transcript. Then, after considering the arguments of counsel relating to the issue, the court should enter an appropriate order settling the record to be transmitted to this court for consideration on appeal.

I am authorized to report that Judges AREY, NEAL, GRIFFEN, and ROAF join in this dissent.

WILLIAMS MACHINE & FABRICATION, INC. *v.* McKNIGHT PLYWOOD, INC.

CA 98-511 983 S.W.2d 453

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1998

Barber, McCaskill, Jones & Hale, P.A., by: *Christopher Gomlicker*, for appellant.

David Solomon, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant, an Oregon corporation, was hired to modify some machinery purchased in Oregon. Before appellant would undertake the work, it required a down payment and financial statement. Appellant received down payment in the form of a check for $33,800 issued by appellee, McKnight Plywood, Inc., an Arkansas corporation. Appellant also received appellee's financial statement on appellee's letterhead. Appellant did the work, which took approximately one year, and was then told to deliver the repaired machinery to a Mississippi corporation named Jackson Wood Products, Inc. Appellant delivered the machinery as instructed but never received full payment. Consequently, appellant sued appellee in a state circuit court in Oregon. Appellee failed to respond, and a default judgment was entered. Appellant then attempted to register the foreign judgment in the Circuit Court of Phillips County, Arkansas. Appellee defended on the grounds that personal jurisdiction was lacking; it asserted that its president was also the president of

Jackson Wood Products, and that the repair order was made on behalf of Jackson Wood Products, which received the equipment. The trial court found that personal jurisdiction over appellee was lacking and held that the default judgment was not entitled to be enforced in Arkansas. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in finding that the Oregon circuit court lacked jurisdiction over appellee, and in finding that appellee lacked sufficient minimum contacts with Oregon to permit an exercise of jurisdiction that comports with the due process clause. We agree, and we reverse.

The Arkansas Supreme Court recently summarized the principles governing the exercise of personal jurisdiction over nonresident defendants in *John Norrell Arms, Inc. v. Higgins*, 332 Ark. 24, 28, 962 S.W.2d 801, 803 (1998), where it stated that:

> The U.S. Supreme Court has held that in order for state courts to maintain personal jurisdiction over a nonresident person under the Due Process Clause of the Fourteenth Amendment, a party must satisfy two prongs. The party, first, must show that the nonresident has had sufficient "minimum contacts" with this state and, secondly, must show that the court's exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In this same vein, the Court has held that personal jurisdiction over a nonresident defendant generally exists when the defendant's contacts with the state are continuous, systematic, and substantial. *Helicopteros Naciaonales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). *See also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). It is essential for a finding of personal jurisdiction that there be some act by which the defendant purposefully avails himself or herself of the privilege of conducting business in the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1957). Moreover, the contacts should be such where a defendant would have a reasonable anticipation that he or she would be haled into court in that state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980):

> The Eighth Circuit Court of Appeals has established a five-factor test for determining the sufficiency of a defendant's contacts with the forum state so as to result in personal jurisdiction:
>
> > (1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.
>
> *Burlington Industries, Inc. v. Maples Industries, Inc.*, 97 F.3d 1100 (8th Cir. 1996). *See also Glenn v. Student Loan Guar. Found.*, 53 Ark. App. 132, 920 S.W.2d 500 (1996). We agree with the Eighth Circuit and our court of appeals that these factors are helpful in the minimum-contact analysis.

Although appellee was later reimbursed by Jackson Wood Products, and despite the trial court's finding to the contrary, we think it clear that appellee was at the very least acting as Jackson Wood Products's agent in the transaction. Agency may be implied from the apparent relations and conduct of the parties, *Showalter v. Edwards and Associates, Inc.*, 112 Or. App. 472, 831 P.2d 58 (1992), and here appellee was the entity writing the checks and providing the credit. In this context, it should be noted that the Oregon Rules of Civil Procedure declare that personal jurisdiction exists where a party is served in any action that arises out of a promise made to the plaintiff by defendant "to perform services within this state *or to pay for* services to be performed in this state by the plaintiff." ORCP 4 E(1) (emphasis added). Whatever other involvement appellee may have had, its payment of the down payment, accompanied by its financial statement, clearly shows that it was the entity promising to pay for appellant's work. Such a promise to pay for services to be performed in Oregon was found to be a sufficient basis for jurisdiction in *Lenhardt v. Stafford*, 101 Or. App. 400, 790 P.2d 557 (1990).

Given the length of the relationship between the parties (almost one year), the fact that appellee's corporate president himself went to Oregon to obtain appellant's services, and that the suit arises directly out of appellee's actions in Oregon, we think it

apparent that appellee purposely availed itself of the privilege of doing business in Oregon. Having submitted its financial statement in Oregon to an Oregon company in an attempt to obtain that company's services, appellee should not have been surprised to be sued in Oregon when those services were not paid for.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Brian Glenn FINDLEY *v.* STATE of Arkansas

CA CR 98-537 984 S.W.2d 454

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 23, 1998

Everett & Mars, by: *John C. Everett* and *Jason H. Wales*, for appellant.

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

JOHN E. JENNINGS, Judge. Brian Glenn Findley was found guilty by a Washington County jury of theft of property and was sentenced by the court to ten years' imprisonment. Findley argues on appeal that the trial judge abused his discretion in admitting into evidence certain exhibits and in denying his motion for a continuance when the exhibits were offered. These arguments are based on the appellant's contention that the State did not fulfill its discovery obligations with respect to the exhibits. We find no error and affirm.

The basis of the State's charge of theft was the contention that appellant had over a period of time voided a number of sale receipts of his employer, Pearle Vision Center, and retained the corresponding money for his personal use. To establish its case, the State introduced into evidence a series of exhibits showing individual transactions.

When the State offered exhibit two the defendant objected:

DEFENSE COUNSEL: Objection on the grounds that I have asked numerous times, through discovery, for the transactions that the State intends to rely on and have been given stacks of transactions, none of which contain any type of work on a customer whose name is Brenda Canfield.

THE COURT: Mr. Rhoades [the prosecutor], has the material that the witness is referring to been provided to the defendant?

PROSECUTOR: Yes, your Honor. The State has talked to Mr. and Mrs. Rogers on numerous occasions and has gotten together all these documents and put them in the State's file before the previous trial date. Although I cannot guarantee that I made copies of these documents and provided them to the defendant, I do know for a fact that the information has been in the State's file in this exact order.

THE COURT: Have you denied access to the defendant?

THE PROSECUTOR: No, sir.

THE COURT: All right, the objection is overruled.

DEFENSE COUNSEL: Just for the record, I have on several occasions been to the Prosecutor's office and made copies of documents in his file. These documents that the State is offering into evidence were not in the file, or I would have copied them. I want to clearly state that on the occasions I copied the State's file, the documents at issue were not to be found therein. The defense simply requests an opportunity to look at and review the proposed evidence.

THE COURT: Ms. Britt, as you know the State maintains an open file policy. The State assures me that this material has been in its file for a considerable period of time. You have been given access to that file. If you want an opportunity for your client to review this information for the next 30 seconds or minute to confirm that it is the documents that the witness has identified, I'll give you the opportunity to look at it, but this information has been available to you for a long, long time.

PROSECUTOR: I would like to repeat the fact that the documents comprising State's Exhibits 2-8 have not only been in the State's file, but they have been in the exact order that the State is presenting them now since the last meeting I had with Mr. and Mrs. Rogers several weeks ago. I do not remember when this

case was initially set for trial, but I would say that the information at issue has been in my file for at least a month, although I cannot guarantee the exact amount of time.

THE COURT: We are going to break for ten minutes. That will give the defendant an opportunity to look at each one of the proposed Exhibits. Then we will come back and move forward with the trial.

DEFENSE COUNSEL: Your Honor, although I recognize the State has an open file policy, it is obvious that I have been to copy the State's file due to the large stack of papers that I have here, and I have been to copy this file on several occasions, but obviously do not have the new material that was brought in today. I don't think the Court can expect us to check the file on a daily basis to make sure anything new has been put in after we have made several trips to copy the file and get the documents responsive to my discovery request. I believe it is up to the State to provide any new information to us or at least tell us that it is in their file. My client and I have painstakingly gone through a list of transactions that was provided to us containing some 21 or 22 items on it. We have looked at each one of those and formulated a defense to each one of the transactions. None of this new paperwork that the State is proposing to submit into evidence was on the list of transactions to which we have prepared a defense, which I thought was the State's master list of transactions. Thirty minutes or ten minutes is not enough time to review seven new transactions that we have never seen before and at this time I would ask the Court to continue this case and give us time to prepare our defense.

PROSECUTOR: This case was originally scheduled for trial on November 26, 1997, and was continued until December 23, 1997. The case was continued from December 23, 1997, until today, February 24, 1998. In preparing for trial in December, I met with Mr. and Mrs. Rogers in my office where we examined and prepared several packages of documentation concerning this case. It is my belief that I either copied these packages or told the defendant's attorney that I had them in my possession and that she could copy them at her convenience. At any rate, the documents comprising these Exhibits at issue have been in the State's file since prior to the December trial date and have been in the exact order in which I propose to introduce them today. The State's position is that these documents have been in its file for at

least a month, probably two months. Considering the State's open file policy, there is absolutely no cause for a continuance.

DEFENSE COUNSEL: I disagree with the Prosecutor. I specifically remember coming back from my maternity leave and meeting with my client. At that time, I sent an investigator up to copy the State's file, and he brought back what he described to me as being all of the transactions that the State had in its file. Your Honor, I have made every effort to copy the State's file. If these items had been in the State's file I would have copied them.

THE COURT: What are these documents that we're talking about today?

PROSECUTOR: The documents at issue create a paper trail and involve several different types of documents. Each packet consists of time cards, daily business reports, which are business records showing what the deposits and transactions were for specific business days. The packages also consist of void records showing where void transactions were done. The packages also contain dispensing records showing where products were dispensed.

THE COURT: To try to answer my question then, I assume these are business records maintained by Mr. and Mrs. Rogers in the ordinary course of their business?

PROSECUTOR: Yes, sir.

THE COURT: Are these business records in the State's file similar at least in terms of form to all the other records and documents that relate to this business?

PROSECUTOR: Yes. The only difference is that these documents are the originals of the Xerox copies which have been in our file for some period of time.

THE COURT: Since at least December the 23rd?

PROSECUTOR: Since the last trial setting, and I believe that was December the 23rd.

The trial court then admitted the exhibits. Rule 17.2 of the Rules of Criminal Procedure provides that the prosecuting attorney may perform his discovery obligations in any manner mutually agreeable to himself and defense counsel or by notifying defense counsel that material and information, described in gen-

eral terms, may be inspected, obtained, tested, copied, recorded or photographed during specified reasonable times. Ark. R. Crim. P. 17.2(b)(i). The trial court has broad discretion in matters pertaining to discovery, and that discretion will not be second-guessed by the appellate court absent an abuse of discretion. *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993); *MacKintrush v. State*, 60 Ark. App. 42, 959 S.W.2d 404 (1997).

Appellant correctly notes that the "open-file policy" of the State has been subject to some judicial criticism. In *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981), the court said:

> The 'open-file policy' of the Pulaski County Prosecuting Attorney's Office may be a time saver for both the State and the defense; however, as here, it often results in the court being unable to determine whether discovery has been complied with under the Arkansas Rules of Criminal Procedure.

In *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988), the supreme court said that it had not given "carte blanche approval" to the open-file policy as an acceptable substitute for disclosure. In *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994), the court said:

> If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practical effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file.

Finally, in *Dever v. State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985), we reversed for a discovery violation on the State's part where critical evidence was located not in the prosecutor's file but rather in a file at the sheriff's office. We said, "We do not read *Robinson* to hold that simply because the prosecution has an open file policy it has fulfilled its discovery obligation and defense counsel is then required to himself examine all other files in the county maintained by law enforcement officials."

Nevertheless, seventeen years have passed since *Earl v. State* was decided, and the supreme court, although it has had a number of opportunities to do so, has not prohibited the use of an open-file policy as a means of compliance with the State's discovery

obligations. The case at bar is unlike *Dever* — there is no suggestion that defense counsel was required to search files other than the prosecutor's.

The crux of appellant's argument is that because statements of his lawyer and those of the prosecutor were in such conflict, it was an abuse of discretion for the court to admit the exhibits without granting a continuance. We do not view the statements of counsel as necessarily being in conflict. Although the prosecutor's statements were not entirely without ambiguity, we think that the trial judge could fairly find that the exhibits sought to be introduced had been in the prosecutor's file for at least sixty days prior to trial. Defense counsel did not tell the court when she last examined the State's file, other than to say that it was after she came back from maternity leave. We have no way of telling when this was, nor do we have any reason to think the trial judge should have known the date to which counsel was referring.

Given the trial court's broad discretion in deciding such matters, we simply cannot say that the court abused its discretion in failing to find a discovery violation. There is not the slightest indication that defense counsel was unaware that the State relied on an open-file policy, and there was no assurance given to the trial judge that defense counsel had checked the State's file within the last sixty days prior to trial.

For the reasons stated, the decision of the circuit court is affirmed.

PITTMAN, ROGERS, and STROUD, JJ., agree.

BIRD and ROAF, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully disagree with the majority because I do not believe that the State has complied with its obligation to provide discovery as required by the Rules of Criminal Procedure. I also believe that the trial court erred when it denied appellant's motion for a continuance so that he would have an opportunity to examine the State's recently acquired exhibits. I would, therefore, reverse and remand this case for a new trial.

Arkansas Rule of Criminal Procedure 17.1 provides, in pertinent part, as follows:

> (a) . . . [T]he prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> . . . .
>
> (v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in any hearing or at trial. . . .

The record of this case reflects that, in preparation for trial, appellant's attorney filed a written request for discovery pursuant to Rule 17.1 in which she specifically requested

> all information or material that is or may come within the possession, control, or knowledge of the prosecutor including copies of Pearle Vision time cards and/or time records in the name of Brian G. Findley, showing the dates and times he worked, and copies of all Pearle Vision audit records which would show the dates and times that Brian G. Findley's password was used to void transactions in the store.

Appellant's discovery request also included a provision, pursuant to Rule 19.2, that the discovery request "be treated as continuing in nature as it relates to all information received by the State up until the day of trial."

The record does not reflect that the State filed a response to appellant's discovery motion, although it is apparent from the record that the State did afford defense counsel access to its file, including the opportunity to make and retain copies of any evidence contained therein.

The trial, which was originally set for November 26, 1997, was first continued until December 23, 1997, and was continued again and eventually begun on February 24, 1998. During the trial, the State offered into evidence State's Exhibits numbers Two through Eight, consisting of various documents generated by appellant's former employer, Pearle Vision, that the prosecutor sought to use to establish a connection between the missing

money and a password that had been provided to appellant to gain access to Pearle Vision's computer. There was no dispute but that these documents met the criteria of those described in defense counsel's discovery request.

When defense counsel objected to the introduction of the exhibits because of the prosecutor's failure to provide them prior to trial, the prosecutor initially responded that the exhibits had been in the State's file since before the previous trial date, but later modified his statement to say that the documents had been in the State's file "since the last meeting I had with Mr. and Mrs. Rogers *several weeks ago*. I do not remember when this case was initially set for trial, but I would say that this information has been in my file *for at least a month*, although I cannot guarantee the exact amount of time." (Emphasis added.)

Defense counsel responded that she was aware of the State's open-file policy and that she had availed herself of it by making copies of the material in the State's file on several occasions, but that the materials contained in Exhibits Two through Eight had not been in the State's file. The prosecuting attorney then offered a third time frame within which the disputed exhibits might have been placed in the State's file, stating that it was the State's position "that these documents have been in its file for at least a month, probably two months." The prosecutor went on to say that because of the State's open-file policy, there was no reason for the court to grant a continuance.

The majority generously characterizes the prosecutor's statements about when the disputed exhibits were placed in the State's file as "not entirely without ambiguity" and suggests that the trial court "could fairly find that the exhibits sought to be introduced had been in the prosecutor's file for at least sixty days prior to trial." I disagree. In my view, it is more accurate to say that the prosecutor's equivocal statements make it clear that he had no idea when the exhibits were put in the file, and that it was the State's position that its open-file policy cast the burden on appellant to discover whatever was put in the file, whenever it was put there, and that *when* the exhibits were put in the file was immaterial so long as they were put there before the trial. It is equally clear from

the statements of the trial judge that he agreed with the State's position that by maintaining an open-file policy, the State had met its obligation to provide discovery.

I do not interpret Rule 17.1 to mean that the State can fulfill its discovery obligations in a criminal case by filing no response whatsoever to a defendant's motion for discovery, and thereafter relying on a so-called "open-file policy" as fully satisfying all requests for discovery. It is true, as the majority points out, that Rule 17.2(b)(i) provides that the prosecuting attorney may perform his discovery obligation in any manner mutually agreeable to himself and defense counsel or by notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, recorded, or photographed during specified reasonable times. However, there was no assertion by the prosecutor in this case that he had made an agreement with defense counsel as to how the State's discovery obligation would be performed, or that the prosecutor had notified defense counsel of specified reasonable times that the State's file could be inspected. Even if it could be said that the State's long-standing practice of maintaining an open file could be deemed to be an implied agreement that its files were open for inspection at all reasonable times, it should also be implied that the materials expressly sought to be discovered by the defendant will be in the State's file when defense counsel chooses to inspect it.

As defense counsel argued, if the State is permitted to rely on an open-file policy as satisfying its discovery obligations, a defendant should not be required to inspect the State's file on a daily basis to see if anything new has been added. This is particularly true where, as here, the defendant's discovery motion reminded the State that Ark. R. Crim. P. 19.2 imposes upon it a duty of continuing discovery, even after its initial compliance with the rules. Rule 19.2 expressly requires parties to promptly notify opposing counsel of the existence of "additional material or information comprehended by a previous request to disclose." There is nothing in Rule 19.2 to indicate that this continuing duty to provide discovery can be fulfilled by the State's reliance on an unwritten, but apparently long-standing, policy of maintaining an open file. To the contrary, Rule 19.2 expressly requires that a party becom-

ing aware of additional material or information "shall promptly notify opposing counsel."

The majority says that it does not view the statements of defense counsel and the prosecuting attorney (quoted at length in the majority opinion) as being in conflict because defense counsel only informed the court that she last inspected the file after she returned from maternity leave, but failed to say when that was. I suggest that knowledge of the specific date upon which defense counsel returned from maternity leave is unnecessary to fairly and logically discern from the record that defense counsel's last examination of the State's file occurred less than thirty days before trial. Specifically, when the prosecuting attorney stated to the court that "the State's position is that these documents have been in its file for at least a month, probably two months," defense counsel responded,

> I disagree with the prosecutor. I specifically remember coming back from my maternity leave and meeting with my client. At that time, I sent an investigator up to copy the State's file and he brought back what he described to me as being all the transactions that the State had in its file.

The only logical meaning that can be attributed to defense counsel's disagreement with the prosecutor's statement is that she returned from maternity leave within the month preceding trial, copied the State's file, and the disputed exhibits were not there.

Although the State's so-called "open-file policy" has never been expressly invalidated, it has been, as the majority points out, the subject of judicial criticism, *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994), *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988), and *Earl v. State,* 272 Ark. 5, 612 S.W.2d 98 (1981), and its improper use has resulted in the reversal of at least one case, *Dever v. State*, 14 Ark. App. 107, 685 S.W.2d 518 (1985). In *Bussard*,[1] *supra*, the supreme court stated:

> [W]e have not given carte blanche approval of an open file policy as an acceptable substitute for disclosure. Merely because the

[1] *Bussard* was reversed on other grounds, making it unnecessary for the court to consider whether the State's discovery violation also warranted reversal.

> prosecutor declares that the files in the case are open, it cannot be taken to mean that he has fulfilled his discovery obligations.

295 Ark. at 80, 747 S.W.2d at 75 (citing *Earl v. State, supra*).

In *Robinson,*[2] *supra,* where the prosecutor had in its file that had been examined by defense counsel three unattested crime-lab reports, but sought at trial to substitute attested facsimile copies of those same reports for introduction into evidence, the supreme court stated:

> Obviously, the State violated the rules of discovery. If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file.

317 Ark. at 517, 879 S.W.2d at 421-22.

The majority states that "seventeen years have passed since *Earl v. State* was decided and, the supreme court, although it has had a number of times to do so, has not prohibited the use of an open-file policy as a means of compliance with State's discovery obligations." I find this statement astonishing in view of the clear caveat set forth in *Bussard* and *Robinson, supra,* (not to mention this court's *Dever, supra*) to the effect that the State's reliance on an open-file policy does not fulfill its discovery obligations. I simply do not know how the supreme court could have made it any more clear.

I see no distinction between the State's discovery violations criticized in *Bussard, Robinson,* and *Dever,* and the violation that has occurred in the case at bar. Furthermore, appellant has clearly demonstrated that he was prejudiced by the State's noncompliance with the discovery rules by establishing that the six disputed exhibits related to alleged thefts of money totaling an amount that would have made a difference between whether appellant could be found guilty of a Class B felony with an exposure to ten years

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[2] *Robinson* was affirmed in spite of the discovery violation because appellant's counsel was held to have waived the violation and conceded that no prejudice had resulted to appellant as a result of the State's failure to comply with its discovery obligations.

imprisonment, or the less serious offense of a Class A misdemeanor with an exposure to only one year imprisonment.

In my opinion, this case should be reversed and remanded for a new trial. I am authorized to report that Judge ROAF joins in this dissent.

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

CA 97-1079 984 S.W.2d 61

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 23, 1998

Winston Bryant, Att'y Gen., by: *M. Shawn McMurray*, Deputy Att'y Gen., and *Ralph M. Spory, Jr.*, Ass't Att'y Gen., for appellant.

Lee McCullough, for appellee Arkansas Public Service Commission.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Hermann Ivester*, for appellee Arkansas Oklahoma Gas Corporation.

SAM BIRD, Judge. This appeal is brought by the Attorney General, State of Arkansas from Order No. 15 of the Arkansas Public Service Commission (Commission). The Attorney General contends that Order No. 15 is unlawful because (1) it does not include sufficient detail and findings of fact to enable a reviewing court to determine how the Commission arrived at its decision, (2) it is not supported by substantial evidence, and (3) the terms of it are arbitrary, capricious, and unreasonable. We agree that Order No. 15 does not include sufficient findings to allow this court to conduct a meaningful review, and we reverse and remand.

Order No. 15 resulted from a petition for a rate increase filed by Arkansas Oklahoma Gas Company (AOG), which initially claimed a rate deficiency of $7,253,853 but later agreed to a revenue deficiency of $3,495,988. Thereafter, AOG, the staff of the Commission (Staff), and West Central Arkansas Gas Consumers (WCAGC), a group of fourteen industrial customers connected to AOG's gas distribution system, filed a "Stipulation and Agreement" with the Commission that proposed a total revenue

requirement of $38,584,136 and a revenue deficiency of $3,495,988 for AOG. Although the Attorney General had no dispute with the proposed revenue requirement and revenue deficiency included in the agreement, he urged the Commission to reject it because it assigned the entire revenue deficiency to the residential class, resulting in a 22% increase in residential rates.

A public hearing concerning the adoption of the Agreement was held by the Commission. AOG, Staff, and WCAGC produced evidence supporting its adoption. The Attorney General's witness argued that a 22% increase in rates to the residential class would cause "rate shock" and was, therefore, unreasonable and not in the public interest. The Attorney General urged the Commission to consider phasing in the rate increase over a period of time.

At the conclusion of the hearing, the Commission requested that the parties supplement the record with summary briefs, specifically addressing alternatives to the proposed 22% increase in residential rates. The Staff's brief contained an attachment outlining a three-year and a four-year phase-in plan for the 22% increase that included a 10.27% carrying charge on the uncollected balance. The Commission adopted the Agreement, conditioned upon the Staff's three-year phase-in plan. The Attorney General petitioned the Commission to rehear Order No. 15, but his petition was deemed denied after thirty days.

Arkansas Code Annotated section 23-2-423(c)(3), (4), and (5) (Supp. 1997) defines our standard of review. We must determine whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the Constitutions of the State of Arkansas or the United States. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996); *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994). In *Bryant v. Arkansas Pub. Serv. Comm'n*, the court stated:

> The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority, and courts may not pass upon

> the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *AT&T Communications of the Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 129, 843 S.W.2d 855 (1992); *Russellville Water Co. v. Arkansas Pub. Serv. Comm'n*, 270 Ark. 584, 588, 606 S.W.2d 552 (1980). . . . This Court has often said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission's action. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 76, 813 S.W.2d 263 (1991).

55 Ark. App. at 135, 931 S.W.2d at 800.

In Order No. 15, the Commission reviewed the evidence that had been presented for and against the Agreement, concluding that "[b]ased upon all of the pre-filed testimony and oral testimony presented by Staff, AOG, and WCAGC, the Commission finds the [Agreement] supported by substantial evidence of record and represents a just and reasonable resolution of all issues in this proceeding and, therefore, is in the public interest, conditioned upon the proposed rate increase for residential customers being phased in using the three-year phase-in proposal as set forth in the attachment to Staff's May 23, 1997, post-hearing brief."

In *Bryant v. Arkansas Public Service Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994), this court held that the Commission's statutory authority is broad enough to allow it to consider non-unanimous stipulations but cautioned that, in doing so, it must afford a nonstipulating party adequate opportunity to be heard on the merits of the rate application and the stipulation agreed to by some of the parties, and that it must make an independent finding, supported by substantial evidence, that the stipulation resolves the issues in dispute in a way that is fair, just and reasonable, and in the public interest. *See also Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

Arkansas Code Annotated section 23-2-421(a) (1987) requires that the Commission's decision 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. *Bryant v. Arkansas Pub. Serv. Comm'n*, 62 Ark. App. 154, 969 S.W.2d 203 (1998). 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. *Id.*; *see also Arkansas Pub. Serv. Comm'n v. Continental Tel. Co. of Ark.*, 262 Ark. 821, 561 S.W.2d 645 (1978). The Commission's findings 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. *Bryant v. Arkansas Pub. Serv. Comm'n*, 62 Ark. App. at 154, 969 S.W.2d at 207. We also stated:

> [I]f 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. (quoting *Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 64, 871 S.W.2d 414, 418 (1994)).

The Attorney General contends that Order No. 15 is unacceptable because it does not include sufficient detail and findings of fact to enable the court to determine how the Agreement represents a just and reasonable resolution of the issues in the proceeding or how the Agreement is in the public interest. He argues that the Commission has failed to explain how the Agreement can be in the public interest when the result of it is to allocate to the residential class a rate increase of 22%, which is more than 100% of the revenue deficiency, while at the same time decreasing the rates of the industrial class by 26%. He maintains that the Commission has failed to make findings supporting its conclusion that the three-year phase-in plan, which charges the residential class an additional $399,318 to phase in the 22% rate increase, is just and reasonable and in the public interest.

In Order No. 15, the Commission found that many of AOG's customers have the ability to bypass AOG's system, that the large industrial customers pay a large share of AOG's fixed costs, and that, if the industrial customers bypass AOG's system, AOG would lose revenue, thereby causing an increase in its rates to its remaining customers. Nevertheless, the Commission made no findings that address the Attorney General's concern about rate shock. The Commission's Order neither addressed whether it found that a risk of rate shock existed nor indicated whether the risk of bypass was weighed against the risk of rate shock. Furthermore, Order No. 15 contains no findings that support its decision to phase in the rate increase to residential class customers over three years. It merely recites: "Staff's proposal is designed to phase-in the rate increase to the residential class by 10 percent per year with a carrying charge on the uncollected balance at the pre-tax rate of return of 10.27 percent. Staff's phase-in proposal is reasonable and in the public interest."

As the trier of fact in rate cases, it is the Commission's function to decide on the credibility of the witnesses, the reliability of their opinions, and the weight to be given their evidence. *See Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995). This court must know what the findings of the Commission are before they can be given conclusive weight. *Bryant v. Arkansas Pub. Serv. Comm'n*, 62 Ark. App. at 154, 969 S.W.2d 206-07.

AOG and Staff argued in their posthearing briefs, and the Commission implies in Order No. 15, that the Attorney General is not in a position to argue about the adoption of the phase-in plan because it was the Attorney General who urged a phase-in of the 22% increase. We find no merit to this argument. Although it would unduly lengthen this opinion to recount the questions and answers from the hearing, it is apparent to us that counsel and the witness for the Attorney General never suggested or agreed to a phase-in plan that would further increase the rates that the residential class would be required to pay.

The Commission asserted that it was aware that acceptance of the Agreement would mean the end of subsidies to the

residential class. The Commission stated: "It is the position of AOG, Staff, and WCAGC that AOG's rates should be redesigned to eliminate inter-class subsidies and that AOG's rates be set based upon the cost of providing service to each customer class." Relying on this language, the Commission contends that Order No. 15 is perfectly clear as to what the Commission's findings of fact were and that it concluded that the risk of bypass by industrial customers was too great to continue the subsidization of residential customers. However, from the arguments, both before the Commission and in oral argument before this court, there seems to be a dispute among the parties as to whether adoption of the Agreement would end all inter-class subsidies. Therefore, we reverse and remand to the Commission.

Reversed and remanded.

PITTMAN, JENNINGS, ROGERS, STROUD, and ROAF, JJ., agree.

Dorothy C. PATRICK, Trustee, Patrick Family Trust *v.* Don McSPERITT

CA 97-1555 983 S.W.2d 455

Court of Appeals of Arkansas
Division III
Opinion delivered December 23, 1998

Gary L. Carson, P.A., by: *Gary L. Carson*, for appellant.

Billy J. Allred, for appellees.

SAM BIRD, Judge. Appellant, the Patrick Family Trust, represented by Trustee Dorothy C. Patrick, filed suit in Madison County to quiet title by adverse possession to a piece of property directly across the street from the family's home. The evidence was clear and convincing that the Patrick family had used and possessed the land and a "shop" located on it for more than fifty years. Quiet title was denied appellant because in 1995 the legislature had revised the adverse possession statute and added a provision requiring that the person attempting to show adverse possession of land prove that he "[h]eld color of title to real property *contiguous* to the property being claimed by adverse possession." Ark. Code Ann. § 18-11-106 (Supp. 1997) (emphasis added). Because a street separated the Patrick's family property from the shop property, the chancellor found the contiguous requirement was lacking.

The cases defining the term "contiguous" generally fall into the categories of annexation, eminent domain, or homestead exemption. *Seligson v. Seegar*, 211 Ark. 871, 202 S.W.2d 970 (1947), involved tax-forfeited land advertized as two separate parcels. The court held that two forty-acre tracts were not contigu-

ous because they did not touch; in fact, their nearest corners were approximately one-fourth mile apart. That court cited *Webster's Dictionary* and *Bouvier's Law Dictionary* as defining contiguous as "in actual contact; touching."

The same definition was relied upon in *Kalb v. City of West Helena*, 249 Ark. 1123, 463 S.W.2d 368 (1971), which was an annexation case. Our statutes generally require land to be annexed by a city to be contiguous to the municipality. *See, e.g.*, Ark. Code Ann. § 14-40-201 (Repl. 1998). In *Kalb* the court repeated the *Seligson* definition of contiguous, and said, "we understand contiguous lands to be those not separated from the municipal corporation by outside lands." *See also Clark v. Holt*, 218 Ark. 504, 237 S.W.2d 483 (1951).

The chancellor found that appellant had proven adverse possession; however, the street destroyed the required contiguity with their other property. Under the circumstances of this case, and the case law cited above, we cannot say the decision of the chancellor was clearly erroneous or clearly against the preponderance of the evidence.

Appellant did not raise the issue of whether Ark. Code Ann. § 18-11-106 should be given retroactive effect where the adverse possession has evolved into ownership before the statute was changed; therefore, we will not address it.

Affirmed.

JENNINGS and ROAF, JJ., agree.

Bettie CLARK, *et al.* *v.* PROGRESSIVE INSURANCE COMPANY

CA 98-141 984 S.W.2d 54

Court of Appeals of Arkansas
Division IV
Opinion delivered December 23, 1998

Wilson & Valley, by: *E. Dion Wilson*, for appellant.

Wright, Lindsey & Jennings LLP, by: *Roger A. Glasgow* and *Kristi M. Moody*, for appellee.

JUDITH ROGERS, Judge. This case arises out of a hit-and-run automobile accident in which a pedestrian, Otha Jordan, was struck and killed. The accident occurred at approximately 10:30 p.m. on July 21, 1995, when Reginald Moseby, who was fleeing from the Dermott police while driving Teresa Moore's Cadillac, ran over Mr. Jordan. Ms. Moore was Moseby's girlfriend. At the time of the accident, Ms. Moore had an automobile liability insurance policy on her Cadillac with appellee Progressive Insurance Company. Appellant Bettie Clark and the other appellants (other than Moore and Moseby) are the heirs of Otha Jordan. They appeal the Chicot County Circuit Court's order granting appellee Progressive Insurance Company's motion for summary judgment. The insurance company had initially sought declaratory judgment and subsequently moved for summary judgment on the basis that it had no contractual duty to defend any suit against Reginald Moseby brought by the heirs of Otha Jordan or to satisfy any judgment against Moseby obtained by the heirs. The insurance company alleged that its liability policy with Moore excluded non-permissive users of her Cadillac and, when Moseby struck and killed Otha Jordan, he did not have Ms. Moore's permission to drive the Cadillac. We reverse and remand the circuit court's order granting summary judgment to the insurance company. We do so because, based on our review of the pleadings and other filings before the circuit court, we conclude that there is a genuine issue of material fact regarding

whether Reginald Moseby had Teresa Moore's implied permission to drive her automobile when he struck and killed Otha Jordan.

In April 1996, appellee Progressive Insurance Company filed in Chicot County Circuit Court a declaratory judgment complaint. In its declaratory judgment complaint, the insurance company recited the facts, noted above, and requested that the circuit court declare that it had no duty, based on its automobile liability insurance policy with Teresa Moore, to indemnify the heirs of Otha Jordan or to defend Reginald Moseby, if the heirs sued him. The insurance company asked for declaratory judgment on the basis that its liability insurance policy with Ms. Moore excluded non-permissive users and that Moseby was a non-permissive user of Ms. Moore's automobile when he struck and killed Otha Jordan. However, it conceded that it was contractually obligated to defend Teresa Moore. The insurance company's declaratory judgment action was assigned Chicot County Circuit Court Docket No. CIV96-49-1.

Just over a year later, in June 1997, the insurance company filed in Chicot County Circuit Court Docket No. CIV96-49-1 a motion for summary judgment. Therein, the insurance company repeated the facts and legal theory that it had set forth in its initial complaint requesting declaratory judgment and asserted that it was entitled to summary judgment because its liability policy with Ms. Moore specifically excluded coverage for non-permissive users of her automobile. The insurance company also noted in its brief in support of its summary-judgment motion that, subsequent to its requesting declaratory judgment, Bettie Clark, as the administratrix of the estate of Otha Jordan, filed a wrongful death action against Teresa Moore and Reginald Moseby in Chicot County Circuit Court Docket No. CIV 96-132-1.

On August 28, 1997, the circuit court handed down an order denying the insurance company's summary-judgment motion. In response to the circuit court's denial of its summary-judgment motion, the insurance company deposed Reginald Moseby and then attached a copy of Moseby's deposition to a supplement to its

summary-judgment motion.[1] At the time the parties deposed Moseby he was imprisoned in the Arkansas Department of Correction, where he was serving a two-year sentence imposed on him after he had been found guilty of the negligent homicide of Otha Jordan. The insurance company's supplement to its summary-judgment motion persuaded the circuit court to reconsider its denial of the company's summary-judgment motion. On October 28, 1997, the circuit court entered a second order granting summary judgment to the insurance company.

The legal principles that govern our review of a trial court's grant of summary judgment are well established. Summary judgment should be granted only when a review of the pleadings and other filings reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Grayson v. Bank of Little Rock,* 334 Ark. 180, 971 S.W. 2d 788 (1998). The moving party always bears the burden of sustaining a motion for summary judgment. *Liberty Mut. Ins. Co. v. Thomas,* 333 Ark. 655, 971 S.W. 2d 639 (1998). Summary judgment should not be granted when reasonable minds could differ as to the conclusions that could be drawn from the facts presented. *Thompson v. City of Siloam Springs,* 333 Ark. 351, 969 S.W. 2d 639 (1998). After the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Adams v. Arthur,* 333 Ark. 53, 969 S.W. 2d 598 (1998). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We review the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Nel-*

[1] General principles of issue preclusion do not bar renewal of a summary judgment motion in a cause of action if the renewal is accompanied by an affidavit or other supporting proof that rebuts the basis for the initial denial of the motion. *See Head v. United States Fidelity & Guaranty Co.*, 247 Ark. 928, 448 S.W.2d 941 (1970). In any event, because the denial of a summary judgment motion does not terminate a cause of action, the order of denial is subject to revision by the trial court before entry of a final judgment in the case. Ark. R. Civ. P. 54(b).

son v. River Valley Bank & Trust, 334 Ark. 172, 971 S.W. 2d 777 (1998). A party seeking a declaratory judgment may move for summary judgment. Ark. R. Civ. P. 56(a).

Reginald Moseby's deposition, which Progressive Insurance Co. introduced to support its renewal of its summary-judgment motion, leaves a genuine issue of material fact to be decided — whether Reginald Moseby had Teresa Moore's implied permission to drive her automobile when he ran over Otha Jordan. In his deposition Reginald Moseby stated that, at the time of the accident, Teresa Moore was his girlfriend, that he and Ms. Moore had "been together" for almost twelve years, that they lived together and that they had three children. Moseby also stated that he had never owned an automobile, but that he had helped Ms. Moore pay "the notes" on her Cadillac, which she had had about two months before the accident. When asked if he considered Ms. Moore's Cadillac to be his car, too, Moseby replied, "I been with her twelve years, so she's my wife, so what's hers is mine and what's mine is hers." Moseby admitted that even though Ms. Moore had forbidden him from driving her Cadillac, he had done so anyway and that she knew that he had done so. On this point, Moseby stated, "I say she knew I was driving the car, but I still didn't have her permission to drive it." Finally, with regard to whether Ms. Moore had given him permission to drive her Cadillac on the night that he struck and killed Otha Jordan, Moseby stated he confronted Ms. Moore, who was at the home of her sister and brother-in-law, Brenda and Robert Staggers, that Ms. Moore did not want him to drive her automobile that evening, that they struggled over the keys to the automobile, which Ms. Moore had in her hand, and that he took the keys from her and drove away.

Whether the owner has given another person implied permission to drive his or her automobile depends on the nature of the relationship between the owner and the borrower. The standard treatise on the law of insurance describes "implied permission to drive an automobile" as follows:

> An implied permission . . . is not confined to affirmative action, but means an inferential permission, in which a presumption is raised from a course of conduct or relationship between

> the parties in which there is a mutual acquiescence or lack of objection signifying consent.
>
> But implied permission is not limited to such situations, and will be evaluated in light of all the facts and circumstances surrounding the parties.
>
> Implied permission may be proved by circumstantial evidence. Circumstances such as usage, practice, or friendship may be used to show implied permission.
>
> It may be found that the insured has given implied permission where the named insured has knowledge of a violation of instructions and fails to make a significant protest.
>
> . . . .
>
> It has also been stated, however, that the term "permission" contemplates something more than mere sufferance or tolerance without taking steps to prevent, and the term is used in the sense of leave, license, or authority with the power to prevent.
>
> Such implied permission is usually shown by usage and practice of the parties over a period of time preceding the day upon which the insured automobile was being used, assuming, of course, that all parties had knowledge of the facts. When this showing is made, there is considered to be a sufficient showing of a course of conduct in which the parties mutually acquiesced to bring the additional insured within the policy protection, provided, of course, that any acquiescence on the part of the insured was by some one having authority to give permission for him.

6C Appleman, *Insurance Law and Practice* § 4365 at 177-87 (Buckley rev. ed. 1979)(internal citations omitted). If the owner of an automobile forbids another person from driving the automobile, but the other person continues to do so with the knowledge of the owner, then the owner has given implied permission to drive the automobile. *See Turner v. Alexander*, 690 So.2d 756 (La. Ct. App. 1997). Given Reginald Moseby's statement in his deposition that Ms. Moore knew he continued to drive her Cadillac even though she had told him not to do so, there is in the record a genuine issue of material fact regarding whether Ms. Moore had impliedly permitted Moseby to drive her Cadillac.

The possibility of Ms. Moore's having given Reginald Moseby implied permission to drive her Cadillac notwithstanding,

Progressive Insurance Company asserts that there is no genuine issue of material fact regarding whether Ms. Moore gave Moseby permission to drive her car on the night that he ran over Otha Jordan. Moseby's deposition testimony, noted above, would eliminate the existence of any genuine issue of material fact regarding whether Ms. Moore gave permission to Moseby to drive her Cadillac on the night in question, *if* it is deemed credible. Of course, in evaluating Progressive Insurance Company's contention that there is no genuine issue of material fact regarding Moseby's conduct on the night in question and Ms. Moore's conduct, as reported by Moseby, the circuit court should have considered Moseby's deposition and all inferences based thereon in the light most favorable to appellants. *See Nelson v. River Valley Bank & Trust, supra.*

A review of the record reveals several circumstances that would cause a reasonable fact-finder to doubt the truthfulness of Moseby's deposition testimony. Although there is little Arkansas authority directly on point addressing whether a motion for summary judgment should be denied because of the lack of credibility of the moving party's supporting evidence, there is ample persuasive authority in federal court decisions interpreting the federal version of our summary-judgment rule, Ark. R. Civ. P. 56, which is Federal Rule of Civil Procedure 56. We consider federal court decisions interpreting Fed. R. Civ. P. 56 to be highly persuasive authority. *See Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995); *Wirges v. Hawkins*, 238 Ark. 100, 378 S.W. 2d 646 (1964). *Accord Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (Ark. App. 1980)(federal court decisions interpreting the Federal Rules of Civil Procedure are "of significant precedential value").

Federal court decisions interpreting the Federal Rules of Civil Procedure establish that a trial court may deny a motion for summary judgment based on the lack of credibility of the moving party's affiants or witnesses. A leading treatise on federal civil procedure summarizes the case law on this point:

> Doubts as to the credibility of the movant's affiants or witnesses may lead the court to conclude that a genuine issue [of material fact] exists. Indeed, as the Advisory Committee states

> in its Note . . . "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."
>
> . . . .
>
> Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial, inasmuch as this situation presents the type of dispute over a genuine issue of material fact that should be left to the trier of fact. Thus, for example, if conflicting testimony appears in affidavits and depositions that are filed, summary judgment may be inappropriate as the issues involved will depend on the credibility of the witnesses.

10A Charles Allan Wright et al., *Federal Practice and Procedure* § 2726 at 440-47 (1998)(internal citations omitted). In essence, these federal decisions hold that the obvious doubtfulness of the moving party's supporting evidence can create a genuine issue of material fact for a jury. Moreover, even a moving party's witness's mere interest in the result of a suit requires dismissal of a summary-judgment motion and submission of the case to a jury. *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620 (1944)(interpreting Fed. R. Civ. P. 56). *Accord Independent Ins. Consultants, Inc. v. First State Bank,* 253 Ark. 779, 489 S.W.2d 757 (1973)(Fogleman, J., dissenting and citing *Sartor*).

Several statements Reginald Moseby made during his deposition reveal his potential bias in Ms. Moore's favor. Moseby's bias establishes a motive for him to tailor his account of what happened between Ms. Moore and him on the night in question. In his deposition Moseby stated that he and Ms. Moore had "been together" for almost twelve years, that they had three children and that they lived together. He also stated that Ms. Moore was *still* his girlfriend. Moreover, Moseby admitted that Ms. Moore had spoken with him about the case. A reasonable fact-finder could doubt the truthfulness of Moseby's deposition testimony because his bias in favor of Ms. Moore would lead him to help her avoid the adverse financial consequences if she were found to have given him permission to drive her Cadillac on the night in question, which could, in turn, render Progressive Insur-

ance Company, as Ms. Moore's automobile liability insurer, liable to the estate of Otha Jordan. A reasonable fact-finder could conclude that Moseby would, at Ms. Moore's request, tailor his testimony to shield Progressive Insurance Company from liability and, thereby, help her avoid an increase in her insurance premium or the outright cancellation of her automobile insurance. A reasonable fact-finder could also conclude that Moseby's bias in favor of Ms. Moore would lead him to testify falsely in order to remove her as a defendant in the wrongful death action brought by appellants. Summary judgment in favor of Progressive Insurance Company, on the basis that there was no genuine issue of material fact as to whether Teresa Moore had given Reginald Moseby permission to drive her Cadillac, would set up a *res judicata* defense for Ms. Moore if she were sued by appellants on the theory that she was the proximate cause of Otha Jordan's death in that she negligently entrusted her Cadillac to Moseby or acted negligently in continuing to let him have access to her Cadillac. A trial court's grant of summary judgment can support a *res judicata* defense to a subsequent cause of action based on the same facts. *See* 46 Am. Jur. 2d *Judgments* § 606 at 880 (1994).

Another statement that Moseby made in his deposition that could cause a reasonable fact-finder to doubt his testimony in favor of Ms. Moore and Progressive Insurance Company was his admission that he was, at the time he was deposed, a convicted felon who was serving a two-year sentence for negligent homicide.[2] A reasonable fact-finder could conclude that a convicted felon currently serving a sentence of imprisonment would not be deterred by the possibility of a perjury conviction from giving false testimony in a deposition taken in a civil suit. During his deposition, Moseby was cross-examined about what he knew about perjury, and he stated that he knew what perjury was.

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[2] Reginald Moseby admitted that he had been convicted of negligent homicide. A person commits negligent homicide if, while driving an automobile while intoxicated, he or she negligently causes the death of another person. Ark. Code. Ann. § 5-10-105(a)(1) (Repl. 1997). "Drunk driving" negligent homicide is a Class D felony. Ark. Code Ann. § 5-10-105(a)(2) (Repl. 1997).

Finally, the circumstance under which Progressive Insurance Company took Moseby's deposition could suggest to a reasonable fact-finder that Moseby tailored his deposition to enable Ms. Moore and the insurance company to obtain summary judgment. As noted above, Moseby admitted that Ms. Moore had spoken to him about the case. Progressive Insurance Company deposed Moseby only after its initial motion for summary judgment had been denied. In its order denying the initial summary-judgment motion the circuit court stated, in pertinent part:

> Exhibit "A" of [appellants'] which is referred to as a statement of [Moseby] by the Dermott Police Department reflects that Moseby refers to Moore as his wife which [gives] rise to the question of whether or not Moseby had expressed or implied permission to drive the vehicle.
>
> The Court is of the opinion that a genuine issue of material facts exists. Whether or not permission to use the vehicle existed and/or whether such permission was expressed or implied cannot be decided from the evidence presented herein. Thus, the motion for summary judgment is denied.

Appellants introduced "Exhibit A" into evidence before the circuit court initially denied Progressive Insurance Company's summary-judgment motion. This exhibit is an in-custodial statement that Moseby gave to a Dermott police officer at 3:10 p.m., July 22, 1995, about sixteen and one-half hours after Moseby had run over Otha Jordan. Therein, Moseby described his confrontation with Ms. Moore on the night in question at the home of his in-laws as follows:

> I ask[ed] my wife (Ms. Moore) why she had left me at my grandmother's house and to come on and let's go home. At that time my brother and sister-in-law (Robert and Brenda Staggers) said that she is not going anywhere. I then ask[ed] my wife (Ms. Moore) if she was coming with me, [and] at that time the in-laws started hitting on me. . . I reached on the couch and got the car keys, ran outside, got in the car and left.

Comparison of the pertinent part of the circuit court's initial order denying Progressive Insurance Company's summary-judgment motion with the pertinent part of Moseby's in-custodial statement establishes that the circuit court must have concluded

that Moseby's assertion in his in-custodial statement, "I reached on the couch and got the keys, ran outside, got in the car and left" supported the inference that Moseby had either the express or implied permission of Ms. Moore to drive her Cadillac on the night in question. Examination of Moseby's deposition reveals that he stated that during the confrontation at his in-laws' home Ms. Moore told him not to drive her automobile, that the keys to the automobile were on a couch, that Ms. Moore reached for the keys and that he took the keys out of her hand. The precision of Moseby's testimony on this point, when considered in light of Progressive Insurance Company's renewal of its summary-judgment motion on proof negating the inference of Ms. Moore's expressed or implied permission to Moseby to drive her automobile, which the circuit court drew based on Moseby's in-custodial statment, could suggest to a reasonable fact-finder that Moseby tailored his deposition testimony on this point to benefit Ms. Moore and Progressive Insurance Company. It is possible for testimony to be so precise and positive that the witnesses's credibility is undermined. *See Loftin v. Goza*, 244 Ark. 373, 425 S.W.2d 291(1968).

In summary, based upon statements Moseby made in his deposition, a reasonable fact-finder could conclude from his testimony that he did not have Ms. Moore's implied permission to drive her Cadillac on the night in question was not true. Based upon Moseby's statements, a reasonable fact-finder could conclude that Moseby was biased in Ms. Moore's favor. Moreover, Moseby admitted that Ms. Moore had discussed the case with him. In addition, a reasonable fact-finder could conclude that because Moseby admitted he was a convicted felon serving a sentence of imprisonment, he would not be deterred from testifying falsely in his deposition by the possibility of a perjury conviction. Finally, a reasonable fact-finder could conclude that Moseby tailored his deposition testimony about the circumstances on the night in question under which he obtained the keys to Ms. Moore's Cadillac in order to negate the part of his in-custodial statement to the Dermott police that provided the factual basis for the circuit court's initial order denying Progressive Insurance Company's summary-judgment motion. If there exists in the rec-

ord specific bases for impeachment of the moving party's witness, summary judgment should be denied. Wright, *supra*.

For the reasons set forth above, we reverse the Chicot County Circuit Court's order granting appellee Progressive Insurance Company's summary-judgment motion and remand to the circuit court further proceedings.

Reversed and remanded.

JENNINGS and CRABTREE, JJ., agree.

ARKANSAS BOARD of REGISTRATION for Professional Geologists *v.* Richard ACKLEY

CA 98-585 984 S.W.2d 67

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1998

Winston Bryant, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellant.

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellee.

WENDELL L. GRIFFEN, Judge. The Arkansas Board of Registration for Professional Geologists (hereinafter "Board") appeals from a February 6, 1998 decision in the Pulaski

County Circuit Court, that directed the Board to approve Richard Ackley's application for registration as a professional geologist. The Board argues that its decision — that Ackley did not possess the statutory educational qualifications to be licensed — was not arbitrary and capricious. We disagree and affirm the decision of the circuit court with directions to enter an order that the Board issue Ackley's certificate of registration forthwith, pursuant to Arkansas Code Annotated section 17-32-308 (Repl 1995).

Richard Ackley applied for registration as a licensed professional geologist with the Board on January 26, 1995. Ackley included with his application a transcript from Cornell University. That transcript shows that Ackley earned a Bachelor of Science degree in 1973 and that in January of 1974 he earned a Master's Degree in Civil Engineering. On September 21, 1995, the Board denied Ackley's application for registration, informed him in its denial letter that the denial was based on his failure to meet the educational requirements for certification, but stated that his application would be reviewed upon proof that he met the education requirements. In his response to this denial, Ackley obtained and submitted to the Board a letter from the Associate Director of the School of Civil and Environmental Engineering at Cornell in March 1996; the letter set forth that Ackley majored in "geotechnical engineering and geological engineering." Again, the Board denied Ackley's application for registration on May 9, 1996. In a letter dated July 1, 1996, the Board informed Ackley that his degrees did not meet statutory requirements. On September 19, 1996, Ackley spoke on his own behalf before the Board for consideration of his application. The Board delayed the reevaluation of Ackley's application until additional requested materials were supplied by Cornell University. On January 27, 1997, the Board again denied the application, on the grounds that Ackley did not meet the minimum educational requirements for registration and that the materials from Cornell did not support his claim of enough hours of credit leading to a major in geology. This finding was announced in a letter dated January 30, 1997.

Ackley appealed the Board's decision pursuant to Arkansas Code Annotated section 25-15-212 (Repl. 1996) in Pulaski County Circuit Court, alleging that the Board's actions were arbitrary and capricious, and not supported by substantial evidence. The trial judge ruled in Ackley's favor on February 13, 1998, and ordered the Board to certify Ackley. On appeal, the Board argues that its decision was not arbitrary and capricious and that the denial of Ackley's application for license was supported by substantial evidence. The Board insists that Ackley did not meet the statutory educational requirements for licensing because he has neither the proper major nor the minimum number of hours of geological course work. On the other hand, Ackley argues that the Registrar at Cornell University certified that he majored in "Geological and Geotechnical Engineering." Because his major was in the proper field, Ackley argues that the minimum number of hours was irrelevant. Ackley contends that his transcript indicates his degree, which is not synonymous with his major.

■ In order to publicly practice geology in Arkansas, Arkansas Code Annotated section 17-32-301 (Repl. 1995) requires a person to be registered as a professional geologist under state law. The statute governing registration as a professional geologist states:

> (a) To be eligible for a certificate of registration, an applicant shall meet each of the following minimum qualifications:
>
> . . . .
>
> (2) Have graduated from an accredited college or university which has been approved by the board with a *major* in either *geology, engineering geology, or geological engineering or* have completed thirty (30) semester hours or forty-five (45) quarter hours, or the equivalent, in geological science courses leading to a major in geology.

Ark. Code Ann. § 17-32-304 (Repl. 1995) (emphasis added). The statute requires that an applicant have *majored* in one of the three categories, *or* have completed a minimum number of hours towards a geology major; the two requirements are independent from one another.

The Board is subject to the Arkansas Administrative Procedure Act[1] (APA) according to Arkansas Code Annotated section 17-32-204 (Repl. 1995). Under the Arkansas APA, a court may reverse or modify the agency decision if

> the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the agency's statutory authority;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Not supported by substantial evidence of record; or
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Repl. 1996). On appeal from circuit court, the appellate review of administrative decisions is directed to the decision of the administrative agency, rather than the decision of the circuit court. *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). When reviewing administrative decisions, the court reviews the entire record to determine whether there is any substantial evidence to support the agency's decision. *Green v. Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984). Substantial evidence is "valid, legal, and persuasive evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore v. King*, 328 Ark. 639, 643, 945 S.W.2d 358, 360 (1997). An absence of substantial evidence is shown by demonstrating that the proof before the agency was "so nearly undisputed that fair-minded persons could not reach its conclusions." *Moore*, 328 Ark. at 643. The credibility and the weight of the evidence is within the agency's discretion. *Moore, supra.*

An agency's action is considered arbitrary and capricious where it is not supported on any rational basis; the party challenging the agency decision "must prove that such action was

[1] Ark. Code Ann. §§ 25-15-201 et seq.

willful and unreasonable, without consideration and with a disregard of the facts or circumstances of the case." *Moore*, 328 Ark. at 644. Administrative agencies are better equipped than courts by specialization, insight through experience, and more flexible procedures to determine and analyze legal issues affecting their agencies; this recognition explains the limited scope of judicial review, and the refusal of a court to substitute its own judgment and discretion for that of an agency. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992). However, this does not mean that an agency may go beyond the legitimate interpretation of a statute and substitute its own standards; rather, the legislative intent of the statute must be imposed. *Kettell v. Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972).

The Board based its decision on an erroneous view of law that both the hours and the major were required, and that a major was the same as a degree. The plain language of the statute shows that certification is concerned with an applicant's *major,* not the label of his or her *degree.* Thus, the Board's zealous concern over Ackley's two degrees (Bachelor of Science and Master's in Civil Engineering), could not provide substantial evidence for the Board's denial of his application if the evidence shows that he has the proper major.

Throughout the process, the record shows that the Board construed a "major" to mean a "degree." It denied Ackley's application because he holds *degrees* issued through the Department of Civil Engineering at Cornell University. The first degree earned was a Bachelor of Science, with honors. The October 11, 1996 statement submitted to the Board from the Cornell University registrar certifies that Ackley received the Bachelor of Science degree on January 17, 1973, "with a major field of study in Geologic and Geotechnical Engineering." In the same statement, the Cornell registrar certified that Ackley was awarded the degree of Masters of Engineering "with a major field of study in Geologic and Geotechnical Engineering." Notwithstanding this clear evidence and the plain language of the statute, and despite the admission by one Board member that at the university he attended

geology was under the department of civil engineering, the Board repeatedly denied Ackley's application to be certified a professional geologist because he did not hold a *degree* in geology, engineering geology, or geological engineering.

■ We hold that the Board's denials of Ackley's application were not supported on any rational basis and, therefore, were arbitrary and capricious. Ackley received a Bachelor of Science, with honors, on January 17, 1973, and a Master's in Civil Engineering on January 23, 1974. A letter from Cornell University, dated October 11, 1996, certifies that *both* degrees were awarded with "a major field of study in Geologic & Geotechnical Engineering." Chairman Steele's comment that he contacted two individuals at Cornell who claimed that the letters from Cornell "should have read that [Ackley] has a concentration or an emphasis or a track in geology or geological engineering and not a major" shows that the Board obtained information from Cornell that Ackley had been educated in geological and geotechnical engineering. Evidence was presented that "geotechnical engineering" was "the application of scientific methods to problems in engineering geology." Although the Board contended during oral argument that a major in "geological and geotechnical engineering" did not fit the statutory requirement of a major in "geological engineering," no evidence in the record supports this interpretation. By conflating two independent means of meeting the statutory education requirements to mean that Ackley was required to possess a *degree* in geology, engineering geology, or geological engineering, the Board acted in a manner wholly inconsistent with the statute and the proof. The Board disregarded the facts and circumstances of this case and substituted its standard for the plain requirement in the statute. No fair-minded person could have reached the same conclusion as the Board did on these facts. It is unfortunate that Ackley has been forced to wait almost four years for his license and endure the disappointment, humiliation, and frustration of repeated denials due to what appears to be a form of professional protectionism by an agency dominated by members who hold degrees in geology rather than engineering.

The circuit court found that the Board's decision was arbitrary and capricious so that Ackley's license should issue. However, the court's comment when it issued its ruling suggested the Board could reanalyze Ackley's application in light of additional information, stating:

> [T]he Court's of the opinion that the matter ought to be returned to the Board with directions to issue the license to the application, *failing something more than is this record upon which they relied to deny the record. In other words, I don't want to foreclose the possibility that if there's something here [that] would prevent it.* [Emphasis added.]

However, the Board has repeatedly considered Ackley's application. The sole basis given for its decisions denying licensure has been the Board's erroneous application of the statutory education requirements. Those determinations, although arbitrary and capricious, are nonetheless dispositive on whether Ackley meets all other conditions to be licensed as a professional geologist in Arkansas. Having completed its review of Ackley's application and limited the basis for denying licensure to its erroneous judgment about the education requirement, the Board has no basis in procedure, law, or public policy for reopening his file to determine whether Ackley may be disqualified on other grounds that it somehow neglected to identify over the years.

The decision of the circuit court is affirmed, with directions that the court enter a order requiring the Arkansas Board of Registration for Professional Geologists to grant Ackley his license forthwith in conformity with this opinion. *See Arkansas State Bd. of Phar. v. Patrick*, 243 Ark. 967, 423 S.W.2d 265 (1968).

Affirmed with directions.

MEADS and AREY, JJ., agree.

David V. BELIEW *v.* STUTTGART RICE MILL

CA 98-525 987 S.W.2d 281

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1998

[redacted]

James G. Petty Jr., for appellant.

Friday, Eldredge & Clark, by: *James C. Baker* and *Betty J. Demory*, for appellee.

WENDELL L. GRIFFEN, Judge. David Beliew brings this appeal from the Arkansas Workers' Compensation Commission and challenges whether the Commission correctly (1) determined the proper compensation rate, (2) found that the Death and Permanent Total Disability Trust Fund's liability for payments did not begin until December 1997, and (3) found that additional payments made by Stuttgart Rice Mill, without modification of the award, are not gratuitous payments. We affirm the Commission on all points.

Beliew worked at Stuttgart Rice Mill on January 2, 1987, when he suffered a compensable injury arising out of and in the course of his employment. Because of that injury, he was temporarily totally disabled from January 3, 1987, through April 21, 1987. On January 19, 1988, he suffered a recurrence of his January 2, 1987 injury that caused him to again be temporarily totally disabled from January 19, 1988, through September 21, 1989. In his findings of fact, the Administrative Law Judge (whose opinion and findings of fact the Commission adopted) stated the healing period ended on September 26, 1989, with Beliew having sustained a permanent physical impairment of 25 percent of the body as a whole and that Beliew was permanently and totally disabled. The Death and Permanent Total Disability Trust Fund was ordered to begin paying benefits to the claimant on December 14, 1997, on the date when Stuttgart Rice Mill's payment of the proscribed $175 per week would reach the total cap of $75,000, notwithstanding the fact that Stuttgart Rice Mill had paid $189 rather than the ordered $175 per week because of an increase in the compensation rate after Beliew was injured.

Several months after the Administrative Law Judge first found the claimant to be permanently and totally disabled, Beliew's attorney brought to the attention of the attorney for the employer's workers' compensation carrier a new issue under the holding of *Montgomery v. Delta Airlines*, 31 Ark. App. 203, 791 S.W.2d 716 (1990). Beliew's attorney argued, and the employer's attorney apparently agreed, that the holding in *Montgomery* should apply to his case. In *Montgomery*, we held that a worker who was injured while one total disability rate was in effect and then returned to work and became permanently and totally disabled after a higher rate had gone into effect was entitled to the higher rate of compensation. Based on that decision, the employer's insurance carrier in the instant case began making weekly payments to the claimant in the amount of $189 rather than $175. Consequently, the employer reached its $75,000 ceiling in May 1997, rather than in December 1997. The Death and Permanent Total Disability Trust Fund refused to begin making payments until December 1997. Thus, Beliew was without disability payments from May to December 1997.

Beliew sought a hearing to protect the continuation of his weekly disability benefits. The parties stipulated the facts and the case was submitted to the Administrative Law Judge on briefs. Beliew argued that *Montgomery* applied and that the carrier had been correctly making $189 weekly payments. Because the payments were correct, Beliew maintained that the Trust Fund's obligation arose when the carrier reached its ceiling in May 1997. Alternatively, Beliew argued that if the Trust Fund correctly refused to make payments until December 1997, then the extra fourteen dollars a week should be characterized as a gratuitous overpayment and not counted toward the $75,000 cap. Beliew argued that because the carrier voluntarily changed the rate of payment without first obtaining a modification of the ALJ's order, it assumed the risk of contravening that order.

Based on the briefs, the Administrative Law Judge held that *res judicata* prevents the application of *Montgomery*, since "the compensation benefit rate is a matter that has been judicially determined by a competent authority." The Administrative Law Judge further opined that under *Hill v. CGR Medical Corp.*, 282 Ark. 35,

665 S.W.2d 274 (1984), the Trust Fund was permitted to withhold payments until its obligation would have arisen had the carrier paid $175 per week. The Commission affirmed and adopted that decision on October 7, 1991.

On appellate review of workers' compensation cases we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). We should affirm the Commission's ruling if there is any substantial evidence to support the findings made. *Id.*

While the facts of *Hill* were different from the facts in this case, the reasoning underlying the holding of *Hill* is applicable. In *Hill*, a widow settled a third-party claim on terms that discharged the workers' compensation liability earlier than it would have been ordinarily fulfilled without the settlement. The court held that the Bank Fund "will become liable on the date the carrier's $50,000 limitation would have been discharged had there been no settlement." The basis of the holding was that the insurance carrier gave up its right to the subrogation funds (in a third-party suit against a tortfeasor who caused the injury) as a credit against future payments of compensation. While the facts are different in the case at bar there being no third-party suit or subrogation right, the reasoning regarding the position of the Trust Fund and the employer's insurance carrier is the same.

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Perry v. Leisure Lodge*, 19 Ark. App. 143, 718 S.W.2d 114 (1986).

In his first point on appeal, Beliew argues that *Montgomery* dictates that he should have been paid $189 instead of $175 and that because the Commission did not decide his compensation rate based on that holding, it is not *res judicata*. While the reasoning underlying *Montgomery* would likely be applicable to the case at bar, *Montgomery* was never raised, either to the Administrative Law Judge or the Commission. Beliew's argument is now barred

based on *res judicata.* The Commission made complete findings that should be given their full weight.

On his second point on appeal, Beliew argues that *Hill* does not apply and attempts to distinguish *Hill* from this case on the basis of intentional versus unintentional prepayment of benefits. Although Beliew is correct that there never was any waiver made or *quid pro quo* as there was in *Hill*, that fact is not determinative. Beliew requested an increase in the amount that was paid him weekly. The insurance carrier granted that request without having the original amount modified. Beliew attempts to place all of the burden of modification on the appellee, when, in fact, he could have sought a modification himself to support his position that the Trust Fund was obligated to begin payments in May 1997. Thus, appellant's second point on appeal is without merit.

Beliew's third point on appeal — whether the extra fourteen dollars per week paid by the carrier was gratuitous — is closely interwoven with his second point. Merely because the insurance carrier agreed to appellant's oral and written request that his weekly disability payments be increased fourteen dollars does not render the payments gratuitous. Beliew cites *Arkansas Vinegar Co. v. Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988), where we held that a carrier was not entitled to credit a lump-sum payment to a widow against the periodic payments due to remaining dependents. Beliew argues that the policy underlying *Arkansas Vinegar* should apply, saying that it is bad policy to let a party take credit for its willful deviation from an order. There was no issue of gratuitous payment in *Arkansas Vinegar.* Moreover, Beliew was benefitting by fourteen dollars per week due to the carrier's acquiescence to his demand for increased benefits.

As there was a substantial basis for the Workers' Compensation Commission's decision denying Beliew's claim we will not overturn it.

Affirmed.

PITTMAN and BIRD, JJ., agree.

Joe Lee PETTIGREW *v.* STATE of Arkansas

CA CR 98-695 984 S.W.2d 72

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1998

Bill Luppen, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Joe Lee Pettigrew appeals from his conviction in Pulaski County Circuit Court on August 28, 1997, on charges of possession of a controlled substance (crack cocaine) with intent to deliver and second-degree battery. Appellant argues on appeal: (1) that the trial court erred when it denied his motion to suppress seventy grams of crack cocaine seized from him following a pat-down search because the search violated his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and Rule 3.4 of the Arkansas Rules of Criminal Procedure; and (2) that the trial court erred when it denied his motion for directed verdict on the second-degree battery charge.

We hold that the pat-down search violated Pettigrew's constitutional right to be free from unreasonable search and seizure because the totality of the evidence does not establish that the police had objective, specific, and articulated facts that justified a reasonable suspicion that Pettigrew was armed and presently dangerous so as to present a threat as prescribed by Rule 3.4 of the Arkansas Rules of Criminal Procedure. Therefore, we reverse and remand the conviction for possession of a controlled substance with intent to deliver and the fifteen-year prison sentence imposed thereon. However, we affirm the second-degree battery conviction and sentence of three years' imprisonment and hold that the trial court did not err when it denied Pettigrew's motion for directed verdict.

On December 12, 1996, Detectives Greg Siegler and Barry Flannery of the Little Rock Police Department were on patrol when they observed a bronze-colored vehicle parked in a parking

lot near the intersection of 29th and Main Streets in Little Rock. The detectives testified that they observed a passenger in the vehicle who appeared to be drinking some type of alcoholic beverage, so they approached the vehicle to investigate. They found four men and a sixteen-year-old girl in the vehicle, and Siegler testified that he noticed open containers of beer and other alcoholic beverages in the vehicle. Siegler also testified (as quoted from the abstract):

> I had everybody get out of the car, and they were all standing around the vehicle. I then began a pat-down search of Mr. Pettigrew, at which time I felt an object in the front waistband of his pants. At that time I asked him what that was, and at that time, he pushed away from the vehicle and began to run. I grabbed him by the back of his shirt. He continued to run. Finally, he turned around and hit me with his elbow and then hit me with his fist. I then struck him with my flashlight. He hit me again with his fist. I grabbed him around the waist and he continued to carry me down to the parking lot. At that time other members of the Street Narcotics Detail arrived. They grabbed a-hold of him. He continued to run and struggle with us. We were finally able to get him to the ground. I believe Detective Green then sprayed him with a half-second burst of OC spray. It didn't seem to have any effect on him. We continued to struggle with him. We were finally able to get him handcuffed. Detective Gravett then removed that object that was in the front of his pants, which was approximately 70 grams of crack cocaine. . . .
>
> When I was conducting the pat-down search on the defendant is when I felt the object in his pants. I asked him what it was, and at that time he pushed off the car and began to run. . . When he ran I did not tell him to stop. I had a hold of his shirt and he was dragging me. . . I had hold of the back of his shirt, he was running and dragging me, and I was trying to pull back stopping him. After we struggled with him, were finally able to get him handcuffed, and Detective Gravett removed the plastic bag with all this.

Pettigrew filed a motion to suppress the evidence seized by the police, and the trial court considered that motion as part of the bench trial. Pettigrew argued that the police lacked a reasonable suspicion for conducting a pat-down search of his person arising merely from the fact that they had seen him in a vehicle with four

other persons where public drinking was taking place. The State argued that Detective Siegler conducted the pat-down search for his safety, and that the crack cocaine was initially felt in appellant's waistband during the pat-down search. The trial court denied appellant's motion to suppress. It later found appellant guilty of possession of a controlled substance with intent to deliver and sentenced him to fifteen years' imprisonment.

The Fourth Amendment to the Constitution of the United States protects the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). In reviewing the denial of a motion to suppress, we make an independent examination based on the totality of the circumstances, and will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). In *Frette*, the supreme court explained that there are three types of encounters between the police and private citizens. The first and least intrusive encounter is when an officer merely approaches an individual on a street and asks if he is willing to answer a question. *Id.* Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the Fourth Amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. *Id.* The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause. *Id.*

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine

the lawfulness of his conduct. In this context, a "reasonable suspicion" has been defined as a suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. *Id.*

■ ■ Rule 3.4 of the Arkansas Rules of Criminal Procedure states:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer . . . may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others.

Rule 3.4 is the Arkansas standard for application of the holding announced in *Terry v. Ohio*, 392 U.S. 1 (1968), a case where an officer observed three men who appeared to be "casing" a store for a robbery. The officer then approached them for questioning and frisked them, finding weapons on two of them. The United States Supreme Court viewed that restraint on their liberty and the subsequent exploration of the outer surfaces of Terry's clothing as a "seizure" and "search," respectively, thus "reject[ing] the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" Then the Court considered what it termed "the central inquiry under the Fourth Amendment — the reasonableness in all the circumstances of *the particular governmental invasion* of a citizen's personal security." (Emphasis added.) In analyzing the reasonableness of the "frisk," the Court "balanced" the magnitude of the intrusion involved against "the governmental interest in investigating crime" and "*the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.*" The Court concluded that "there must be *a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.*" *Id.* (Emphasis added.)

On the same day that the Supreme Court decided *Terry*, it also decided *Sibron v. New York*, 392 U. S. 41 (1968), a companion case. There, an officer had observed Sibron talking with several known narcotics addicts over an eight-hour period, but was completely ignorant about the content of the conversations and had seen nothing passed between Sibron and the addicts. Nevertheless, the officer ordered Sibron aside, telling him, "You know what I am after," and as Sibron reached into his pocket, the officer simultaneously thrust his hand into the same pocket and seized heroin. The Supreme Court reversed Sibron's conviction, holding that not only was "probable cause" lacking to arrest but also that the officer lacked adequate grounds to support a self-protective search for weapons. Writing for the Court, Chief Justice Warren stated:

> Before [an officer] places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so. *In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.*

Id. (Emphasis added.)

The Supreme Court has also stated that a frisk is only justified when the officer has a reasonable suspicion that the detainee is armed. *Ybarra v. Illinois*, 444 U.S. 85 (1979). The test in determining whether a frisk is reasonable is an objective one. While the officer need not be absolutely certain that the individual is armed, the basis for the frisk must lie in a reasonable belief that the officer's safety or that of others is at stake. *Terry*, *supra*, at 21. Essentially, the question is whether a reasonably prudent person in the officer's position would be warranted in the belief that the safety of the police or that of other persons was in danger. The officer's reasonable belief that the suspect is dangerous must be based on "specific and articulable facts." *Terry*, *supra*, at 21.

In the case now before us, there is no challenge to the validity of the initial police encounter between Detectives Flannery and Siegler and appellant and the other occupants of the vehicle that the detectives observed in the parking lot. The only issue is whether the pat-down frisk of appellant's person was a constitu-

tionally permissible intrusion into his personal security. This requires us to review the totality of the circumstances surrounding the pat-down frisk to determine whether the trial court's denial of appellant's motion to suppress was clearly against the preponderance of the evidence.

The totality of the circumstances in the record provides no "specific and articulable facts" upon which the inference could reasonably be warranted that Detective Siegler reasonably believed appellant to be "armed and presently dangerous" when he performed the pat-down search. Siegler and Detective Flannery, his partner on the encounter, testified that they were investigating what they suspected amounted to public drinking, a misdemeanor, when they encountered the vehicle in which appellant was sitting. There is no proof that appellant did anything that Siegler deemed threatening, or that Siegler had a reason to believe that appellant was armed and dangerous at the time of their encounter. Thus, Siegler had no reason to invade appellant's personal space in order to protect himself or anyone else.

The decisions of the United States Supreme Court, the Arkansas Supreme Court, and our court, as well as Rule 3.4, clearly show that before the police place a hand on someone to perform a pat-down or "frisk" search, the officer must be able to specify objective facts from which a reasonable person can infer that the person to be searched is presently armed and dangerous. The only constitutional justification for such intrusions into the personal space of persons detained by police is to provide protection against "any weapon or other dangerous thing which may be used against the officer or others." Ark. R. Crim. P. 3.4. Where the totality of the circumstances fails to show objective, specific, and articulable facts that someone detained by the police is armed and dangerous, the Fourth Amendment protects the detainee from the invasion of a weapons search because the police have no reasonable basis for placing hands on a detainee to search for weapons that no reasonable person would suspect to exist. This limitation on police conduct protects detained persons from unwarranted police intrusion into their personal liberty and security. It also protects the police from false or simply mistaken accusations by detainees of unjustified and offensive touching. Meanwhile, it ful-

fills the legitimate governmental interest in protecting the police and the public from the threat posed by armed and dangerous persons who, based on specific, objective, and articulable factors, pose a threat to the police or to other persons.

The State argues that we should reject appellant's challenge to the denial of the suppression motion because "nothing incriminating was found during the pat-down search for weapons." Rather, the State contends that Detective Siegler felt "an object in appellant's waistband, but before the object could be identified, appellant fled." By this argument, the State asserts that appellant nullified any claim that he might have otherwise asserted in challenging the propriety of the pat-down search when he attempted to flee and created "an entirely new situation for which the officers unquestionably had cause to pursue and search him." The decision by the United States Supreme Court in *California v. Hodari*, 499 U.S. 621 (1991), is cited in support of this argument. In that case, police officers in Oakland, California, observed several people surrounding a car. The car sped away and Hodari, one of the people standing around it, ran away as the patrolling officers approached. An officer pursued Hodari on foot and, during the pursuit, saw Hodari toss a rock-like substance that was later found and established to be cocaine. The Supreme Court upheld Hodari's adjudication as a juvenile against his motion to suppress the cocaine because it concluded that the cocaine was discovered following the chase of a person who had not been under police control. The State also contends that the officers had a legitimate basis for arresting appellant for fleeing and battery so that we should view the cocaine as having been discovered in the course of a valid search incident to arrest, citing *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997).

Neither argument is persuasive. Unlike the situation in *Hodari*, Detective Siegler actually detained appellant and was conducting a weapons search when he discovered the object that was ultimately seized and proved to be crack cocaine. A seizure under the Fourth Amendment had plainly occurred and a weapons search was underway when appellant struggled with Siegler and other officers in a vain attempt to escape. Siegler testified that he was grasping appellant's clothing during the attempted escape and

struggle. The search was initiated and resisted in this case, but it was never terminated. By contrast, in *Hodari* the police never initiated a weapons search; rather, the police saw the challenged evidence being thrown away during the pursuit of a person they had observed but never detained or searched.

Likewise, we find no merit in the State's argument that the seized cocaine in this case was discovered in a valid search incident to arrest. The totality of the circumstances shows that Detective Siegler discovered the "object" that was eventually found to be crack cocaine during the course of a pat-down weapons search, not an arrest for fleeing and battery. When the pat-down occurred, Siegler had no basis for arresting appellant, having merely observed him sitting in the driver's seat of a vehicle where the police thought that public drinking was occurring. Siegler had not seen appellant engage in any activity that constituted probable cause for an arrest. While we do not condone appellant's conduct in attempting to escape and in striking Siegler and other police officers who helped prevent the escape, we cannot pretend that appellant's conduct somehow "nullified" the plainly unconstitutional search.

Based on our review of the totality of the circumstances, Detective Siegler lacked specific, objective, and articulable facts to support a reasonable suspicion that appellant was armed and presently dangerous when he conducted the pat-down search. Therefore, we hold that the trial court's denial of appellant's suppression motion was clearly against the preponderance of the evidence so that his conviction for possession of a controlled substance with intent to deliver must be reversed and remanded.

Appellant's challenge to the trial court's denial of his motion for directed verdict on the second-degree battery charge does not, however, persuade us that the trial court's decision was wrong. Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Bennet v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992). Where the sufficiency of the evidence is challenged, we consider only that evidence which supports the guilty verdict. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994). The test is whether there is substantial evidence to sup-

port the verdict, and on appellate review, "it is only necessary for us to ascertain that evidence which is most favorable to the [State]." *Jameson v. State*, 333 Ark. 128, 130, 970 S.W.2d 705 (1998). Substantial evidence is evidence of such certainty and precision as to compel a conclusion one way or another. *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998).

A person commits battery in the second degree if:

> (1) With the purpose of causing physical injury to another person, he causes serious physical injury to any person;
>
> (2) With the purpose of causing physical injury to another person, he causes physical injury to any person by means of a deadly weapon other than a firearm;
>
> (3) He recklessly causes serious physical injury to another person by means of a deadly weapon;
>
> (4) *He intentionally or knowingly without legal justification causes physical injury to one he knows to be:*
>
> > *(A) A law enforcement officer . . . while such officer . . . is acting in the line of duty[.]*

Ark. Code Ann. § 5-13-202(a) (Repl.1997) (emphasis added).

Appellant contends that there was insufficient proof that he caused a physical injury, which is defined by Arkansas Code Annotated § 5-1-102(14) (Repl. 1997) as the impairment of physical condition or the infliction of substantial pain.

There is no requirement that a victim of second-degree battery seek medical treatment in order to be deemed to have sustained a physical injury, for purposes of our statute that defines second-degree battery. *See Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993). Rather, in determining whether an injury inflicts substantial pain, the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the part of the body to which the injury is inflicted. The trier of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life. *Holmes v. State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985).

Here, the record shows that appellant struck Detective Siegler in the face. Siegler testified that he experienced pain from bruises and scrapes on his hands, face, elbows, and knees. Detective Chandler testified that he had a painful bruise on the side of his face from a blow received from appellant during the struggle to prevent his escape. Based on our standard of review, we find this evidence sufficient to compel the conclusion that the officers sustained physical injury while acting in the line of duty so that the trial court's denial of appellant's motion for directed verdict was proper. Therefore, we affirm that ruling and appellant's conviction for second-degree battery.

Reversed and remanded in part; affirmed in part.

AREY and MEADS, JJ., agree.

Karriem MUHAMMAD *v.* STATE of Arkansas

CA CR 98-201 984 S.W.2d 822

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 23, 1998

[Petition for rehearing denied January 27, 1999.*]

* GRIFFEN and ROAF, JJ., would grant.

Keil & Goodson, by: *John C. Goodson*, for appellant.

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

MARGARET MEADS, Judge. Karriem Muhammad entered a conditional plea of guilty to manufacture, delivery or possession of a controlled substance (cocaine) pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure and was sentenced to forty years in the Arkansas Department of Correction. Appellant's sole issue on appeal is that the trial court erred in denying his motion to suppress the cocaine found on his body because there was no reasonable articulable suspicion of criminal activity justifying a pat-down search of his person by the officer who stopped him for a traffic violation. We disagree and affirm.

When reviewing the trial court's denial of a motion to suppress, the appellate courts make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997); *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). In making this determination, the evidence is viewed in the light most favorable to the State. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998).

Arkansas State Trooper Jeffery Thomas testified for the State that on March 21, 1996, he stopped appellant for following too closely behind an eighteen-wheeler tractor-trailer rig. Thomas said that appellant was extremely nervous, his lips were trembling, and he stood very still and erect. Although he said that he was going to Little Rock to visit his father for his birthday, appellant was unable to state his father's age when asked.

In conjunction with the traffic stop, Trooper Thomas ran National Crime Information Computer (NCIC) and Interstate Identification Index (Triple I) checks on appellant, from which he learned that appellant had a criminal history of sale or possession of a dangerous drug and at least one arrest for aggravated robbery. Thomas then requested and received appellant's written consent to search the vehicle. At some point, appellant was issued a warning citation for following too closely. Contrary to the dissent's

assertion that Thomas detained appellant *after* issuing the warning citation, the record is unclear as to when the citation was actually issued, as evidenced by the following colloquy:

> Q Did you give him a warning citation?
>
> A Yes, I did. I issued him a written warning ticket for a violation.
>
> Q Did he seem to become more calm or anything at that point in time?
>
> A No, he didn't. Actually, I didn't see any noticeable change in the demeanor after making the statement to him that I was going to issue a warning.

While waiting for back-up to arrive, Thomas performed a pat-down search of appellant. When he got to appellant's belt line, Thomas felt a rigid object that he believed to be the corner of a firearm sticking out of appellant's waistband. Although appellant attempted to remove Thomas's hand from the object, Thomas discovered a brick of compressed material wrapped in brown duct tape protruding from appellant's groin area inside what appeared to be a lady's girdle.

On appeal, appellant does not contend that Thomas lacked authority to make the initial stop for following too closely; instead, he argues that Thomas had no authority to conduct a pat-down search of his person because there was no reasonable, articulable suspicion of criminal activity. We disagree. Thomas had the requisite reasonable suspicion necessary to detain appellant further and frisk him pursuant to Ark. R. Crim. P. 3.1 and 3.4.

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require

> the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

■ ■ "Reasonable suspicion" is defined in Rule 2.1 of the Arkansas Rules of Criminal Procedure as "a suspicion 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." The existence of a reasonable suspicion must be determined by an objective standard, and due weight must be given to the "specific reasonable inferences" an officer is entitled to derive from the situation in light of his experience as a police officer. *Coffman v. State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988) (citing *Terry v. Ohio,* 392 U.S. 1 (1968)). In making this determination, the trial court may consider the factors listed in Ark. Code Ann. § 16-81-203 (1987). Those factors most relevant to this case include:

> (1) The demeanor of the suspect;
>
> (2) The gait and manner of the suspect;
>
> (3) Any knowledge the officer may have of the suspect's background or character;
>
> . . .
>
> (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all the other factors;
>
> . . .
>
> (13) The suspect's apparent effort to conceal an article . . . .

■ ■ Although Trooper Thomas acknowledged that he did not have reasonable suspicion to search appellant's vehicle, appellant gave written consent for the search when asked to do so and does not contend on appeal that his consent was anything but voluntary. While the dissent believes otherwise, it is not necessary for an officer to have reasonable suspicion to request consent to search, *see Johnson v. State*, 27 Ark. App. 54, 766 S.W.2d 25 (1989); therefore, the request for consent was clearly within

Thomas's purview. Thomas was alone with appellant while awaiting back-up officers to assist in the consensual search of appellant's automobile, and he testified that he did not feel 100% out of danger, because "there were some signals there." Thomas, a ten-year veteran of the Arkansas State Police, testified that based on his experience he suspected that appellant was armed, due to appellant's extreme nervousness, his rigid posture, his trembling lips, his manner of dress, and appellant's criminal background. With appellant's previous felony conviction for aggravated robbery, his possession of a firearm would violate Ark. Code Ann. § 5-73-103(a)(1) (Repl. 1997) (felon in possession of a firearm), and such a violation would constitute a felony. Viewing the totality of the circumstances, Trooper Thomas could certainly reasonably suspect that appellant was armed with a weapon, thereby committing a felony. Therefore, appellant's detention was proper under Rule 3.1.

Rule 3.4 of the Arkansas Rules of Criminal Procedure, which is used in conjunction with Rule 3.1, provides:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

We find that Trooper Thomas could reasonably believe that appellant was armed; thus, he was justified in searching appellant's person pursuant to Rule 3.4 to ensure his safety. Thomas testified that when he searched appellant's belt line, he felt a "rigid" object, which he believed to be a weapon. It was only when he had removed the object that he discovered it was a brick of what later proved to be cocaine.

The dissent cites *Knowles v. Iowa*, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), and *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985), in support of its position that the search of appellant's person violated his Fourth Amendment rights. Both of these cases are distinguishable from the case at bar not only because they

involve vehicle searches rather than searches of a person, but also because in neither case had consent been granted. Here, Trooper Thomas asked appellant for consent to search his car; appellant agreed and signed a consent form. The pat-down search of appellant's person to ensure the officer's safety occurred after consent had been given to search the vehicle, as stated above.

The dissent also states that "the record does not show that the NCIC and Triple I information identified appellant as likely to be armed and dangerous," and surmises that "one would think that the information supplied to field officers would include a notice to that effect." It then broadly concludes "[t]he fact that Thomas mentioned no such notice dictates the conclusion that none was given because none was deemed warranted." These statements are purely speculative and have no basis from the record before us. To reach the conclusion which the dissent has reached is unfounded and imprudent.

Moreover, the dissent misleads the reader concerning appellant's "profile" when he relates the trooper's testimony about the totality of the circumstances which justified the pat-down search. The actual exchange between appellant's counsel and Trooper Thomas is as follows:

> Q That is a profile situation, is that right? We have got a guy that is nervous. We have a person who is a convicted felon of narcotics. That is creating a profile of somebody who is conducting criminal activity, in this case trafficking in narcotics, and that is the reason that you wanted to search, isn't that true?
>
> A My search was based on the information that was available to me by his demeanor and the pat down was conducted solely for officer's safety at the point I began to pat down.
>
> Q My question is, Officer, but those circumstances created a profile situation where you believed there were drugs in that car and that is why you wanted to search?
>
> A If you want to refer to it as a profile that's fine. I don't refer to that as a profile.

Trooper Thomas articulated the reasons on which he based his search and made it clear that the basis was not a "profile."

Having made an independent determination based on the totality of the circumstances, we find that the trial court properly denied appellant's motion to suppress; therefore, we affirm.

Affirmed.

AREY, JENNINGS, and BIRD, JJ., agree.

GRIFFEN and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Despite a unanimous decision less than two weeks ago by the Supreme Court of the United States that invalidated a full search of a car after a police officer stopped a motorist and issued a speeding citation, *Knowles v. Iowa*, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), today a majority of our court has upheld a "pat down" search and the denial of a motion to suppress evidence seized from it by a state trooper who gave appellant a warning ticket for following too closely and admitted that he had no probable cause to request that appellant consent to a search of his automobile. I believe that the appellant's conviction following a conditional guilty plea to the manufacture, delivery or possession of a controlled substance and his sentence (forty years' imprisonment) should be reversed and remanded because the trooper lacked reasonable cause to detain appellant after issuing the warning ticket and because the trooper lacked a reasonable basis for believing that appellant presented a threat to his safety. Thus, I would hold that the trial court's denial of the motion to suppress the cocaine was clearly erroneous.

Appellant was stopped by Trooper Jeff Thomas of the Arkansas State Police on March 21, 1996 after Trooper Thomas observed appellant's car following too closely behind a tractor-trailer rig traveling eastbound on Interstate 30 in Miller County. At the suppression hearing, Thomas testified that appellant produced a Texas driver's license that identified him as Karriem Muhammad and that appellant said he was going to the Little Rock area to celebrate his father's birthday. Appellant appeared "very nervous" according to Thomas, but Thomas did not view that to be unusual. However, Thomas observed that appellant's nervous demeanor did not appear to calm after he received a

warning citation. Thomas ran a NCIC check and an Interstate Identification Index (what Thomas termed a "triple I") check and received a response from his Hope headquarters that appellant's criminal history involved a previous sale or possession of a dangerous drug and at least one arrest for aggravated robbery. Appellant was standing outside Thomas's vehicle when the response was given and was "very erect and still the whole time" that Thomas was on the radio. Thomas then directed appellant to enter the patrol unit where he requested written consent to search appellant's vehicle. Appellant sat with an erect and still posture in the patrol unit and signed the consent to search. Thomas called for back up and asked appellant to step from the patrol unit. He then testified:

> We walked to the right front fender of my unit. For my safety and for the things that I have been told by the dispatcher about the [appellant's] previous criminal record, particularly his previous drug conviction and an aggravated robbery conviction, and because of the nervousness that he was displaying, I asked him to put his hands on the cruiser and to spread his legs. I then began to pat him down for a weapon. I began in the chest area with the palms of my hands and began a patting type motion on his outer garment area, and then I worked to the wasitband area. I did not reach inside his clothing during this time. When my hands got to the belt line, I felt something very rigid with the palm of my right hand. It seemed to be resting upon a corner of some object. That object was very rigid and was consistent with what I thought to be the corner of a firearm sticking out of his waistband. At that time, I did not know what it was, but I believed that it was a firearm. At this time, the [appellant] became very fidgety. He had removed his hand from the hood of the vehicle and placed it on top of my hand and attempted to peel my hands back off the object. At that time, I subdued [appellant] and got him under control. I had him interlace his hands behind his head. I then searched [appellant] further. What I found was a brick of a compressed material wrapped in brown duct tape. It was protruding out of his groin area inside what appeared to be a lady's style girdle.

Thomas testified on cross-examination that he suspected that appellant's nervousness was related to the criminal history reported on the NCIC check, and that his decision to search

appellant's vehicle was based solely on the fact of appellant's nervousness and the information obtained in the NCIC report about appellant's narcotics conviction, stating: "Based on his demeanor and the information that was made available to me from the NCIC, I wanted to search his car for drugs. *I did not have probable cause to search his car.*" Thomas also admitted that the pat-down search was not conducted incident to an arrest, that he saw no bulges prior to patting appellant down, that appellant had not threatened him at any time, and that Thomas suspected that appellant would be armed based on the NCIC report about his previous arrest history. He testified:

> The totality of the circumstances that lead me to have a reasonable belief that [appellant] was carrying a firearm or committing a felony was that he was a convicted felon on parole for narcotics and his nervousness. Those things create a profile of a person who would be conducting criminal activity. As a law enforcement officer, a lot of my job concerns profile. . . If I went out tonight or this afternoon and stopped someone who was nervous and found from an NCIC check that he had been convicted previously of narcotics, I would probably want to search that person's vehicle also.

It is obvious that Thomas lacked reasonable cause to detain appellant after he decided to issue a warning rather than a traffic ticket for following too close because he lacked specific, articulable, and objective indicators that appellant was committing, had committed, or was about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Once Thomas issued the warning citation, there was no need to detain appellant in order to verify his identity or the lawfulness of his conduct. The "request" to search appellant's vehicle was based on nothing more than Thomas's naked curiosity that appellant may have been transporting drugs based on his previous narcotics arrest, not any contemporaneous indication that appellant was committing, had committed, or was about to commit the crimes outlined in Rule 3.1. Thomas even admitted that he lacked probable cause to search appellant's car.

It is also obvious that appellant posed no threat to Thomas at any time before Thomas conducted the pat-down search for weapons. Under Rule 3.4 of the Arkansas Rules of Criminal Procedure, if a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person *is armed and presently dangerous* to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and may seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall the search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

In this case, the State argues that Thomas had a reasonable basis for suspecting that appellant was armed and dangerous when he encountered him based on the information that Thomas obtained from the NCIC and Triple I inquiries concerning appellant's prior arrests on narcotics and aggravated robbery charges. But the record does not show that the NCIC and Triple I information identified appellant as likely to be armed and dangerous. Thomas offered no evidence that appellant engaged in any conduct that could even remotely be termed threatening. In fact, Thomas conceded that appellant was cooperative and polite, albeit nervous, throughout the encounter leading up to the pat-down search. It is simply astounding that we would deem the record as supporting a suspicion that appellant was armed and dangerous so as to present a safety risk to Thomas, let alone a *reasonable suspicion.*

In *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985), our court reversed and remanded convictions of possession of a controlled substance with intent to manufacture and deliver that arose from a weapons search by a Clark County deputy sheriff. There the appellants were stopped by two sheriff's deputies who spotted them driving along a gravel road owned by International Paper but open to the public in a remote area some four to six miles off a main highway. The deputies directed appellants to leave their vehicle after Leopold was unable to produce a driver's license and after Leopold stated that "they were just out riding around killing time." In explaining why the weapons search was invalid, Judge Donald Corbin wrote:

> The State failed to show legal justification for a protective search. The officer (whose testimony was the only evidence presented) failed to articulate any objective factual basis for a reasonable belief that appellants were dangerous and might gain immediate control of weapons. In fact, Officer Pierce testified that appellants were cooperative and courteous at all times. We find that the facts show that the officers were not motivated by fear nor that the officers' behavior at the time of the stop supports a finding that they believed they were in danger. Accordingly, all evidence seized as a result of the unjustified protective search is inadmissible and the trial court erred in denying appellants' motion to suppress.

15 Ark. App. at 300. If the pat-down search in *Leopold* was unconstitutional where a police officer encountered men that he merely suspected might have been night-hunting with weapons in their vehicle, surely the pat-down search in this case violates the Fourth Amendment.

The Fourth Amendment should not be dismissed out of hand by police officers who rely upon information about past criminal activity that poses no present threat to their safety. There is no presumption that someone is armed and presently dangerous simply because they have been arrested in the past, whether they were arrested on narcotics and aggravated robbery charges or for some other offenses. If the police agencies responsible for compiling and reporting NCIC and Triple I information to officers in the field believe that a person may be a likely threat to the safety of those officers and others, one would think that the information supplied to field officers would include a notice to that effect. The fact that Thomas mentioned no such notice dictates the conclusion that none was given because none was deemed warranted. That we would now deem a threat to have existed, based on information from police agencies that reported no such threat to field officers who might need that information to protect themselves and the public, and do so even after the field officer admitted that a detainee made no threatening actions but was polite, nervous, and cooperative, is nothing short of fantastic.

The State's position elevates Thomas's naked hunch to extravagant fantasy; the majority decision now accords that extrav-

agant fantasy the dignity of Fourth Amendment authority. The majority does so in the face of undisputed proof that Thomas lacked probable cause to search appellant's vehicle so as to justify further detaining him. The majority does so in the face of undisputed proof that appellant did not threaten Thomas in any shape, form, or fashion. The majority does so in the face of undisputed proof that Thomas intended to let appellant go on his way with a warning before he received the NCIC and Triple I information and decided to undertake a plainly unwarranted expedition into appellant's vehicle and personal security. And the majority bottoms its decision in doing so on appellant's consent to the unwarranted vehicular search within a fortnight of a unanimous decision by the Supreme Court of the United States in *Knowles v. Iowa, supra,* that the police have no right to search vehicles merely because they issue traffic citations.

The Supreme Court in *Knowles* addressed the "legitimate and weighty" concern about officer safety in determining that the search incident to arrest exception did not justify the search of Knowles' vehicle by an Iowa police officer. I recognize the difference between the vehicular search involved in *Knowles* and the pat-down search in this case. I also realize that in writing for the unanimous Court in *Knowles*, Chief Justice Rehnquist affirmed that concern for officer safety may justify the "minimal" additional intrusion of ordering a driver and passengers out of a vehicle, yet not justify the "often considerably greater intrusion attending a full field-type search." Yet that is precisely the point of my disagreement with the State's position and the majority decision. Once appellant was stopped for following too closely and given a warning, Thomas had no need to further detain him or search him. He did not need to do so to discover evidence for following too closely. Thomas did not need to detain appellant to establish his identity because appellant had identified himself and Thomas had verified his identity through the NCIC and Triple I inquiries. Thomas had no valid reason for detaining appellant after he issued the warning, no reason to mount an expedition into his vehicle, and no reason to lay hands on appellant's person. His conduct was precisely what the Fourth Amendment was intended to protect against.

There is something chilling about the idea of a law enforcement officer deliberately undertaking a full search of a vehicle and the detention and pat-down of its driver when he knows that he lacks legal justification to search it, but does so because he is dealing with a solitary motorist who previously ran afoul of the law. The "request" to search, when acquiesced in by a nervous motorist, cannot be deemed justification for a police officer to lay hands on someone when he has no reasonable basis for suspecting the detainee is armed and presently dangerous; this is a gross departure from the rationale for the Fourth Amendment. If the majority decision is ultimately sustained, the requirement of Ark. R. Crim. Pro. 3.4 that a law enforcement officer reasonably suspect that a detainee is armed and presently dangerous is worthless to protect people from unwarranted pat-down searches for weapons, especially those who have prior arrests or convictions.

The Fourth Amendment's guarantee against unreasonable searches and seizures ought to protect against governmental fantasy and overreaching, not dignify it.

I dissent, and am authorized to state that ROAF, J., joins in this opinion.

Cleo RAYNOR and Jerome Raynor *v.*
Dr. James KYSER

CA 98-133 984 S.W.2d 451

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1998

[Petition for rehearing denied January 27, 1999.]

Law Offices of Brad Hendricks, by: *Lamar Porter*, for appellant.

Friday, Eldredge & Clark, by: *Laura Hensely Smith*, for appellee.

MARGARET MEADS, Judge. Cleo and Jerome Raynor's complaint for medical negligence against Dr. James Kyser was dismissed on a motion for summary judgment based upon the trial court's findings that such a cause of action was barred by the statute of limitations and that the "continuous course of treatment" theory was not applicable to toll the running of the statute of limitations. On appeal, appellants contend that summary judgment was improper because the trial court erroneously determined that the continuing treatment theory, which would have tolled the statute of limitations, was not applicable to their case. We affirm.

Arkansas Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is reserved for cases that have no genuine factual disputes. *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998). The moving party bears the burden of sustaining a motion for summary judgment, and once that burden is met, the opposing party must meet proof with proof to demonstrate that a material issue of fact still exists. *Id.* On appeal, the evidence is

viewed in the light most favorable to the opposing party. *Id.* Summary judgment is proper when the statute of limitations bars the action. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995).

The parties agree that the facts are not in dispute; therefore, the only issue remaining is whether appellee was entitled to judgment as a matter of law. The medical malpractice statute of limitations, codified at Ark. Code Ann. § 16-114-203 (Supp. 1997), provides in pertinent part:

> (a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues.
>
> (b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time.

Cleo Raynor (hereafter "appellant") became appellee's patient in January 1985, and was diagnosed with nasal polyps. Appellee surgically removed these polyps on January 15, 1985, and appellant followed up this procedure with an office visit on January 28, 1985. In August 1986, appellant returned to see appellee, he surgically removed benign papillomas, and she returned for an office visit in September 1986. In 1987, there was an August office visit and an August surgical procedure to remove nasal polyps, followed by office visits in August and November. On August 2, 1988, appellant underwent a surgical procedure to remove nasal polyps, and there was a pathological diagnosis of inverted papilloma. This procedure was followed up with office visits on August 24 and November 30. In 1989, appellant had two office visits with appellee, both indicating that her nose was clear of polyps. In 1990, appellant had an office visit with appellee on July 11; on July 18, appellee performed surgery to remove polyps and papillomas. This procedure was followed up with office visits on July 19 and August 14, 1990. On March 26, 1991, appellant returned to see appellee, who noted that her nose was clear and there were no polyps. At this time, appellant was advised to return in six months; however, she did not return until October 1994.

When appellant returned to see Dr. Kyser on October 18, 1994, she was required to complete a new patient information sheet because of her extended absence from appellee's care. Appellant underwent surgery for nasal polyps on October 25, and she was seen for a post-operative check-up on November 28, 1994. At that time, appellant's nose was free of polyps, and appellee recommended that she schedule another appointment in six months. She next saw Dr. Kyser on March 28, 1995, at the suggestion of her family physician, Dr. Tommy Love, with new complaints of diplopia and third nerve palsy. At that time, appellee referred appellant to Dr. James Suen, who eventually removed an inverted papilloma that had invaded her maxillary sinus in the orbital area.

Appellant filed suit against appellee on February 6, 1997. She asserts that the continuing treatment theory is applicable to her case and tolls the statute of limitations until March 28, 1995, the last day of treatment provided by Dr. Kyser.

The Arkansas Supreme Court first recognized the "continuing treatment" exception to the two-year statute of limitations in *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988). In that case, a physician began treating his future wife's migraine headaches with narcotic injections in 1966 and continued this treatment for the next eighteen years. In May 1985, after the parties were divorced, Mrs. Lane sued Dr. Lane for medical malpractice. Dr. Lane moved for summary judgment on the basis that the statute of limitations had run, and the trial court denied the motion. On appeal, the supreme court affirmed the allowance of the claim based on the continuing treatment theory, which is defined as follows:

> If the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated — unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Lane, supra, 295 Ark. at 673-74, 752 S.W.2d at 26-27 (citing 1 D. Louisell and H. Williams, *Medical Malpractice* 13.08 (1982) (footnotes omitted)).

The supreme court also applied this theory in *Taylor v. Phillips*, 304 Ark. 285, 801 S.W.2d 303 (1990). However, in his concurring opinion in *Taylor*, Justice Newbern cautioned, "It should not be assumed by those reading the court's opinion that as long as a doctor-patient relationship continues, or there is a continuous course of non-treatment or omission, the statute does not begin to run." 304 Ark. at 290.

Lane and *Taylor* are the only two cases in which our supreme court has applied the continuing treatment theory to toll the statute of limitations in medical malpractice cases. The theory has been rejected by the court in *Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993); *Pastchol v. St. Paul Fire & Marine Ins.*, 326 Ark. 140, 929 S.W.2d 713 (1996); and most recently in *Wright v. Sharma*, 330 Ark. 704, 956 S.W.2d 191 (1997). Additionally, the Eighth Circuit, applying Arkansas law, declined to apply the continuing treatment theory in *Roberts v. Francis*, 128 F.3d 647 (8th Cir. 1997) and *Hobbs v. Naples*, 993 F.2d 173 (8th Cir. 1993).

In the present case, appellant contends that appellee was negligent in treating her from January 1985 through November 1994 because he failed either to make the diagnosis of inverted papilloma, or, if he did make the diagnosis, to properly treat and/or monitor the condition. Reviewing the evidence in the light most favorable to appellant, as we must do in summary-judgment cases, we note that appellant stated in her affidavit in support of the denial of summary judgment that appellee told her she would need to remain under his care indefinitely because of the frequent recurrence of nasal polyps. She admitted that she did not see appellee from March 1991 until October 1994, but understood that if she had any problems she was to return to his office. Appellant stated that she was a regular patient of appellee from 1985 until March 1995, and she especially considered herself under his care from November 1994 until March 1995 because she had been instructed during her November 1994 follow-up examination to return in six months.

We find that the period between January 1985 and October 1994 is clearly barred by the two-year statute of limitations. It is undisputed that appellant did not seek any treatment for her nasal polyps from March 1991 until October 1994, a period of three years and seven months, although she had been instructed to schedule a follow-up appointment six months after her March 1991 visit. The decision in *Tullock v. Eck, supra*, supports this determination. In *Tullock*, the supreme court held that refilling a prescription, with no other contact between patient and doctor, was insufficient to toll the statute of limitations under the continuous-treatment theory. If the act of repeatedly refilling a prescription is not sufficient to apply the continuous-treatment theory, then a three-and-one-half year period in which there is *no* action or contact whatsoever between patient and doctor does not constitute continuous treatment and does not toll the statute of limitations for the period from January 1985 until October 1994.

As to the period from October 1994 to March 1995, the dispositive issue is whether the March 28, 1995, visit was part of a continuous course of treatment to toll the statute of limitations. Appellant contends that she was still in continuous treatment in March 1995 because she had been instructed in November 1994 to come back in six months. However, appellant saw appellee in March 1995 at the behest of her family physician for diplopia and third nerve palsy, both of which were new complaints for which she had never before sought treatment. Appellant did not mention nasal polyps at any time during the March 1995 visit. Moreover, the parties agree that there was no negligence with regard to the March 1995 office visit. Therefore, we find that the statute of limitations began to run from the time of appellant's last post-operative follow-up examination on November 28, 1994, which revealed no nasal polyps. It was at that point that treatment with regard to appellant's October 1994 surgery was complete.

Appellant contends that no case has held that negligence must be claimed with respect to the date of the last treatment, or that negligence must be claimed with respect to each treatment. She cites *Lane, supra*, in support of this proposition:

> Generally, the cause of action would accrue at the end of a continuous course of medical treatment for the same or related condition even if the negligent act or omission has long since ended.

295 Ark. at 675, 752 S.W.2d at 27.

However, in the two cases in which the supreme court applied the continuous-treatment theory, *Lane, supra*, and *Taylor, supra*, the last portion of negligent treatment fell within the two-year statute of limitations, even though the initial act of negligence was outside of that period. In the present case, there is no allegedly negligent treatment within the two-year limitation period. Because appellant concedes that no negligent treatment occurred on March 28, 1995, the last date appellee could have been negligent in any treatment was November 28, 1994.

Thus, we agree with the trial court's conclusion that appellant's lawsuit filed on February 6, 1997, is time-barred because it was not filed within two years of November 28, 1994.

Affirmed.

AREY and GRIFFEN, JJ., agree.

Cephas BREWER *v.* STATE of Arkansas

CA CR 98-935 984 S.W.2d 65

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1998

Theresa S. Nazario, for appellant.

No response.

PER CURIAM. A motion has been filed by appellant's court-appointed counsel at trial to be relieved as counsel on the appeal of his criminal conviction and to allow his new and *retained* lawyer to be substituted as counsel on the appeal after appellant obtained a transcript of the trial record at State expense. We believe that there are serious factual issues to be resolved before we can decide the question; therefore, we are remanding the motion to the trial court.

Appellant was charged by information, tried to a jury, and eventually convicted following a four-day trial on two counts of rape involving victims younger than fourteen years of age. The trial court sentenced appellant to twenty years' imprisonment on each count and ordered the prison sentences to be served concurrently. Appellant petitioned the trial court for appointment of counsel on account of his professed indigency and was provided defense counsel at State expense. After appellant was convicted, his court-appointed lawyer dutifully filed notice of appeal and ordered a transcript of the trial proceedings to prepare the appeal. A two-volume trial transcript numbering almost a thousand pages and costing $2,748.60, based on the court reporter's invoices in the record, was provided to appellant's court-appointed lawyer at State expense on account of his indigency. On September 28, 1998, appellant's court-appointed lawyer tendered a motion to withdraw as counsel of record, but the motion was not filed until

after the clerk's office confirmed that it had been served on appellant (October 16, 1998).

The motion to withdraw states that appellant "has *hired private counsel* to pursue his appeal. Attorney Karen Pope Greenaway has obtained transcripts as evidenced by the attached receipt in order to perfect the appeal." (Emphasis added.) The referenced receipt is dated September 17, 1998.

A decision to grant the substitution of counsel would mean that the State of Arkansas has provided a free transcript worth almost three thousand dollars to someone who has somehow hired private counsel to appeal his conviction. On one hand, we could remand appellant's motion for substitution of counsel with instructions that it be granted after appellant reimburses the State for the cost of the trial transcript. We did so in *Smith v. State*, 63 Ark. App. 31, 970 S.W.2d 336 (1998). After all, the transcript is needed for the appeal. Appellant is the party contesting the result below and, therefore, the party responsible for ordering and lodging the record of the trial proceedings with the Court of Appeals. Appellant obtained a free transcript only because of his indigency based on the principle that the government-paid transcript was essential pursuant to his right to effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States. When he obtained funds to hire private counsel for the appeal, appellant could have also obtained the funds needed to reimburse the State for the cost of the transcript. We have no indication that appellant was or is now unable to obtain those funds, that he does not have those funds presently, or that he is otherwise unable or unwilling to reimburse the State. Without knowing whether this is the case, however, we hesitate to grant appellant's motion.

The other possibility is to remand the case to the trial court so that additional proceedings can be held. Remanding the case for consideration will not jeopardize appellant's right to appeal his conviction. If the trial court finds that reimbursement was not demanded — or that it was demanded but rejected by appellant's funding source — it can render findings concerning the reim-

bursement demand and response so that our court can intelligently decide whether it would be just to give appellant a taxpayer-paid trial transcript on one hand while allowing him to dump his taxpayer-paid lawyer in favor of one hired with private funds on the other. When did appellant obtain funds to hire private counsel and from what source? How much was obtained to procure the private attorney? Are there any valid reasons why the appellant cannot be directed to reimburse the State for the cost of the transcript? Has the State demanded reimbursement? If so, when was the demand made and why wasn't it honored?

We realize that the financial arrangements that litigants have with their privately retained lawyers are sensitive matters. We also acknowledge that some sources who fund hiring private counsel on appeal may balk at reimbursing taxpayers for the trial transcript and may withdraw their offers to pay for private counsel. And we recognize that our decision to remand means assigning this sensitive issue to trial judges who are already overloaded. Nevertheless, this situation begs for an informed judicial solution. The questions it presents are better addressed by trial judges who are able to conduct evidentiary hearings than by appellate judges sitting in panels or en banc.

Our decision to remand rather than to grant the motion to substitute counsel occurs in response to what appears to be a common practice whereby the State of Arkansas pays the cost of a trial transcript after an indigent criminal defendant files notice of appeal. Then the appellant hires private counsel to prosecute the appeal. From one perspective, this practice can be said to mock the notion of indigency and the reason for granting a free transcript to indigent appellants. To those who object to judicial inquiries into the sources of funds used to hire private counsel in criminal appeals after the appellants have been represented by court-appointed lawyers at trial, one need only remember that criminal defendants are provided court-appointed lawyers at trial and free trial transcripts on appeal only after trial courts have made findings of indigency and the accused persons have provided sworn evidence of that fact. Trial judges regularly include lan-

guage in the orders appointing counsel for indigent defendants that the accused and/or appointed-counsel has a duty to report the receipt of funds or other property that might be used to provide a defense. We see no rational basis for dismissing this fact-finding and reporting process during the appellate stage so as to permit supposedly indigent convicted felons to hire lawyers to prosecute appeals of their convictions using transcripts obtained at State expense without even a demand that the transcript cost incurred by taxpayers be reimbursed.

For decades, poor people who have sought government assistance on account of professed indigency have endured daily inquiries into their finances, the sources of their income, and even their living arrangements. Government employees of social-welfare agencies have gone into the residences of poor people, often unannounced and without preamble, to determine whether a husband, father, or some other source of financial assistance may have been living with a family seeking government assistance. Applicants for unemployment benefits are required to submit weekly reports of their efforts to obtain work and risk losing their benefits if they fail to do so. Our decision to remand so that the trial court can conduct an evidentiary hearing and render appropriate findings on this motion is, therefore, both judicially necessary and even-handed. If the people of Arkansas must provide a free trial transcript to convicted felons who hire their own lawyers on appeal, they at least deserve to know why they cannot be reimbursed for the transcript cost. They deserve to know why, when, and from what sources these appellants are finding money to hire lawyers to prosecute their appeals but not pay for the transcripts. By remanding the motion to substitute counsel, this and similarly situated appellants will be afforded a chance to prove continued indigency in the face of proof that they somehow have managed to hire private counsel on appeal.

Therefore, we remand the case to the trial court with instructions that it conduct proceedings and render findings of fact relevant to the source of funds used to hire appellant's retained counsel, the date that the funds were obtained and counsel was

retained, and whether a demand was made on behalf of the State for reimbursement of the cost of the trial record. These proceedings and findings shall be conducted and rendered within forty-five days, after which the trial court shall refer the motion and its findings to our court for final disposition.

PITTMAN, JENNINGS, STROUD, NEAL, and ROAF, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. While I agree with the majority of this court that there are potential problems in connection with the motion, I cannot join in the court's disposition. I would grant the motion.

The majority's concerns are quite reasonable. If criminal defendants are misusing the system to obtain transcripts at State expense when they are not entitled to do so, that is a cause for concern. But here we draw the inference that there is necessarily a problem and, on our own motion, remand the matter to the trial court with instructions. When we raise and decide issues sua sponte we are somewhat more likely to go astray.

It is the State, through the attorney general's office, who represents the people in criminal proceedings. I would leave it to the State to represent the people in this matter and ask for relief if the process is being abused. Here, the State has not opposed the motion for substitution of counsel.

Finally, I must concede that we took a similar approach in *Smith v. State*, 63 Ark. App. 31, 970 S.W.2d 336 (1998).

For the reasons stated, I respectfully dissent.

PITTMAN, STROUD, NEAL, and ROAF, JJ., join in this dissent.

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