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Thelma Marie FISHER *v.* STATE of Arkansas

CA CR 82-90 643 S.W.2d 571

Court of Appeals of Arkansas
Opinion delivered December 8, 1982

[redacted]

William Randal Wright of *Graves & Graves,* for appellant.

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

JAMES R. COOPER, Judge. This is a criminal case in which the appellant was charged with theft of property having a value of over $100.00 but less than $2,500.00. After a trial by jury, she was found guilty and sentenced to a term of four years in the Arkansas Department of Correction and a fine of $5,000.00. The trial court suspended imposition of the four year sentence and imposed the $5,000.00 fine. On appeal, the appellant challenges the sufficiency of the evidence, and alleges that the trial court erred in ruling that certain portions of a video tape recording were properly admitted into evidence. We find no merit to either contention, and therefore we affirm.

THE FACTS

The appellant and her two daughters were employed by M & W Thriftway in Nashville, Arkansas to clean the store. On August 12, 1981, the appellant and her daughters arrived at the store for the purpose of cleaning it. The manager and owner of the store had installed a video tape camera on the premises, prior to the time that the appellant and her daughters arrived. He testified that he adjusted the camera, started it, and then left the building, leaving the camera unattended. He testified that he started the video tape camera at approximately 9:15 p.m. and that he returned at approximately midnight. He testified that he replaced the tape in the camera, since the first tape was about to run out. The manager testified that at approximately 1:30 to 2:00 a.m., he returned to get the tapes. When he arrived at the store, he found law enforcement officers on the scene, and, pursuant

to their instructions, he removed the video tapes. He testified that he had safeguarded those tapes until the time of trial.

The sheriff of Howard County, Dick Wakefield, testified that he observed the appellant's daughters removing groceries in paper sacks from the back door of the store. The sheriff had the individuals arrested. He testified that the appellant indicated that she had left a check for the groceries at the store. He further testified that there was a check on top of the cash register in the amount of $29.64. The officers recovered seven bags of groceries, which the owner of the store testified were valued at $183.29. One of the appellant's daughters testified that she did help sack the groceries and that she intended to return with a check to pay for the balance of the groceries. The appellant testified that she had an agreement with the owner of the store that she could purchase groceries in the manner described above and that she did not intend to steal any groceries from the store.

THE ADMISSIBILITY OF THE VIDEO TAPE RECORDING

The appellant argues that the trial court erred in permitting in evidence a video tape recording,[1] since no witness testified that the photographic evidence was a fair and accurate representation of the subject matter.

Immediately prior to the trial, the trial court conducted a hearing on the appellant's motion *in limine* which sought to preclude the State from introducing the video tapes. The trial court required the State to present the foundational facts which would support its claim that the video tapes were admissible. The manager of the store, Mr. Moore, testified that he had positioned the video tape camera on a tripod on top of an ice machine, so as to provide a view of the back door. He testified that he loaded the tape into the camera,

[1]A video tape recording is an electronic means of recording sound and action on tape for subsequent playback in the form of a sound motion picture. 1 C. Scott, Photographic Evidence § 87 (2d ed. 1969). Video tape recordings are admissible in evidence on the same basis as sound motion picture films. 3 C. Scott, Photographic Evidence § 1294 (2d ed. Supp. 1980).

started it, and checked to make sure that it was operating properly, prior to the time that he left the store. He testified that at the time he left the store, no one else was present in the store. He further testified that he changed the tape approximately two hours later and that he had continuous custody of the tapes, since the date of the alleged theft.

Mr. Moore further testified regarding the contents of the tapes, that the camera worked properly at all times, and that there were no gaps in the tapes. He testified that, when he returned to the store, the camera had not been moved or tampered with in any way, and that fact could be verified, since the tapes would have shown movement had the camera been moved. He testified that in order to turn the camera off or to change the tapes, he had to pass in front of the camera and that his image appeared on the video tapes. He also testified that, once the camera had been turned on, the controls could not be approached, without a picture of that approach being made.

The trial court held that a proper foundation had been presented, and that the video tape was admissible. He found that the video tape fairly represented the situation that existed at the store, and he further noted that any question regarding the tapes went more to their credibility, rather than to admissibility. He noted it was for the jury to determine whether any criminal activity was taking place by virtue of the events which were shown on the video tape. The tape showed appellant and her daughters sacking groceries, and removing them.

The admissibility of photographic evidence is based on two different theories. One theory is the "pictorial testimony" theory. Under this theory, the photographic evidence is merely illustrative of a witness' testimony and it only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness' personal observation. Obviously, the photographic evidence in this case is not admissible under such a theory, since no person could verify that the video tape accurately represented what occurred at the store, based on personal observation. A second theory

under which photographic evidence may be admissible is the "silent witness" theory. Under that theory, the photographic evidence is a "silent witness' which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness. *See,* 2 C. Scott, Photographic Evidence § 1021 (2d ed. Supp. 1980); 3 J. Wigmore, Evidence § 790 (Chadbourn rev. 1970).

In Arkansas, photographic evidence is admissible under the "pictorial testimony" theory, when a sponsoring witness testifies that it is a fair and accurate representation of the subject matter. *Martin* v. *State,* 258 Ark. 529, 527 S.W.2d 903 (1975); *Ballew* v. *State,* 246 Ark. 1191, 441 S.W.2d 453 (1969); *Gross* v. *State,* 246 Ark. 909, 440 S.W.2d 543 (1969); *Lillard* v. *State,* 236 Ark. 74, 365 S.W.2d 144 (1963); *Hays* v. *State,* 230 Ark. 731, 324 S.W.2d 520 (1959); *Reaves* v. *State,* 229 Ark. 453, 316 S.W.2d 824 (1958), *cert. denied,* 359 U.S. 944, 79 S. Ct. 723, 3 L.Ed.2d 676 (1959); *Grays* v. *State,* 219 Ark. 367, 242 S.W.2d 701 (1951); *Simmons* v. *State,* 184 Ark. 373, 42 S.W.2d 549 (1931); *Sellers* v. *State,* 93 Ark. 313, 124 S.W. 770 (1910).

The question presented on this appeal has never been answered in Arkansas. A video tape recording and a film produced by an automatic camera have been admitted into evidence in two cases. However, the precise objection made in the case at bar was not raised in either case. *See, French* v. *State,* 271 Ark. 445, 609 S.W.2d 42 (1980); *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978).

This case presents the question of whether photographic evidence may be admitted as substantive evidence under the "silent witness" theory. We hold that the trial court correctly ruled that the video tape recording was admissible.

The Uniform Rules of Evidence, Rule 901 (a), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that authentication is a condition precedent to the admissibility of evidence and that this requirement is met by a showing of evidence sufficient to support a finding that the matter in question is what its proponent claims. Section (b) lists various illustrations, showing methods of authentication or identification.

The Uniform Rules of Evidence, Rule 1001 (2), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that "photographs" includes photographs, x-ray films, video tapes, and motion pictures.

X-ray films are admissible in Arkansas, subject to proper authentication. *Oxford* v. *Villines,* 232 Ark. 103, 334 S.W.2d 660 (1960); *Arkansas Amusement Corporation* v. *Ward,* 204 Ark. 130, 161 S.W.2d 178 (1942); *Prescott & N.W.R. Co.* v. *Franks,* 111 Ark. 83, 163 S.W. 180 (1914); *Miller* v. *Minturn,* 73 Ark. 183, 83 S.W. 918 (1904). Obviously, it is impossible for a witness to testify that an x-ray film is a fair and accurate representation of the subject matter, based on that witness' personal observation. Therefore, x-rays could never be admissible under the "pictorial testimony" theory. 3 C. Scott, Photographic Evidence § 1262 (2d ed. 1969). Every jurisdiction admits x-ray films as substantive evidence upon a sufficient showing of authentication, thus utilizing the silent witness theory, even if unintentionally.[2] We note that Rule 1001 (2) treats x-rays, photographs, video tapes, and motion pictures, as one and the same.

Photographic evidence is the best available means of preserving the appearance of a scene at a given time. It is superior to eyewitness testimony in certain respects. Eyewitness testimony is subject to errors in perception, memory lapse, and a witness' problem of adequately expressing what he observed in language so that the trier of fact can understand. *See,* 1 C. Scott, Photographic Evidence § 41-54 (2d ed. 1969). Photographic evidence can observe a scene in detail without interpreting it, preserve the scene in a permanent manner, and transmit its message more clearly than the spoken word.

We hold that photographic evidence is admissible where its authenticity can be sufficiently established in view

[2]Some jurisdictions treat x-rays as scientific evidence, and not photographic evidence. *See, Howard* v. *State,* 264 Ind. 275, 342 N.E.2d 604 (1976). Professor Wigmore treats the admissibility of x-rays as scientific evidence, even though admitting that the "silent witness" theory may be a "more satisfactory rationale." 3 J. Wigmore, Evidence § 795 n.1 (Chadbourn rev. 1970).

of the context in which it is sought to be admitted.[3] Obviously, the foundational requirements for the admissibility of photographic evidence under the "silent witness" theory are fundamentally different from the foundational requirements under the "pictorial testimony" theory. It is neither possible nor wise to establish specific foundational requirements for the admissibility of photographic evidence under the "silent witness" theory, since the context in which the photographic evidence was obtained and its intended use at trial will be different in virtually every case. It is enough to say that adequate foundational facts must be presented to the trial court, so that the trial court can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims. The trial court determines the preliminary questions regarding the admissibility of evidence, and the appellate court reviews those determinations only for an abuse of discretion. Uniform Rules of Evidence, Rule 104 (a) (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979); *Wilson* v. *City of Pine Bluff,* 6 Ark. App. 286, 641 S.W.2d 33 (1982). Our holding in this case in no way affects the admissibility of, or the foundational requirements for, photographic evidence used as demonstrative evidence under the "pictorial testimony" theory.

In adopting the "silent witness" theory, we join the overwhelming majority of other jurisdictions that have decided this issue. *United States* v. *Gordon,* 548 F.2d 743 (8th Cir. 1977); *United States* v. *Gray,* 531 F.2d 933 (8th Cir. 1976), *cert. denied,* 429 U.S. 841, 97 S.Ct. 117, 50 L.Ed.2d 110 (1976); *United States* v. *Stearns,* 550 F.2d 1167 (9th Cir. 1977); *United States* v. *Taylor,* 530 F.2d 639 (5th Cir. 1976), *cert. denied,* 429 U.S. 845, 97 S.Ct. 127, 50 L.Ed.2d 117 (1976); *United States* v. *Pageau,* 526 F. Supp. 1221 (N.D. N.Y. 1981); *Watkins* v. *Reinhart,* 243 Ala. 243, 9 So.2d 113 (1942); *State* v. *Kasold,* 110 Ariz. 558, 521 P.2d 990 (1974); *South Santa Clara Valley Water Conservation Dist.* v. *Johnson,* 231 Cal.App.2d 388, 41 Cal. Rptr. 846 (1965); *People* v. *Bowley,* 59 Cal. 2d

[3]Photographic evidence is subject to the same rules as other evidence. Thus, even if photographic evidence is properly authenticated, it may still be excluded because it is not relevant or because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Uniform Rules of Evidence, Rules 401, 402, 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963); *People* v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792 (1948); *Oja* v. *State,* 292 So.2d 71 (Fla. App. 1974); *Franklin* v. *State,* 69 Ga. 36, 47 Am. Rep. 748 (1882); *Bergner* v. *State,* 397 N.E.2d 1012 (Ind. App. 1979); *State* v. *Holderness,* 293 N.W.2d 226 (Iowa 1980); *Cook* v. *Clark,* 186 N.W.2d 645 (Iowa 1971); *State* v. *Thompson,* 254 Iowa 331, 117 N.W.2d 514 (1962); *Franzen* v. *Dimock,* 251 Iowa 742, 101 N.W.2d 4 (1960); *Perry* v. *Eblen,* 250 Iowa 1338, 98 N.W.2d 832 (1959); *Foreman* v. *Heinz,* 185 kan. 715, 347 P.2d 451 (1959); *Litton* v. *Commonwealth,* 597 S.W.2d 616 (Ky. 1980); *State* v. *Young,* 303 A.2d 113 (Me. 1973); *Sisk* v. *State,* 236 Md. 589, 204 A.2d 684 (1964); *Hartley* v. *A. I. Rodd Lumber Co.,* 282 Mich. 652, 276 N.W. 712 (1937); *Hancock* v. *State,* 209 Miss. 523, 47 So.2d 833 (1950); *State* v. *Withers,* 347 S.W.2d 146 (Mo. 1961); *Vaca* v. *State,* 150 Neb. 516, 34 N.W.2d 873 (1948); *King* v. *State,* 108 Neb. 428, 187 N.W. 934 (1922); *People* v. *Byrnes,* 33 N.Y.2d 343, 308 N.E.2d 435, 352 N.Y.S.2d 913 (1974); *State* v. *Hunt,* 297 N.C. 447, 255 S.E.2d 182 (1979); *Dunford* v. *State,* 614 P.2d 1115 (Okla. Crim. App. 1980); *State* v. *Brown,* 4 Or. App. 219, 475 P.2d 973 (1970); *State* v. *Goyet,* 120 Vt. 12, 132 A.2d 623 (1957); *Ferguson* v. *Commonwealth,* 212 Va. 745, 187 S.E.2d 189 (1972), *cert. denied,* 409 U.S. 861, 93 S. Ct. 150, 34 L.Ed.2d 108 (1972), *reh. denied,* 409 U.S. 1050, 93 S.Ct. 533, 34 L.Ed.2d 504; *State* v. *Dunn,* 246 S.E.2d 245 (W. Va. 1978); *But see, Casson* v. *Nash,* 54 Ill.App.3d 783, 370 N.E.2d 564, 12 Ill. Dec. 760 (1977); *Foster* v. *Bilbruck,* 20 Ill. App. 2d173, 155 N.E.2d 366 (1959).

THE SUFFICIENCY OF THE EVIDENCE

The appellant concedes that the State proved the value of all of the groceries, but she alleges that since it was not proven that the value of the items which the appellant herself removed exceeded $100.00, then she can only be convicted of a misdemeanor. We disagree. The jury could certainly have found that all three women committed the theft. Under the Arkansas Criminal Code, the appellant could be found guilty by virtue of the conduct of others with whom she was acting in concert, as well as her own actions. Ark. Stat. Ann. § 41-301 *et seq.* (Repl. 1977); *King* v. *State,*

271 Ark. 417, 609 S.W.2d 32 (1980). The record supports the jury's finding that the appellant took all the articles from the grocery store, and that the articles had a value in excess of $100.00, but less than $2,500.00.

The appellant argues that the jury had to speculate to find that appellant actually stole all the articles, but we disagree with that contention. The explanation offered by the appellant and her daughters was for the jury to weigh, and the jury obviously did not believe appellant's explanation. There is substantial evidence to prove theft of property.

Affirmed.

James Carter SUMMERLIN *v.* STATE of Arkansas

CA CR 82-73 643 S.W.2d 582

Court of Appeals of Arkansas
Opinion delivered December 15, 1982
[Rehearing denied January 12, 1983.]

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

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

MELVIN MAYFIELD, Chief Judge. James Carter Summerlin appeals his conviction for sexual abuse in the first degree.

Appellant was charged by information which alleged he unlawfully engaged in certain acts of sexual contact with a young boy, and was tried before the court sitting without a jury. The state presented testimony from the eleven-year-old boy, from the child's grandmother, who testified as to what she said the child related to her shortly after the alleged incident concerning acts committed by appellant, and from three other witnesses. The appellant testified and denied ever engaging in any kind of sexual contact or conduct with the child.

The trial court found appellant guilty and imposed a sentence of five years and a fine of $3,500.00. The only point raised on appeal is appellant's contention that he was denied a fair and impartial trial because of improper and irrelevant cross-examination by the state.

During the state's cross-examination of appellant, the following occurred:

Q [By the deputy prosecuting attorney]: Mr. Summerlin, you said you were in the Navy?

A: Yes, sir.

Q: What kind of discharge did you get?

A: Honorable.

Q: Isn't it true that it's less than an honorable discharge?

A: No, sir.

Q: Were you kicked out of the service for exactly the same thing you're charged with here today?

A: No, sir.

[Defense counsel]: I would object to that, Your Honor. I don't think he has any proof of that and I don't think it's relevant.

[Deputy prosecutor]: I can state my offer.

[The Court]: What is your offer?

[Deputy prosecutor]: What he told the —

[Defense counsel]: I don't think that's —

[Deputy prosecutor]: What he told the psychiatrist out there when he was being —

[Defense counsel]: And that's not relevant. And I'm going to move for a mistrial, Your Honor.

[The Court]: We're not going to get a mistrial, Mr. Simpson. We're going to —

[Defense counsel]: He's basing this on hearsay.

[The Court]: We're going to try this case. He's in cross-examination, and he can ask him, and Mr. Summerlin can certainly deny it.

. . . .

[Deputy prosecutor]: You never told the psychiatrist that?

[Summerlin]: No, sir.

Appellant contends these questions about prior misconduct were highly improper and prejudicial and require reversal of his conviction, citing the Arkansas Uniform Evidence Rule 608 (b) and several recent cases applying that rule. The rule states:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979), the Arkansas Supreme Court considered the application of Rule 608 (b), and listed the following circumstances under which questions about prior misconduct may be

asked for purposes of impeachment: (1) the questions must be asked in good faith; (2) the probative value must outweigh the prejudicial effect; and (3) the misconduct must relate to truthfulness or untruthfulness. Clearly, *Gustafson* limited the permissible scope of such cross-examination to the witness's veracity, not the witness's alleged predilections.

In *Harper* v. *State,* 1 Ark. App. 190, 614 S.W.2d 237 (1981), we reversed the appellant's conviction for the sexual abuse of a nine-year-old girl because the prosecutor had cross-examined the appellant about an act, similar to the one with which he was charged, allegedly committed by the appellant on the girl prior to the time of the incident for which he was on trial. Relying on *Gustafson,* we held it error for the state to ask about the earlier act because the state's questions did not relate to Harper's credibility or veracity, but went instead to his propensity for the act charged.

In the instant case, the appellant concedes that the deputy prosecutor did not ask the questions about appellant's service discharge in bad faith under the *Gustafson* rule. But he contends that this line of questioning was improper because it did not deal with appellant's character for truthfulness and had no probative value. We have to agree and we point out that *Gustafson* specifically held that it is *not* correct to say that a negative answer to an improper question results in no prejudicial error. In fact, the opinion states, "There is no doubt that such a question harms a defendant's case." 267 Ark. at 291. Since specific acts of misconduct may not be proved by extrinsic evidence, *Gustafson* teaches that a prosecutor hazards a reversal when he asks about prior misconduct and does not get an answer of probative value as to the witness's truthfulness or untruthfulness.

The state argues that there is a significant difference between this case and *Gustafson* because there was no jury here and correctly points out that in cases tried by a judge without a jury the judge is presumed to have considered only competent evidence. The state agrees, however, that this presumption is overcome "where there is an indication that

the trial judge did give some consideration to the inadmissible evidence." *Clinkscale* v. *State,* 269 Ark. 324, 602 S.W.2d 618 (1980).

The excerpt from the transcript set out above does not answer our problem as clearly as we would like. But we think there were sufficient objections to the questions asked, *see* Uniform Evidence Rule 103 (a) (1), and the trial judge did not *sustain* the objections and he did not *say* he would not consider the questions. In *Marshall* v. *State,* 264 Ark. 210, 570 S.W.2d 261 (1978), the court said:

> The difference in this case and the *Hickey* case is simply that in *Hickey* the trial judge overruled the defendant's objection to the reference to prior criminal conduct; we, therefore, assume that the court considered the evidence. In this case the trial judge sustained the objection to the reference to other misconduct and stated that the evidence would be disregarded.

We also note that appellant was given a five-year sentence which was only one year less than the maximum, *see* Ark. Stat. Ann. § 41-1808 (2) (Repl. 1977) and § 41-901 (1) (e) (Supp. 1981), and that he was also fined $3,500.00 and the maximum fine was $10,000.00, *see* Ark. Stat. Ann. § 41-1101 (1) (b) (Repl. 1977).

In *McCarley* v. *State,* 257 Ark. 119, 514 S.W.2d 391 (1974), the court said that in determining whether inadmissible testimony is prejudicial it is proper to consider its effect upon the defendant's credibility and to consider the severity of his punishment.

Given the fact that the objections to the questions were not sustained, considering the effect the implications of the questions could have upon appellant's credibility in regard to his denial of the charges against him, and looking at the sentence imposed, we have concluded his conviction should be reversed and the matter remanded for a new trial.

Reversed and remanded.

Paul L. HODGE *v.* Wilburn M. BRIGGS, Rea BRITTON, L. Gene WORSHAM and SPRING LAKE SHORES, INC.

CA 82-108 & CA 82-109 643 S.W.2d 576

Court of Appeals of Arkansas
Opinion delivered December 15, 1982

Thomas G. Montgomery, for appellant.

Cynthia S. Moody, for appellee Briggs.

Friday, Eldredge & Clark, for appellee Britton.

GEORGE K. CRACRAFT, Judge. On October 31, 1979 Wilburn M. Briggs commenced an action to foreclose two real estate mortgages which were then in default. The first of these mortgages was executed by L. Gene Worsham on April 5, 1976 to secure an indebtedness of $125,000 evidenced by a note payable to Capitol City Savings & Loan Association and subsequently assigned to Briggs. He further alleged that he was the holder of a separate note for $150,000 executed by Worsham on April 28, 1977, which was also secured by a mortgage on the same property. The appellant Paul L. Hodge was named as a defendant on allegations that "he may claim an interest by virtue of a second mortgage on the property" executed by Worsham on the 20th day of September, 1976 to secure an indebtedness owed to Hodge in the sum of $10,000. The only relief prayed against Hodge was that the two mortgages held by Briggs be declared to be superior to that of Hodge.

Rea Britton was also named a defendant on allegations that she too "may claim" an interest as assignee of a mortgage and notes on that property dated April 4, 1977. It was alleged that Britton's mortgage was void and, in any

event, was inferior to those of Briggs. There were other parties to the suit against whom relief was sought. These parties and issues are not involved in this appeal, which is narrowed solely to the issues of the priorities as to the mortgages of Briggs, Hodge and Britton.

Britton filed an answer denying all allegations of the complaint and counterclaimed against Briggs asserting that her lien was a valid one and was superior to Briggs'. Britton cross-complained against all other co-defendants except Hodge.

Although Hodge was properly served with a copy of the Briggs complaint, he was not named as a cross-defendant or served with a copy of the answer and counterclaim filed by Britton. Hodge did not appear and filed no responsive pleading in the case.

On August 27, 1981 the court, reciting that Hodge was in default, entered a foreclosure decree "as a part of an agreement between Briggs and Britton." This decree ordered foreclosure, declared that Briggs had a first lien by virtue of his two mortgages, found that Britton's lien was subordinate only to that of Briggs, and that the lien of Hodge was subordinate to both liens. Appellant had notice neither of the filing of the answer, counterclaim and cross-complaint nor the entry of the judgment until after the decree had been entered. On September 4, 1981 he filed a timely motion to set aside the decree on the grounds that he had not been made a party or served with notice of Britton's answer, counterclaim and cross-complaint and that any interest claimed by Britton was in fact subordinate to his own. The court denied this motion and a timely notice of appeal was filed in that case.

On that same day the appellant brought a separate action to foreclose his second mortgage asserting that only the mortgage executed by Worsham to Capitol City Savings and Loan Association (held by Briggs under an assignment) was superior to his. Worsham did not answer. Briggs and Britton moved to dismiss as to them asserting that the question of priority of this lien had been fully adjudicated in the decree in cause No. E-79-581. The court entered a

personal judgment by default against Worsham in favor of Hodge in the amount of the debt but granted the motions of Briggs and Britton, holding that the priority of their liens had been fully adjudicated in the prior decree. Appellant also appeals from that order and both appeals were consolidated in this court.

In the complaint Briggs alleged that he was the holder of the notes secured by the two mortgages on the property. One mortgage dated April 5, 1976 had been assigned to him by Capitol City Savings & Loan. He also alleged that he was holder of a note in the amount of $150,000 executed by Worsham secured by a mortgage on the same property dated the 28th of April, 1977. Even though the appellant's mortgage was prior in time to the second of the Briggs mortgages, the complaint alleged that it was inferior to Briggs' lien. The only relief prayed for against the appellant was that the two Briggs mortgages be declared superior to that of the appellant. The appellant filed no responsive pleading controverting the superiority of the Briggs mortgage which had been filed for record subsequent to his own.

Rule 55, Arkansas Rules of Civil Procedure, provides that where a party against whom a judgment for affirmative relief is sought has failed to appear or otherwise defend as provided by the rules, judgment by default will be entered by the court. The relief sought by Briggs against the appellant was a declaration that the liens of both Briggs' mortgages were superior to that of the appellant, notwithstanding that only one of Briggs' notes was superior in time. When Briggs asserted that the appellant claimed an interest in the land but that it was inferior to his liens, the appellant was required to plead and prove whatever interest he had which he might claim to be superior to that of the appellee. Having failed to do so, he is in no position now to claim a superior lien. *Bank of Commerce* v. *Ryan,* 152 Or. 614, 52 P.2d 1139 (1936); Rule 55 (c), Arkansas Rules of Civil Procedure. There is nothing in the record showing excusable neglect, unavoidable casualty or any other just cause for setting the decree aside. We find no error in the court's refusal to set aside that part of the decree which declared appellant's lien to be inferior to both of those of Briggs or in holding that

appellant was estopped by the prior decree to raise that question in the separate action brought by him.

Appellant next contends that the chancellor erred in both deciding the issue of priority of liens between Hodge and Britton in the first action and in holding that determination to be a binding adjudication of the issue between them in the second case. We agree that the pleadings in the original suit did not raise that issue for the court's determination.

Britton's pleading was two-pronged. It was an answer to the allegations made by Briggs against her in his complaint and a counterclaim against Briggs and a cross-complaint against other co-defendants seeking affirmative relief against them. Hodge was not named a party in the cross-complaint, and no relief was prayed against him. He was not served with a copy of the pleading.

An answer to a complaint is responsive only to the allegations of the plaintiff and cannot raise justiciable issues as to other co-defendants. In order to properly seek affirmative relief from a co-defendant it is necessary to cross-complain against him stating the facts on which the relief is sought and to serve him with it. *Marr* v. *Lewis,* 31 Ark. 203 (1877); *Ringo* v. *Woodruff,* 43 Ark. 469 (1884); *Pillow* v. *Sentelle,* 49 Ark. 430, 5 S.W. 783 (1887); *Reynolds* v. *Jones,* 63 Ark. 259, 38 S.W. 151 (1896); *Luttrell* v. *Reynolds,* 63 Ark. 254, 37 S.W. 1051 (1896); *Miller* v. *Mattison,* 105 Ark. 201, 150 S.W. 710 (1912); *Fox* v. *Pinson,* 182 Ark. 936, 34 S.W.2d 459 (1930).

In *Ringo* the court stated:

> But neither of them made his answer a cross-complaint. Failing to do this, there was lacking the pleading which was necessary to authorize the court below to grant them such relief. For in asking this relief they seek to go beyond the inquiry proposed by the complaint, and ask for relief against co-defendants which is dependent on facts of which no statement is made in plaintiff's complaint and are not involved in the

> determination of the relief plaintiff is entitled to, or in the determination of the questions presented by the allegations of his complaint, and are not responsive to the allegations of the complaint, and cannot be set up in opposition to the relief prayed for by plaintiff. *To obtain this relief insisted on by defendants, as stated, it was necessary for them to have stated the facts upon which they demanded it, and asked for it, in an answer made a cross-complaint against the co-defendants against whom the relief was sought. It was not sufficient to state the facts and ask for the relief in the answer,* but the answer should have been made a cross-complaint against the co-defendants who would have been affected by the relief if it had been granted. . . . *Unless he be made a party defendant in the answer in the nature of a cross-complaint in the manner indicated, the co-defendant is not required to answer the allegations constituting the grounds of relief asked for against him; and as corollary to this it follows, no proof is required to disprove the allegations on which this relief is asked.* (Emphasis supplied)

Here Britton did not assert her priority as against Hodge in a cross-complaint; she counterclaimed only against Briggs on this issue. Even if she had cross-complained against Hodge it would be necessary for her to have served the cross-complaint in accordance with Rule 5, Arkansas Rules of Civil Procedure.

It was argued in conference that as Hodge was in default as to the Briggs complaint, Rule 5 did not require service of the Britton cross-complaint upon him because that pleading did not "assert new or additional claims for relief" against him. It was argued that as a party to the action Hodge was required to take notice of this pleading and was therefore on notice that Britton was raising the issue of priority in her cross-complaint against the other co-defendants. This is expressly contrary to the rulings in *Ringo* v. *Woodruff, supra; Pillow* v. *Sentelle, supra;* and *Miller* v. *Mattison, supra.*

It was contended in conference that *Schulte* v. *Walthour,* 239 Ark. 627, 393 S.W.2d 242 (1965) supports that position. *Schulte* quotes at length, and relies entirely on, the Court's prior decision in *Board of Directors St. Francis Levee Dist.* v. *Raney,* 190 Ark. 75, 76 S.W.2d 311 (1934). Both cases are clearly distinguishable from the matter now under review and, in fact, recite the distinction we make. Both cases involved petitions to intervene; neither involved a cross-complaint against co-defendants. In both cases the court points out that interventions, unlike cross actions, are not independent actions but merely ancillary proceedings and supplemental to the main case.[1] In holding that where there is an *intervention* the original parties must take note of subsequent pleadings, the court in *Raney* made it clear that this had no effect on its declarations with respect to *cross-actions* in *Ringo, Pillow* and *Miller* in the following language:

> Section 1204, Crawford & Moses' Digest, cited to support the contention that there must be process issued and served against the cross-defendant, has no application to proceedings by intervention. That section refers to a defendant already in court, and allows him to file a cross-complaint against persons other than the plaintiff where he has a cause of action affecting the subject-matter of the suit against a co-defendant or a person not a party to the action.
>
> In a suit where there is an intervention, the original parties are already in court, and must take notice of all subsequent proceedings in that action relating to the subject-matter of the suit. This includes intervening petitions. *The cases of Ringo v. Woodruff, 43 Ark. 496; Pillow v. Sentelle, 49 Ark. 430, 5 S.W. 783; and Miller v. Mattison, 105 Ark. 201, 150 S.W. 710, are not in conflict with the principle announced.* These cases hold that, where a cross-complaint is filed, process must issue and be served on the cross-defendant, but in all these cases the one made cross-defendant was

[1]Under Rule 24 (c), Arkansas Rules of Civil Procedure, interventions are now subject to the service provisions of Rule 5, just as are cross-complaints.

> a co-defendant with the one filing the cross-complaint, and therefore that procedure is governed by § 1204, *supra.* (Emphasis supplied)

We conclude that the chancellor erred in not setting aside that portion of the decree which adjudicated matters not properly before it and in dismissing appellant's separate action seeking to put that issue before the court.

The cause is affirmed in part and reversed and remanded in part for further proceedings not inconsistent with this opinion on the issue of the priority of appellant's lien as to Britton and their respective rights to participate in any surplus resulting from the foreclosure sale ordered by the court.

Affirmed in part and reversed and remanded in part.

GLAZE, J., dissents.

TOM GLAZE, Judge, dissenting. I believe the case law in *Schulte* v. *Walthour,* 239 Ark. 627, 393 S.W.2d 242 (1965), and *Fox* v. *Pinson,* 182 Ark. 936, 34 S.W.2d 459 (1930), requires this case to be affirmed.[1] Before discussing the rules of law found in *Schulte* and *Pinson,* a brief analysis of the facts in the instant case is necessary. The facts are not complicated and sequentially, the relevant facts are as follows:

> 1. *Briggs filed a mortgage foreclosure action and obtained valid service on* Worsham, Britton, Harris, Standley, Spring Lake Shores, Inc., and *Hodge.* Hodge was named because he might claim an interest in the subject property by virtue of a second mortgage. Briggs prayed, among other things, that his interests in the property be declared superior to all of the named defendants' interests.

[1]The Arkansas Rules of Civil Procedure were adopted effective July 1, 1979. Rules 5 (a) and 24 may well affect the prior Supreme Court holding in *Schulte* v. *Walthour* and *Fox* v. *Pinson.* These Rules were not argued before the trial court nor were they argued in this appeal.

2. Britton was the only party who filed an answer to the Briggs complaint. *Hodge* and the others *defaulted.*

3. *Britton* also *filed a counterclaim against Briggs and a cross-complaint against Worsham and Spring Lake Shores, Inc. (Spring Lake).* Britton's counterclaim and cross-complaint were based on a note, mortgage and assignment which had been recited in Briggs' foreclosure complaint as being the basis upon which Britton might claim an interest in the subject property. In her actions, Britton sought judgment against Briggs, Worsham and Spring Lake and that the judgment be held to constitute a first and prior lien on the property. *Hodge was never served a copy of Britton's counterclaim or cross-complaint.*

4. The court subsequently entered its decree finding all parties had been duly served with process and that Briggs and Britton were the only ones to appear for the hearing. It found that Standley and Harris had no interest or lien in the property and that if Hodge had any interest, it was by virtue of a mortgage which was subordinate to the liens of Briggs and Britton.

5. Hodge filed a motion to set aside the court's decree. This occurred eight days after the decree was entered and nearly two years after the Briggs foreclosure suit was filed and served on Hodge.

The factual issue is simple: Whether Britton was required to serve Hodge with a copy of her counterclaim and cross-complaint in the pending Briggs foreclosure suit even though (1) Hodge already had been made a party to the original foreclosure action, (2) Britton's cause of action in her counterclaim and cross-complaint recited the claim upon which Britton might assert an interest in the property and which, in fact, did serve as the basis of Britton's cause of action alleged in her counterclaim and cross-complaint. I believe service of the cross-complaint on Hodge was not necessary and that my position on this point is supported by the rules announced in *Schulte* v. *Walthour, supra,* and *Fox* v. *Pinson, supra.*

Procedurally, *Schulte* involved a complaint-in-intervention rather than a cross-complaint. Otherwise, the issue considered by the Supreme Court is strikingly similar to the one posed in the instant case. In *Schulte,* Holmes, a contractor, commenced building homes on properties owned by his wife. Walthour held four mortgages on the properties. Holmes became unable to complete the work, and Walthour foreclosed against the Holmeses. Walthour also named Big Rock Stone and Robinson Lumber Company as material lien holders. Schulte, a painting contractor who did work on the homes, was not made a party-defendant by Walthour. However, Schulte later intervened, seeking judgment for his services. He acquired service on Walthour but *not* on the Holmeses. Their summons was returned *non est.* The trial court held Schulte did not acquire a lien against the subject property because his complaint-in-intervention had not been served on the Holmeses. The principal question on appeal was whether Schulte, an intervening party, was required to obtain service on the Holmeses before he could claim a lien against the property. The Supreme Court reversed the trial court, holding that the Holmeses were parties to the litigation, and they were required to take notice of all subsequent proceedings relating to the pending litigation. The Supreme Court's decision in part was based on the fact that Walthour's original action essayed, *inter alia,* to establish priority of liens between himself, as mortgage holder, and the lien holders, Big Rock and Robinson Lumber Company. Accordingly, the court held it was entirely in order for the trial court to permit Schulte to intervene, since the same property was involved and his claim presented the same legal question. The court stated:

> "Appellant complains that the judgment by default was rendered without summons having been issued on the intervention or served on it, and it had no notice that the intervention had been filed. This would be of no avail to the appellant. An intervention is not an independent proceeding where it is against the plaintiff in the original action, but is ancillary and supplemental to the main case. *In a suit where there is an intervention, the original parties are already in the*

> *court and must take notice of all subsequent proceedings relating to the subject-matter, including intervening petitions.*" (Emphasis supplied).

Schulte v. *Walthour,* 239 Ark. at 631, 393 S.W.2d at 244 (quoting *Arkansas Bond Co.* v. *Harton,* 191 Ark. 665, 67 S.W.2d 52 [1935]).

The reasoning and logic employed by the Supreme Court in *Schulte* should be recognized in the instant case. The original action filed by Briggs involved the same property. Additionally, the claims and issues raised by Britton in her counterclaim and cross-complaint are consistent with and based upon the same allegations as set forth in Briggs' foreclosure complaint. From the time the original action was filed, the common issue for all the parties involved the establishment of priority of liens. Once Hodge knew his lien interests in the subject property were involved in the foreclosure action, he had a duty to exercise due diligence in following all subsequent proceedings in the suit which might affect his interests.

Before leaving this point, I address the majority's attempt to distinguish *Schulte* v. *Walthour.* In sum, the majority contends that interventions, unlike cross-actions, are not independent actions but merely ancillary proceedings. Thus, while the original parties must take notice of subsequent pleadings when an intervention is filed, this rule is inapposite in cases in which cross-actions are filed. This simply is not true, and the case of *Fox* v. *Pinson,* 182 Ark. 936, 34 S.W.2d 459 (1930) — cited by the majority — contradicts its position on this point. The Court in *Pinson* stated the general rule that cross-complaints are in the nature of independent suits, and parties defendant are required to be served in cross-complaints as in original complaints. However, the Court stated further that there is a distinction between cross-complaints that are merely defensive and those that seek affirmative relief. It concluded:

> If Mrs. Fox had merely made allegations in her cross-complaint which would entitle her to damages by way

of defense to the foreclosure suit, this would not have made her cross-complaint an independent action.

As I have already stated, Britton's cross-complaint alleged nothing new; she sought damages and entitlement to a lien which were by way of a defense to Briggs' foreclosure action. If Britton had asserted a new, independent cause, the ruling case law would have required such cross-complaint to have been served upon Hodge. That was not the situation here.

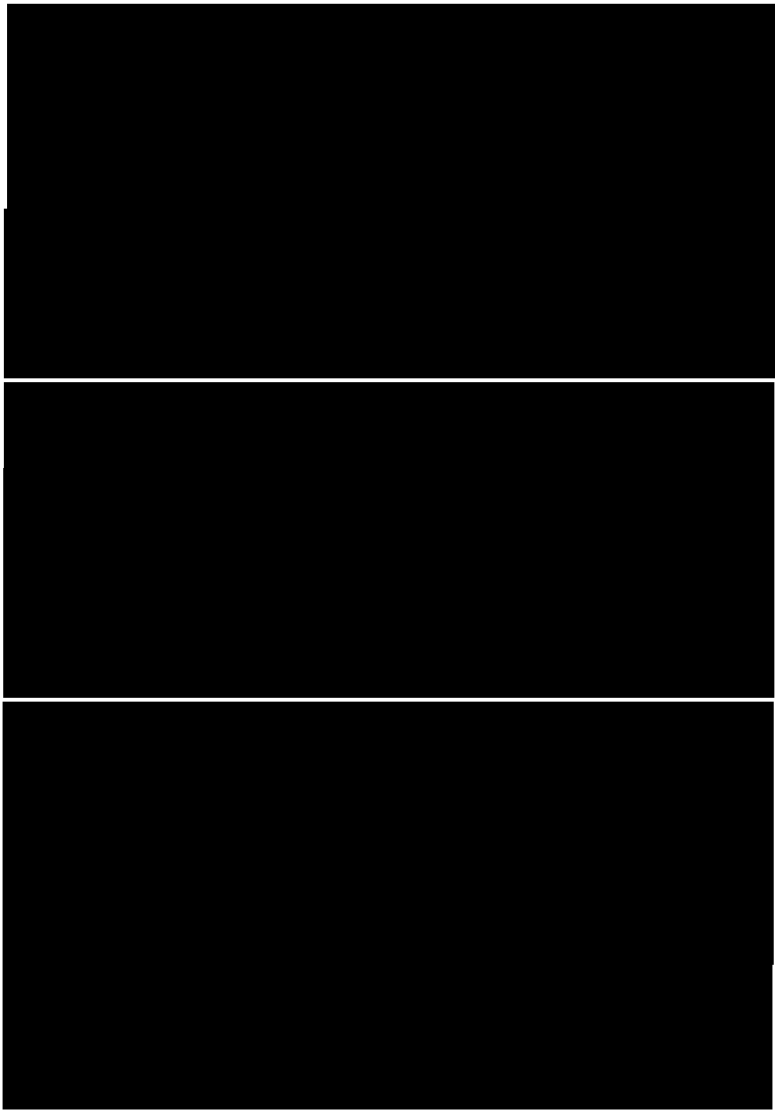
In conclusion, Hodge argues that he possesses a valid second mortgage which, he admits, is inferior to that held by Briggs. He claims, however, that his mortgage has priority over Britton's mortgage which was recorded after Hodge's. Contrary to Hodge's contention, no evidence was presented to the trial court that Hodge held a valid, enforceable note and second mortgage. The only reference to Hodge's possible interest is reflected in the Briggs complaint which alleged that Hodge "may claim an interest in said lands by virtue of a second mortgage. . . . " The court decreed that the mortgage lien of Hodge, *if any,* was subordinate and inferior to the liens of Briggs and Britton. Hodge defaulted after being duly served, he presented no evidence and he is now too late to assert a defense he should have interposed over two years ago.

Hodge was subject to the personal jurisdiction of the trial court, and the court was fully authorized to determine the priority of the various parties' interests. I believe the trial court was correct in denying Hodge's motion to set aside the court's decree. He simply sat on his rights and should not be heard to complain at this late date.

Virgil Lee HARPER *v.* STATE of Arkansas

CA CR 82-112 643 S.W.2d 585

Court of Appeals of Arkansas
Opinion delivered December 15, 1982



Acchione & King, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Virgil Lee Harper appeals from his conviction of possession of a controlled substance with intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981). The appellant admitted both the possession of marijuana and his intent to deliver to an undercover agent of the Little Rock Police Department but interposed the defense of entrapment. He maintains that the trial court erred in not directing a verdict in his favor on the issue of entrapment, in admitting evidence of prior criminal actions with which he was not charged, and permitting the jury to consider the amount of contraband seized when the quantity was not established by competent opinion testimony. We find no merit in any of these contentions.

The appellant first contends that the trial court erred in not holding as a matter of law that he had been entrapped. Ark. Stat. Ann. § 41-209 (Repl. 1977) provides:

> Entrapment. — (1) It is an affirmative defense that the defendant was entrapped into committing an offense. (2) Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

This statute places emphasis on the conduct of the law enforcement officer or persons cooperating with him in

determining whether the officer has induced the commission of the offense by persuasion or has merely afforded a person who is ready, willing and able to commit the offense the opportunity of doing so. The defendant's conduct and predisposition both prior to and concurrent with the transaction are material and relevant on the question of whether the accused was only afforded the opportunity to commit the offenses.

Entrapment is an affirmative defense which must be proved by a preponderance of the evidence. *Brown* v. *State,* 248 Ark. 561, 453 S.W.2d 50 (1970); *Spears* v. *State,* 264 Ark. 83, 568 S.W.2d 492 (1978). We can only say that there is entrapment as a matter of law if there is no factual issue to be resolved by the trial court. *Leeper* v. *State,* 264 Ark. 298, 571 S.W.2d 580 (1978). On appellate review we view the evidence in the light most favorable to the State and will reverse only if there is no substantial evidence to support the jury's verdict.

Sam Williams, a detective with the Little Rock Police Department, testified that on June 29, 1981, acting on information of an informant, he negotiated with the appellant the purchase of 100 pounds of "home grown" marijuana. He testified that appellant then demanded that he "see the money." The officer had in his possession some $20,000 which he then exhibited to the appellant. He testified that appellant then told him that he had to obtain the marijuana from Hampton, Arkansas, and that he would get it that evening, let it dry, and deliver it to him on July 1st. The officer testified that appellant then demanded $5,000 as "front money" which he refused. He stated that appellant then asked for $500 for expenses, which was also refused. He stated that appellant finally asked for and was given $100 as expense money and "to show that I was interested in the deal."

The officer testified that on July 1st the appellant called him and arranged a place for closing the transaction. The officer went to the designated place and was shown approximately 300 pounds of green marijuana. He stated that he was told that appellant would have to dry and bale it

himself "to make the agreed 100 pounds." At that time the appellant was arrested.

The police officer also testified that he had information from informants that appellant was dealing in controlled substances. Acting on that information he had contacted the appellant in early June, 1981. On June 24th he again went to appellant's home where he purchased half a pound of "home grown" marijuana from him. At that time he and the appellant discussed his obtaining up to 100 pounds of marijuana. He stated that four days later the appellant had called him and told him that he would be able to obtain the 100 pounds and agreed to meet.

If the State's version is accepted there was no persuasion or inducement by the officer. He had information that appellant was dealing in controlled substances and went to his home to purchase marijuana, indicating that he had a substantial sum to invest and wanted to buy 100 pounds of marijuana. Four days later the appellant informed the officer that he could obtain that amount but would have to cut and dry it before delivery, which was three days later.

Appellant testified that he had never dealt in marijuana and when first approached by the officers he so informed them. He testified that he was approached by the informant and officers who told him he could make $20,000 in the deal, that he thought about it and "that it was a lot of money." He stated that he needed the money and agreed to obtain the marijuana on that sole inducement. There was evidence in the record that appellant had sold marijuana on at least one prior occasion and clearly he was able to produce a large amount in a short period of time.

The jury was not required to believe the appellant's testimony nor give it greater weight than that given to the police officer's. *Wrather* v. *State,* 1 Ark. App. 155, 613 S.W.2d 601 (1981). It could easily determine that appellant was predisposed to selling marijuana and that the officers merely afforded him an opportunity to do that which he was ready, willing and able to do. When the evidence is viewed in the light most favorable to the State we cannot say that the

finding that he had not been entrapped is not supported by substantial evidence.

The appellant next contends that the trial court erred in admitting evidence of other offenses with which the appellant had not been charged. In direct examination of the officer the prosecuting attorney made no reference to earlier contacts or transactions between the officer and appellant. He questioned the officer only as to the June 29th meeting and the July 1st arrest. For the purpose of establishing entrapment defense counsel asked Officer Williams if he had visited appellant's home on June 2nd and what his purpose was at that time. The officer answered that he went to appellant's home "at which time he sold me seven white tablets." Defense counsel objected that the answer was not responsive and the court sustained the objection and ordered the answer stricken. If there was error in this answer it could have been cured by the court's sustaining the objection and admonishing the jury to disregard it. Where no request to admonish the jury is made, and appellant did not request it here, it is not error to fail to do so. *Fears* v. *State,* 262 Ark. 355, 556 S.W.2d 659 (1977).

After this the prosecutor, referring to defense counsel's question as to the purpose of the June 2nd visit, asked the officer why he went there on that date. The witness answered that he went there "to purchase Quaaludes." He was then asked if he did in fact purchase the contraband but he did not answer due to a timely objection by defense counsel. He was not thereafter asked, nor did he state, whether he purchased any contraband at that time, even though the trial court indicated that he would permit that answer. Defense counsel did not request any cautionary instruction.

The officer was then asked to state the purpose for which he went to appellant's home on June 24th. The officer answered that he went there for the purpose of purchasing marijuana and that he in fact did purchase half a pound of home grown marijuana for $100. Over defendant's objection the trial court admitted the question and answer. According to the officer, at that time the appellant advised him that he had a supply of marijuana and the officer then discussed

with him the larger purchase of the 100 pounds. We find no error in this ruling of the court.

Rule 404 (b), Uniform Rules of Evidence, provides that evidence of other crimes or acts is not admissible to prove the character of a person or that he is a bad man, but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or acts absent of mistake or accident. However, such actions may be admissible if they are so interrelated in time and substance as to form one transaction or are relevant to the main issue in the sense of tending to prove some material point rather than merely to prove the defendant is a criminal. *Setters* v. *State,* 4 Ark. App. 46, 627 S.W.2d 263 (1982). In the case at bar three meetings between the appellant and the officers took place in one week. Those meetings were so interrelated by time and substance as to form a single transaction. At the first meeting the appellant sold the officer half a pound of marijuana and agreed to try and deliver the larger amount. At the second meeting four days later appellant informed the officer that he had obtained the marijuana and arranged for a delivery date and received $100. At the third meeting the larger amount of marijuana was delivered as agreed.

Evidence of these acts was also admissible to rebut the inference that appellant had been entrapped. Appellant's testimony tended to show that the officers had induced him to do an act which he had never done before by offering him a large sum of money which he sorely needed at the time. The evidence tended to prove that material point rather than merely that the defendant was a criminal and was admissible for that purpose. *Setters* v. *State, supra.*

The officers testified that when the marijuana was delivered it was green. There was testimony that in its green stage it weighed 286 pounds but it was never weighed after it had dried. Officer Williams was permitted to testify that in his opinion the dry weight of the marijuana delivered to him would be around 100 to 120 pounds. Appellant contends that it was error for the court to permit that opinion from one not qualified as an expert and to instruct the jury that they might consider the amount of quantity of the mari-

juana along with all other circumstances in determining the purpose and intent for which the marijuana was possessed. The police officer testified that he had bargained with the appellant for 100 pounds of dry home grown marijuana and that at the time the bargain was struck the appellant stated that he would dry it before delivery. He testified that he had been an officer dealing with narcotics for approximately three years and had received special training in that field. Defense counsel objected on the grounds that the officer was not an expert qualified to make a quantitative analysis of dry weight. The trial court determined that he had sufficient in-service training and experience to give such an opinion. *Euton* v. *State,* 270 Ark. 121, 603 S.W.2d 468 (Ark. App. 1980). It is well established that the determination of an expert's qualification as a witness is within the sound discretion of the trial court and absent an abuse of discretion we do not reverse its decision. *Smith* v. *State,* 258 Ark. 601, 528 S.W.2d 389 (1975); *Ray* v. *Fletcher,* 244 Ark. 74, 423 S.W.2d 865 (1968). The court properly instructed the jury that an expert witness is a person who has special knowledge, skill, training or education on a subject to which his testimony relates and that they should consider his opinion in the light of his qualifications and credibility. They were further instructed that they were not bound to accept an expert opinion as conclusive but should give it that weight which they felt it was worth. They were further instructed that they may disregard it completely if they found it to be unreasonable. We find no error.

Affirmed.

Michael FERRELL *v.* STATE of Arkansas

CA CR 82-121 644 S.W.2d 302

Court of Appeals of Arkansas
Opinion delivered December 15, 1982
[Rehearing denied January 19, 1983.]

John Burris, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Michael Ferrell, was found guilty of possession of a controlled substance and was sentenced to one year in the Clay County jail and fined $1,000.00. We affirm.

Deputy Sheriff Jim Earl Groning and Game and Fish Warden Austin Arnold observed appellant and William J. Woods parked on Highway 135. Upon approaching the vehicle, Deputy Groning observed beer bottles strewn about the car. The officer asked the driver, William Woods, for his

driver's license. When Woods got out of the car to show his license, the officer observed marijuana butts, seeds and a roach clip on the floorboard of the vehicle. After gathering these items up, Mr. Woods told the officer to look in the trunk of the car. The appellant was in an intoxicated state. He ran away from the officers and returned after the officers had searched the vehicle.

According to Rule 11.2 (b) of the Arkansas Rules of Criminal Procedure a vehicle can be searched if consent is given by the registered owner or one who is in "apparent control of the operation at the time consent is given." Clearly consent was given in this case by one in "apparent control." Some relatively recent cases in Arkansas have determined the question of apparent authority to consent. The United States District Court stated in *U.S.* v. *Butler,* 495 F. Supp. 679 (E.D. Ark. 1980) that:

> It is well settled that consent to search effective to validate a warrantless search and seizure may, in appropriate circumstances be given by a person other than the victim of the search. *Frazier* v. *Cupp,* 394 U.S. 731 (1969). This third person authority may be based upon the fact that the third person shares with the absent target of the search a common authority over, general access to or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others. *United States* v. *Matlock,* 415 U.S. 164 (1974).

It was reasonable for Deputy Sheriff Groning to believe that William Woods could consent to the search. When the sheriff first saw the Ferrell vehicle, Woods was the driver of the vehicle. The Sheriff also testified that he did not know Ferrell was the actual owner until he looked up the registered owner the next day. Although appellant later protested, initially, Woods went to the trunk of the car to let the deputy search it without any argument on Ferrell's part. Woods testified that the appellant wanted him to drive

because he had been drinking. Thus, Woods had apparent control of the vehicle. In addition, appellant abandoned the car, leaving the keys to the vehicle with the officers.

We hold that the trial court was correct in refusing to grant appellant's motion to suppress and affirm.

Charles LEWIS *v.* STATE of Arkansas

CA CR 82-69 644 S.W.2d 303

Court of Appeals of Arkansas
Opinion delivered December 22, 1982
[Rehearing denied January 19, 1983.]

Morehead & Associates, by: *Robert F. Morehead,* for appellant.

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

MELVIN MAYFIELD, Chief Judge. The appellant was found guilty of possession of cocaine with intent to deliver and was sentenced to ten years. He was also found guilty of possession of marijuana and Valium and fines were imposed for those offenses. He appeals only the conviction for possession with intent to deliver and his first contention is that the jury's verdict was contrary to the law and evidence.

There was testimony that law enforcement officers, acting with a search warrant, searched appellant's house and seized the following items: $500.00 in bills of various denominations; a plastic sandwich bag containing approximately five grams of a white crystalline powder; a bag containing approximately one ounce of vegetable matter; an unlabeled bottle containing 81½ tablets; a single-pan scale calibrated in grams and another scale calibrated in ounces; a quantity of cigarette papers; and several glass and metal smoking pipes. Arkansas State Crime Laboratory chemists who tested the powder, vegetable matters, and tablets seized from appellant's home testified that the bag of white powder weighed 6.3 grams and contained 2.1547 grams of pure cocaine mixed with a larger amount of sugar, that the vegetable matter was marijuana, and the tablets were Valium.

Appellant testified in his own defense and admitted that the items seized were his, but said the cocaine was for his own personal consumption and that he had not engaged in selling any drugs. He testified that the scales were gifts and that the money came from his used car business.

Appellant's former wife testified that she was aware appellant smoked marijuana and sometimes laced it with cocaine, but that she had never known him to sell any controlled substances to anybody, either before or after his arrest. She testified that the money seized by the officers came from a car sale; that appellant had been collecting money from cars to go to an auction in Little Rock the following week; and that he normally kept his money at home.

The appellant argues that the evidence could have supported a conviction for possession of cocaine, but not for possession with intent to deliver. Intent, or state of mind, is not subject to direct proof but must be inferred. We think there was sufficient evidence for the jury to make that inference in this case. The amount involved, 2.1547 grams of pure cocaine, was evidence which the jury could properly consider in determining the purpose or intent with which it was possessed and, in keeping with Arkansas Model Criminal Instruction 3307, the jury was so instructed. Other

evidence seized in appellant's home, from which the jury could reasonably infer the requisite intent, included the large amount of money in a variety of denominations and the scales calibrated in grams.

It is settled that purpose can be established by circumstantial evidence, and often this is the only type of evidence available to show intent. *Washington* v. *State,* 268 Ark. 1117, 1120, 599 S.W.2d 408 (Ark. App. 1980). However, as *Washington* says, the circumstances established by the evidence must be such that the requisite purpose of the accused can reasonably be inferred, and the evidence must be consistent with guilt of the accused and inconsistent with any other reasonable conclusion. The jury was so instructed in this case and the appellant contends that his evidence provided the jury with just such a reasonable alternate conclusion, and that the jury could not, under the law and the instructions, find him guilty of possessing the contraband with the intent to deliver it, based on the circumstantial evidence in this case.

The jury is not required, however, to believe the testimony of any witness, and especially not that of the accused who is certainly interested in the outcome of the trial. *Core* v. *State,* 265 Ark. 409, 578 S.W.2d 581 (1979). It was the jury's prerogative, as the trier of fact, to evaluate the evidence and draw its own inferences as to why appellant had the cocaine in his possession. *Milburn* v. *State,* 260 Ark. 553, 542 S.W.2d 490 (1976). In *Caradine* v. *State,* 189 Ark. 771, 75 S.W.2d 671 (1934), the court said:

> [T]here is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and, if the jury believes from the circumstances introduced in evidence beyond a reasonable doubt that the defendant is guilty, it is the duty of the jury to find him guilty, just as it would if the evidence was direct.

In this case, the jury found appellant guilty of possession with intent to deliver. We cannot say the evidence was insufficient to support the verdict.

Appellant's second point argues that the evidence seized should have been suppressed because the nighttime search was in violation of the Arkansas Rules of Criminal Procedure.

The pertinent part of the affidavit upon which the search warrant was issued reads as follows:

> That a confidential informant who has furnished reliable information in the past which led to the location of a fugitive felon, and who has, in the past, purchased illegal drugs from Charles Lewis at 406 West 3rd St., Smackover, Ark., furnished information that during March, 1980, he observed Charles Lewis sell marijuana and cocaine, and that Charles Lewis had secured the drugs from a back room of that residence.
>
> . . . .
>
> The informant stated that many sales take place at night and a night search may be more successful.

Our Criminal Procedure Rule 13.2 (c) provides:

> (c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> . . . .
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Appellant's only argument on this point is based on the very narrow contention that the affidavit did not state that the warrant could be safely or successfully executed *only* at nighttime. First, we note that Criminal Procedure Rule 16.2 (e) provides that a motion to suppress shall be granted only if the court finds that a violation is substantial or it is otherwise required by the United States or Arkansas Constitutions. Both constitutions prohibit unreasonable searches and seizures and it has been pointed out that affidavits for search warrants should be tested and interpreted in a commonsense and realistic fashion under both of them. *Baxter* v. *State,* 262 Ark. 303, 556 S.W.2d 428 (1977). Also, appellant's argument overlooks the other part of Rule 13.2 (c) (iii) which provides that a nighttime search may be authorized if the warrant can be safely or successfully executed only under circumstances the occurrence of which is difficult to predict with accuracy.

Considered in the light of the above, we find that the trial court's ruling on the motion to suppress should be sustained. As in *Blankenship* v. *State,* 258 Ark. 535, 527 S.W.2d 636 (1975), we accord some weight to the decision of the judicial officer who issued the warrant and from the language of the affidavit we find that he could have reasonably believed that the occurrence of daytime sales were so difficult to predict that the warrant could be successfully executed only at nighttime when many sales take place and when supplies are likely to be present in the back room of appellant's residence.

No argument is made here as in *State* v. *Broadway,* 269 Ark. 215, 599 S.W.2d 721 (1980), that the language of the affidavit was so conclusory that the judicial officer could not make an independent and neutral determination of reasonable cause for the issuance of the warrant. We think, however, that the language here is no more conclusory than the officer's statement that "evidence of the crimes might be disposed of" which was approved in *Harris* v. *State,* 262 Ark. 506, 509, 558 S.W.2d 143 (1977). There the court found no substantial violation of Harris' rights and we find no substantial violation of the appellant's rights here.

Affirmed.

Pamela Jane Anderson WILSON *v.*
John Dan KEMP, Jr., Administrator

CA 82-152 644 S.W.2d 306

Court of Appeals of Arkansas
Opinion delivered December 22, 1982
[Rehearing denied January 19, 1983.*]

*CLONINGER and GLAZE, JJ., would grant rehearing.

Herby Branscum, Jr., for appellant.

Steve Clark, Atty. Gen., by: *E. Jeffery Story,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Pamela Jane Anderson Wilson appeals from an order of the Probate Court of Stone County denying her petition for probate of a holographic will purportedly written and signed by Jack Blue, deceased. She advances four arguments for reversal of that order and also appeals a subsequent order disapproving a settlement agreement between her and the State for an equal division of the assets of the estate. We find no merit in either appeal.

A general recital of the background and events leading to these appeals is necessary for an understanding of the issues presented. A more specific recitation of the details pertinent to the issues will be made as those issues are addressed.

Jack Blue died at the age of eighty on November 19, 1977. Prior to his death he had established a close relationship with appellant who had done chores for him and treated him with kindness since she was twelve years old. She was approximately seventeen years of age at the time of his death. There was testimony from appellant and others that he had stated on numerous occasions that at his death she would receive his entire estate. At the time of his death, however, no will was found. On December 8, 1977 John Dan Kemp, Jr. was appointed administrator of Blue's intestate estate which was ultimately valued in excess of $55,000. As the petition for appointment of administrator listed no relatives of the deceased within those inheriting classes set forth in Ark. Stat. Ann. § 61-149 (Repl. 1971) the prosecuting attorney appeared on behalf of the State in order to protect the interest of the State in the event of escheat pursuant to Ark. Stat. Ann. § 61-150 (Repl. 1971).

Over a year later appellant offered for probate as the last will of the deceased a writing purportedly written and signed by the deceased. She testified that the writing was found among papers delivered to her by the coroner after Blue's funeral. The proffered will was as follows:

At my deth [sic] Pamela Anderson gets every thing.

Jack Blue

The State answered denying that the will was a valid one and prayed that the petition be denied. Prior to the hearing the State withdrew its objection. The court then instructed the administrator to take an adversary position to admitting the will. At the conclusion of the hearing, and over the objection of appellant, the court on its own motion appointed a handwriting expert to examine the documents. The expert filed a written report that the proffered writing was forged. The court entered its order denying the appellant's petition to admit the will to probate and appellant filed a timely notice of appeal from this order.

Thereafter appellant entered into an agreement with the prosecuting attorney under which the administrator would be paid a fee of $3,000 and the balance of the estate would be equally divided between the two parties. This agreement was expressly made subject to the approval of the court. On January 5, 1982 the court entered its order disapproving the settlement, finding that the agreement was not in the best interest of the estate. Appellant appeals that order also.

I.

The appellant first contends that the court's holding that the proffered holographic will was forged was against a clear preponderance of the evidence. She argues that of the twelve persons who testified at the August 11th hearing, eleven stated that they were familiar with the signature and handwriting of the deceased and expressed their opinion that the proffered will was written entirely in the handwriting of the deceased. Only Gary Sutton, who denied having ever seen the handwriting or signature of the deceased, did not join in that opinion. This argument would be more persuasive if the probate judge had made his determination solely on the basis of the evidence adduced at that hearing. But the judge did not do this.

At the conclusion of the hearing the judge indicated that he was not satisfied and was considering the appointment of a handwriting expert. He subsequently did so. On August 31, 1981 the expert filed his report with the court in which he concluded, "I am positive the words and signature (on the proffered will) were fabricated by someone other than Jack Blue in clumsy, crude imitation of Blue's handwriting."

Ark. Stat. Ann. § 62-2117 (b) (Repl. 1971) provides that proof of a holographic will shall be made by the testimony of at least three credible disinterested witnesses proving the handwriting and signature of the testator and such other facts and circumstances as would be sufficient to prove a controverted issue in equity. Controverted issues in equity are determined by a preponderance of the evidence. The factual question before the court was whether the proffered document had been forged. It is true that more witnesses testified for the appellant than for the appellee, but the weight of evidence depends upon its effect in inducing belief. The question is not on which side the witnesses are more numerous, but what is to be believed. *Romaines* v. *Brumfield,* 199 Ark. 1066, 136 S.W.2d 1026 (1940). This is not to say that the evidence of appellant's witnesses was not credible. It simply means that the judge may, and did, attach greater weight to that of his expert than to the lay witnesses. The record does not justify our finding that the decree is contrary to a preponderance of the evidence unless, as appellant argues, the court erred in considering the expert's report at all.

II.

Appellant next contends that the trial judge abused his discretion in appointing an expert witness. We do not agree.

At the time the probate judge announced his decision to appoint a handwriting expert pursuant to Rule 706, Uniform Rules of Evidence, appellant filed a written objection stating four grounds for opposing the appointment. She maintained that as no witness refuted the overwhelming evidence that the writing was genuine, the court had no basis

to suspect forgery; that there was no formal objection to the probate of the will by any person with standing to do so; and "for the reason that the petitioner will not be allowed to cross-examine the person making the examination and such examination has not been afforded by the court." We find no merit to these arguments.

Although the trial judge did not specifically state the basis for his suspicion, it appears from the report of the expert that it had a reasonable basis. The trial judge had before him the proffered will and numerous known specimens of the deceased's signature and handwriting. During the trial the probate judge freely exercised his prerogative to interrogate the witnesses. In his questioning of the bankers it is clear that he felt that they had placed too much emphasis upon a signature card on file, and on matching only the signature part of the proffered will. It is clear that he felt they had given too little attention to a comparison of the specimens of the deceased's handwriting to the text of the will. At the conclusion of the hearing he asked counsel if anyone had submitted the document to a handwriting expert for analysis and indicated that he was considering doing so on his own motion as provided in Rule 706. We cannot conclude that the trial judge abused his discretion in exercising his right under Rule 706 to appoint the expert.

Nor can we agree that appellant was not afforded the right to cross-examine the court appointed expert, as she alleged in her objection to the appointment and has argued here on appeal. After the expert's report was filed she was fully offered that opportunity by the trial court and declined to exercise it.

On August 12th the court appointed Charles C. Scott of Kansas City, Missouri, a handwriting expert of his own selection. Mr. Scott was informed of his duties by the court in writing and a copy of those instructions was filed with the clerk as provided in Rule 706. The court also provided to Mr. Scott the proffered will and nineteen known specimens of the handwriting and signature of the deceased introduced at the hearing.

On August 31st Mr. Scott reported in writing to the court that the proffered will was a "crude, clumsy imitation of Blue's handwriting" fabricated by someone other than the deceased. He described the various tests he had made and the reasons for having reached that conclusion. The court furnished all interested parties with a copy of the report and all other correspondence and documents in connection with it.

On September 4, 1981 the probate judge directed that the expert's report be made part of the record, informing all interested parties that they would be afforded the right to reopen the record for the taking of evidence from other experts of their own choosing and/or to take the deposition of Mr. Scott. He requested that counsel inform him of their intention as to deposing Mr. Scott or calling other experts by September 14th.

On September 11th appellant filed her motion asking the court to extend the time for her decision as to taking Scott's deposition or reopening the record to September 25th. The court granted that request. She also petitioned the court to enter into the record the amount charged by Mr. Scott for his examination and this also was granted. She also petitioned "in the event she decided to take the deposition of Mr. Scott" the cost of the deposition be borne by the estate. We conclude that she was afforded the right to cross-examine the witness, was made fully aware of that right and given ample opportunity to exercise it. She elected not to do so.

A careful review of the record discloses that at no time after September 4th or in any subsequent proceeding did the party interpose an objection to the action of the trial judge in making the expert's report a part of the record or of his considering it. That issue cannot be raised for the first time on appeal. *State Highway Commission* v. *Lone Star, Inc.*, 4 Ark. App. 103, 628 S.W.2d 23 (1982).

Mr. Scott's report did contain extra-judicial statements received in evidence to prove the truth of the matters asserted. Clearly the document was objectionable hearsay

under Rule 801, Uniform Rules of Evidence. That hearsay is objectionable, however, does not necessarily mean that it is incompetent. Absent an objection, hearsay, if relevant, is competent and entitled to consideration by the trial court and by a reviewing court in support of its findings. *Rinke* v. *Shackleford,* 248 Ark. 941, 455 S.W.2d 83 (1970); *McWilliams* v. *R & T Transport, Inc.,* 245 Ark. 882, 435 S.W.2d 98 (1968).

III.

The appellant next contends that the court erred in directing the administrator to take an adversary position to the admission of the proffered will. She argues that the record shows that under the facts of the case the estate would escheat to the state since no heirs had been located. She argues that the state had filed an objection to the probate of the will but later had withdrawn it and had made known to the court that it had no further objection to the petition to probate the will. She cites no cases in support of her position and does not present a persuasive argument. The record does not clearly establish an escheat and no action designed to effect escheat had been initiated under Ark. Stat. Ann. § 61-150 (Repl. 1971) or § 62-1801, *et seq.* (Repl. 1971). Appellant testified that the deceased had once been married and had two children. A probate judge has a higher duty to preserve the interest of all those who are or might become beneficiaries of a decedent's estate. The probate judge made it clear in the record that he was taking that action only in pursuit of the truth and "historically, courts have always found that the best way to get to the truth" was to have adversaries "ferreting it out from what the other presents." We find no error in the court's action.

IV.

Appellant argues that the trial court erred in not considering the *animus testandi* expressed by the decedent. There was testimony from the appellant, her parents and another witness that the deceased had stated that he intended that appellant receive all of his estate at his death. It is well settled that a will, such as that offered here, must be in writing. The testamentary intent of the deceased, no matter

how often expressed, does not dispense with that requirement.

On November 27, 1981, the appellant entered into an agreement with T. J. Hively, prosecuting attorney for the Sixteenth Judicial District, in which the parties agreed to a settlement of their disputed claims. This agreement provided that the administrator of the estate should be paid an additional fee of $3,000 and that the remainder of the estate would be divided equally between the appellant and the State of Arkansas. It was further agreed that they would present the agreement to the probate court for its approval and if approved the appellant agreed to dismiss her appeal. On January 5, 1982 the administrator filed his petition stating that no known heirs had been located and that the estate should escheat to the state. The petition then set forth the agreed settlement of November 27, 1981. The court denied the petition finding that the amount of the settlement was in excess of what was reasonable under the circumstances and that it would not be in the best interest of the estate that it be approved. The appellant contends that the court erred in its order. In support of her position she argues the well established principle that the law favors and encourages settlements of disputes among parties.

It is to be noted that the agreement was made expressly subject to approval by the court. The court found that the settlement was not fair and equitable and not in the best interest of the estate and denied it. We find no abuse of discretion in that order.

While the parties might make such division of their distributive share of the estate after an order of distribution has been entered and complied with, we are cited no authority which compels a probate court to order distribution in accordance with agreements which he finds unfair.

Affirmed.

GLAZE and CLONINGER, JJ., dissent.

Mary Bea VAN WINKLE *v.* Larmon D. VAN WINKLE

CA 82-136 644 S.W.2d 311

Court of Appeals of Arkansas
Opinion delivered December 22, 1982

David E. Smith of *Smith & Boswell,* for appellant.

Barron, Coleman, Barket & Smith, P.A., by: *Gary P. Barket,* for appellee.

LAWSON CLONINGER, Judge. This is an appeal from the refusal of the trial court to dissolve a temporary order which changed the custody of the two children of the parties from the mother to the father.

Appellant, Mary Bea Van Winkle (now Estes), was granted a divorce from appellee, Larmon D. Van Winkle, on January 8, 1979, at which time the parties were awarded joint custody of their children, Larmon D. Van Winkle, Jr., then four years of age, and Michael Paul Van Winkle, then one year of age.

Appellant subsequently remarried and petitioned the court to modify the joint custody arrangement and to give her permission to move with her new husband to North Carolina. Appellee resisted the motion of appellant, and, after a full hearing, the court, on December 3, 1979, entered

an order which granted appellant permission to remove the children from the state. The court also granted custody of the children to appellant for nine months each year, the time to coincide with the opening and closing of school after the children began attending school. Appellee was granted custody for three months each year beginning the later of June 1 or two days after the closing of school. The non-custodial parent was additionally given stated visitation rights.

On March 25, 1980 a motion filed by appellee requested that appellee be awarded custody of the children for nine months of the year, and on September 4, 1980 the court entered a temporary order which provided that the children be returned to the custody of appellant until December 26, 1980; that appellant on that day was to deliver the children to appellee, and that appellee was to have custody of the children until the older child began the first grade of elementary school. The order provided that the court would make a decision with regard to permanent custody upon the petition of either party.

At the hearing on the motion the trial court found that the fact that appellant had gone to work since the permanent order of December 3, 1979 was entered was a change in circumstances, but that it was not a material change.

On February 23, 1981 appellant filed her motion requesting that she be awarded the custody of the children during the regular nine months school term, stating that she was not working and had no intention of working. A hearing on the motion was conducted on August 10, 1981, and on September 10, 1981, the court entered an order providing that "the temporary order is left as is, pending a change in the future." This appeal is from that order.

Appellant contends that the trial court erred when it modified a permanent order, the order of December 3, 1979, from which no appeal was taken, although no material change in circumstances was shown. We agree.

The trial court found that appellant's employment did not constitute a material change in circumstances since the

entry of the permanent order, and that finding is amply supported by the evidence. No other changes were shown.

Appellee's contention that the interests of the children would be better served by remaining in their circle of friends and their numerous relatives has considerable merit, but those contentions were before the trial court when the permanent order of December 3, 1979 was entered. Appellee will not be permitted to re-litigate that issue. A decree with respect to the custody of a child is subject to modification in the light of circumstances which have changed since the rendition of the original decree. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978). The party seeking a change of custody must assume the burden of showing such changed conditions as would justify a modification. *Plum* v. *Plum,* 252 Ark. 340, 478 S.W.2d 882 (1972). In the instant case, at the hearing on the motion to dissolve the temporary order, the trial court correctly observed that in order to obtain a change in custody the moving party had to show a material change of circumstances.

By its own terms, the temporary order entered by the trial court dissolved itself in August, 1981, when the older child began the first grade of elementary school. On September 10, 1981, the court entered no permanent order, but merely declined to dissolve the temporary order.

The judgment is reversed and the cause is remanded to the trial court with directions to reinstate the permanent order of the court entered on December 9, 1979.

GLAZE, J., not participating.

Michael WILKINSON, d/b/a WILKINSON BROTHERS CONSTRUCTION CO. *v.* AMOS ENDERLIN CONTRACTING CO., INC.

CA 82-134 644 S.W.2d 313

Court of Appeals of Arkansas
Opinion delivered December 22, 1982
[Rehearing denied January 19, 1983.*]

A. G. Burkhart, Jr. and *Robert Smith, Esq.*, of counsel, for appellant.

Anderson & Kilpatrick, by: *Joseph E. Kilpatrick, Jr.*, for appellee.

DONALD L. CORBIN, Judge. Appellee, Amos Enderlin Contracting Co., Inc., filed suit in Pulaski Chancery Court seeking judgment against appellant, Michael Wilkinson, d/b/a Wilkinson Brothers Construction Company, in the amount of $27,795.25 for work performed under a subcontract with appellant. The work consisted of the removal of rubble and debris on lands owned by Doyle W. Rogers and Josephine Rogers, his wife. Appellee also sought to impose a lien on Doyle W. Rogers and Josephine Rogers' land located in Little Rock, Pulaski County, Arkansas. At the request of

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

appellant, the case was transferred to the Pulaski County Circuit Court.

Appellee filed Requests for Admissions and Interrogatories. Appellant did not respond within 30 days and was deemed to have admitted that the exact amount sued for was due and constituted the proper amount by which to render judgment. Appellee sought summary judgment against appellant, asking that it be granted a lien against the Rogers' property.

The trial court granted appellee's motion for summary judgment in the amount of $30,505.26 plus interest against appellant and a lien on Doyle W. Rogers and Josephine Rogers' land in the amount of $30,921.81 plus interest. From that summary judgment, appellant has appealed to this court stating that summary judgment was not proper. We affirm.

Appellant argues that the Requests for Admissions and Interrogatories filed by the appellee did not comply with the requirements of Rule 36 of the Arkansas Rules of Civil Procedure. Request No. 4 reads as follows:

> REQUEST NO. 4: Admit that Exhibit "A" hereto are true copies of statements submitted by plaintiff to Wilkinson
>
> (a) The number of hours worked per day by the Caterpillar 955L Loader and Operator;
>
> (b) The number of hours worked per day by the JD 410 and Operator;
>
> (c) The number of loads hauled by dump trucks and drivers provided by plaintiff;
>
> (d) All amounts paid by Wilkinson Brothers Construction Co. for work performed by plaintiff pursuant to contract relating to the property described in the Complaint;
>
> (e) The amount due plaintiff from Wilkinson Brothers Construction Co. for the work performed pursuant to contract relating to the property described in the Complaint.

Exhibit "A" referred to in the Requests for Admissions and Interrogatories contained statements showing the billing methods of appellee, credits and the total amount alleged to be due.

Although appellant argues that Request No. 4 was ambiguous and does not comply with Rule 36 of the Arkansas Rules of Civil Procedure, we believe that its wording conforms to the requirements of Rule 36. Rule 36 authorizes a party to serve upon any other party a written request for the admission of the truth of any matter that relates to statements or opinions of fact, including the genuineness of any documents described in the request. Here, appellee requested that appellant admit that the statements in Exhibit "A" were true copies which directly reflected those items in subparagraphs a through e.

Appellant did not admit, deny or object to the Requests for Admissions and Interrogatories nor did he respond to appellee's motion for summary judgment. The granting of summary judgment was proper under these circumstances.

In *Thomas* v. *Poff,* 268 Ark. 939, 597 S.W.2d 838 (Ark. App. 1980), this court held that a summary judgment finding appellants liable for a real estate commission was appropriate, there being no question of fact outstanding in view of deemed admissions by the appellants as well as a lack of timely objection or opposition to the motion. The appellees had made their summary judgment motion on the basis of the deemed admissions by appellees. Neither appellants nor their counsel appeared at the hearing, and the court granted the motion. In affirming the trial court's decision, this court stated:

> If the law and the justice system were administered without rules, we would have adjudication at the whim of the adjudicators, a miasma which even the most ill-disciplined could not tolerate. The strength of our legal system comes largely from the fact that it is a system, and to refuse to require order in the manner of reaching fair dispositions of disputes would be to kick aside a major peg of the law's contribution to our

civilization. True, our rules are complex, and perhaps too much so for lay persons. Thus we have a need for lawyers who are familiar with and able to apply them. In our view the "justice" which the appellant's counsel insists his clients are being denied requires even-handed adherence to procedural requirements. Whimsical departures from them in the service of the needs of those who refuse to abide by the rules would do ultimate and universal disservice to the cause of fairness for all.

We affirm.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I agree with the appellant's contention that the Request for Admission No. 4 is so ambiguous it cannot constitute the basis for a summary judgment.

The first sentence of the request is: "Admit that Exhibit 'A' hereto are true copies of statements submitted by plaintiff to Wilkinson Brothers Construction Co. directly reflecting . . . . " Already, we have a problem.

It is clear that the sentence does not ask the appellant to admit that the exhibit *contains statements which correctly reflect* the hours actually worked and the amounts actually due. It asks appellant to admit that the exhibit *contains true copies of statements which directly reflect* the number of hours worked and the amounts due.

The difference is between admitting the statements are true copies of those which have been submitted and admitting they correctly reflect the work which has actually been done and the amount which is actually due. Thus, when we hold that the *request* is admitted, what are the *facts* which we say have been admitted?

In *Walker* v. *Stephens,* 3 Ark. App. 205, 210, 626 S.W.2d 200 (1981), this court stated these general rules applicable to motions for summary judgment:

> On such motions the moving party has the burden of demonstrating that there is no genuine issue of fact for trial and any evidence submitted in support of the motion must be viewed most favorably to the party against whom the relief is sought. Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. . . . if there is any doubt whatsoever the motion should be denied.

As applied to the issue here involved, the Arkansas Supreme Court said in *Hood* v. *Welch,* 249 Ark. 1159, 1163, 463 S.W.2d 362 (1971):

> Furthermore, we have specifically held that if doubts exist which render the meaning of a written instrument ambiguous, there then arises an issue of fact to be litigated which precludes summary judgment.

In *Porter* v. *Deeter Real Estate,* 255 Ark. 1057, 1059, 505 S.W.2d 18 (1964), the court reversed the granting of a motion for summary judgment because a fact issue was involved since "the contract here is somewhat ambiguous." And in *United States* v. *Lange,* 466 F.2d 1021 (9th Cir. 1972), a summary judgment was reversed because of an ambiguity in the material presented and the court said, "this is precisely the kind of factual determination that is not appropriate for decision on motion for summary judgment."

I would reverse the judgment in the instant case.

CLONINGER and COOPER, JJ., join in this dissent.

Doyle ROGERS and Josephine ROGERS, His Wife *v.*
AMOS ENDERLIN CONTRACTING CO., INC.

CA 82-228 644 S.W.2d 316

Court of Appeals of Arkansas
Opinion delivered December 22, 1982

Hoover, Jacobs & Storey, by: *Victor A. Fleming,* for appellants.

Anderson & Kilpatrick, by: *Joseph E. Kilpatrick, Jr.,* for appellee.

DONALD L. CORBIN, Judge. Doyle W. Rogers and Josephine Raye Rogers, his wife (Rogers), were owners of real estate, upon which existed the Grady Manning and Marion Hotels in Little Rock. As part of a construction project, appellant Doyle W. Rogers caused these buildings to be demolished.

Hardin International, Inc. (Hardin), appellant's general contractor, subcontracted the debris removal job to Daniel A. Wilkinson, Arten Wilkinson, Harold E. Wilkinson and Michael Wilkinson, d/b/a Wilkinson Brothers Construction Company, a partnership (Wilkinson). Wilkinson subcontracted a portion of the debris removal to the

appellee, Amos Enderlin Contracting Co., Inc. (Enderlin). Appellee filed a claim of materialmen's lien for $27,795.25.

On July 18, 1980, appellee filed its Complaint, seeking judgment against Wilkinson and a lien against appellants' real estate. On July 21, 1981, appellee filed Requests for Admissions and Interrogatories. Among other things, appellee requested an admission that certain attachments to the Requests for Admissions and Interrogatories "are true copies of statements submitted by plaintiff to Wilkinson . . . directly reflecting [the number of hours worked by certain equipment, the number of truck loads of debris hauled, all payments made, and the amount due plaintiff from Wilkinson]," Wilkinson did not respond within 30 days to the Requests for Admissions and thus was deemed to have admitted that the exact amount sued for was due and constituted the proper amount by which to render judgment. The appellants were also deemed to have admitted the aforementioned Request for Admissions.

Appellee sought summary judgment against Wilkinson, asking that same be a lien against appellants' property. Appellants contended a factual issue existed because of execution by appellee of a partial lien waiver and because, notwithstanding all admissions, a mixed issue of law and fact existed as to how much of the judgment amount was lienable.

Appellant produced a document titled "Partial Waiver of Lien" apparently executed by appellee stating that liens were waived for any and all work performed up to and including March 27, 1980. The appellee subsequently executed an affidavit which was attached to its Supplemental Brief as an exhibit. It stated:

> On March 21, 1980 I presented my bill in the amount of Eleven Thousand Five Hundred Seventy Dollars ($11,570.00) to Wilkinson Brothers Construction Co. for work performed prior to March 21, 1980.
>
> On March 28, 1980 I met with Harold Wilkinson, Michael Wilkinson and Dwight Evans. At that time Mr. Wilkinson presented me with a check in the

amount of Eleven Thousand Five Hundred Dollars ($11,500.00) in payment of my March 21, 1980 bill leaving a balance due of Seventy Dollars ($70.00). Along with the check Mr. Wilkinson presented me with a Waiver of Lien form to sign as a receipt for the moneys received. I signed the Lien Waiver form and dated it March 28, 1980.

All parties at the meeting agreed that the Waiver of Lien was for work performed prior to March 21, 1980 and that the Waiver of Lien would have no effect on work performed after that date.

I have received no payments for work done after March 21, 1980. The total amount owed to me for work performed after March 21, 1980 is Twenty-Seven Thousand Seven Hundred Ninety-Five Dollars and Twenty-Five Cents ($27,795.25).

/s/ Amos Enderlin

/s/ D. E. Evans

On November 24, 1982, judgment was rendered against Wilkinson in the sum of $30,505.26, plus interest. That judgment has also been appealed from. On February 24, 1982, a judgment was entered declaring the entirety of the aforementioned judgment to be a lien against the real property owned by appellants. From the latter judgment, this appeal is taken, contending essentially that a genuine issue of material fact existed as to the amount of the judgment that could be a lien against the appellants' real estate.

We hold that summary judgment was inappropriate and reverse and remand for a trial.

The appellee executed the following Partial Waiver of Lien:

> Whereas, the undersigned, Enderlin Contracting Co. has been employed by the Wilkinson Brothers Construction Company to furnish labor, equipment, and/or materials . . .

> NOW, THEREFORE, for and in consideration of $11,500.00 and other valuable considerations, . . . the undersigned does hereby waive and release any and all lien or right of lien . . . on account of labor or materials, or both, furnished to this date by the undersigned to or on account of the Wilkinson Brothers Construction Company . . . given under my hand and seal the 27 day of March, 1980.
>
> */s/ Amos Enderlin*
>
> */s/ D. E. Evans*

We find that the partial waiver of lien speaks for itself, and appellees' affidavit contradicts it directly. This is in violation of the Parol Evidence Rule. The affidavit constitutes extrinsic evidence which is inadmissible to vary, contradict, or add to the terms of a written instrument. *McCormick,* Law of Evidence, § 211 at 430; *Arkansas Rock and Gravel Co.* v. *Chris-T-Emulsion,* 259 Ark. 807, 536 S.W.2d 724 (1976); *Gainer* v. *Tucker,* 255 Ark. 645, 502 S.W.2d 636 (1973). Enderlin's attempt to utilize the affidavit in question presents a classic set of circumstances for application of the Parol Evidence Rule.

The case of *Hoffman* v. *Late,* 222 Ark. 395, 260 S.W.2d 446 (1953), cites the following rule:

> It is the accepted present-day view that the parol evidence rule is not really a rule of evidence but is instead a rule of substantive law. Wigmore on Evidence (3d Ed.), § 2400; Williston on Contracts (Rev. Ed.), § 631; Rest., Contracts, § 237; 4 Ark. L. Rev. 168. Wigmore puts it, *supra*: "What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all." The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement

released him from the duties that he had simultaneously assumed in writing.

The record is clear that there is a genuine issue as to a material fact remaining to be decided and the trial court should have refused to grant the summary judgment. In addition, the trial court considered the affidavit in its decision to grant summary judgment which was in violation of the Parol Evidence Rule.

Reversed and remanded.

MAYFIELD, C.J., concurs.

BEARDEN LUMBER COMPANY *v.* Bobby BOND and LIBERTY MUTUAL INSURANCE COMPANIES

CA 82-160 644 S.W.2d 321

Court of Appeals of Arkansas
Opinion delivered January 5, 1983

Bridges, Young, Matthews, Holmes & Drake, for appellant.

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

Friday, Eldredge & Clark, by: *Donald H. Bacon,* for appellee Liberty Mutual Insurance Companies.

GEORGE K. CRACRAFT, Judge. Bearden Lumber Company appeals from the decision of the Workers' Compensation Commission holding it liable for disability benefits due Bobby Bond under the Arkansas Workers' Compensation Act. Bobby Bond received an acknowledged compensable injury to his back while employed at Bearden Lumber Company at a time when Liberty Mutual Insurance Company was its workers' compensation carrier. He subsequently suffered a second episode of disability to his back at a time when Bearden was self-insured. The sole issue in the case is whether the second episode was a natural and probable result of the initial injury for which Liberty Mutual would remain liable under our rules applicable to recurrence of such injury or resulted from an independent intervening cause, for which Bearden would be liable under our rules applicable to aggravations of preexisting conditions. Appellant contends that the Commission erred in holding it, rather than Liberty Mutual, its former carrier, liable for the disability and medical expenses. We do not agree.

This case involves a series of accidents suffered by Bond while employed by Bearden over a period of approximately three years. In November of 1976 Bond fell through some wood flooring and injured himself but did not require treatment. In March of 1977 he injured his back while picking up a heavy object. Treatment by Dr. Lohstoeter disclosed that he had suffered a slipped disc as a result of that incident but did not require surgery at that time. Bond was off work for a period of nearly two weeks and then returned to his job.

In August, 1978 he again slipped on an oily surface and fell, injuring his back so severely that Dr. Lohstoeter was required to perform surgery to correct it. Bond did not return to work until February 12, 1979. At the time of the August, 1978 injury Bearden's workers' compensation carrier was Liberty Mutual Insurance Company. The carrier paid all benefits due under the Workers' Compensation Act. Shortly before Bearden returned to work after his surgery, Liberty Mutual ceased to be the carrier for Bearden who thereafter was a self-insured employer.

In April, 1979 Bond sustained a fall of some eight feet while working for Bearden, then self-insured, but did not miss any work as a result of it. In May of that year he again slipped and fell and that injury also required him to miss no work. In January of 1980 he was terminated at Bearden and again began working for a different employer until his condition reached the point where he could not do his work and he returned to Dr. Lohstoeter. Dr. Lohstoeter determined that his back was in such a condition that he was temporarily totally disabled. There was no evidence of any accidental injury while in his second employment.

Bearden Lumber Company contended that any disability Bond now suffers resulted from a natural progression or "recurrence" of that for which the surgery was performed and that Liberty Mutual was still liable for his present claim. Liberty Mutual contended that the incidents in April and May following Bond's surgery and while in the employ of Bearden were intervening second injuries or "aggravating" ones, and that Bearden Lumber

Company, as a self-insured employer when those subsequent injuries occurred, was liable for any benefits due Bond. The Commission found in favor of Liberty Mutual and this appeal follows. Appellant first argues that the finding of the Commission is not supported by the evidence.

On appellate review of workers' compensation cases the evidence is reviewed in the light most favorable to the finding of the Commission and given its strongest probative value in favor of its order. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result we will affirm if reasonable minds could reach the Commission's conclusion. *Bankston* v. *Prime West Corporation,* 271 Ark. 727, 601 S.W.2d 586 (Ark. App. 1981); *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979).

Bond testified that when he returned to work after his surgery on February 12, 1979 he went to his regular job as foreman and was doing basically the same job he had done before. He was working full time, the same as he was before he got hurt. He testified that he was again injured in April, 1979 when he stepped on a piece of iron, lost his footing, and fell a distance of eight feet. "After that I started going down and then I had the other problem and I just kept going down and down. I went back to Dr. Lohstoeter." He testified that in May of 1979 he injured himself again coming down a catwalk. "At the time I stopped working at Bearden Lumber Company I wasn't in the best condition. I was going downhill from them *other two falls* and I just kept getting worse and worse and worse." He testified that after his surgery and return to work he found that the surgery had helped him. After the fall in April he had to restrict his activities and wasn't able to do as much.

The appellant argues that Dr. Lohstoeter does not state with any degree of certainty which of the incidents actually caused the final result and that it was therefore a natural

consequence of the original injury. While Dr. Lohstoeter did not state which of the instances subsequent to his surgery was the direct cause of his present condition, he did attribute the disability to the series of subsequent incidents in the following language:

> [A]nd taking this man from the time of surgery, watching him just absolutely do very well, taking him to a time of doing so well that I could even return him to work, then taking care of him when these mishaps that occurred at that time, I'm talking about during that time span of eight to ten months or so, we finally reached a stage in the Spring of 1980 when he was stopped once again and that's where I am. I have no other recourse but to describe the incidents that he has told me have accumulated and have aggravated his low back area to the point that he has arachnoiditis now, post traumatic in variety, he does not need surgery but he does need conservatism.

Throughout his testimony Dr. Lohstoeter made constant use of the word "aggravation" when referring to the subsequent falls and their effect on Bond's present condition. He stated further, "I think the man was hurt in April, I think he was hurt again in May or June, and I think each successive hurting we've got a little more added of an inflammatory production stage and then bang, he just reaches the state where he can't go any further."

The Commission found that Bond's present disability resulted from the falls he suffered subsequent to his original surgery and was an aggravation of the prior injury rather than a mere recurrence of it. It applied our rule that when an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident; and it is only when the employee suffers merely a recurrence of a former injury without an intervening cause that the employer at the time of the initial injury is liable for the recurring disability. *Burks, Inc.* v. *Blanchard,* 259 Ark. 76, 531 S.W.2d 465 (1976). The finding of the Commission is supported by the evidence and we find no error in its application of the law to those facts.

Appellant's argument for reversal is not based only on the substantial evidence rule of appellate review. The main thrust of its argument is that the Commission misapplied the true test for determining liability. This argument advanced in its brief is stated as follows:

> There seems to be a tendency on the part of the Commission and the courts alike to become bogged down in the semantic differences between a "re-occurrence," [sic] and an "aggravation." Such, it is suggested, should not be the case. If the standard advanced by Professor Larson and accepted by the Arkansas Supreme Court in *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S.W.2d 315 (1960), that all of the logical events flowing from the initial incident should be the responsibility of the employer and the carrier at the time of the initial incident are applied, it is clear that Liberty Mutual rather than Bearden Lumber Company is responsible for temporary total disability benefits to the claimant.

After a careful review of our cases on this subject we cannot agree that the courts and the Commission have applied differing connotations of words employed or that they have not consistently applied the same principle announced in *Williams.* We conclude that in all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have applied the test set forth in *Williams* — that where the second complication is found to be a natural and probable result of the first injury, the employer remains liable. Only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. While there may be some variance in the words used to describe the principle, there has been no departure from the basic test, i.e., whether there is a causal connection between the two episodes. *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S.W.2d 315 (1960); *Moss* v. *El Dorado Drilling Co.,* 237 Ark. 80, 371 S.W.2d 28 (1963); *Home Ins. Co.* v. *Logan,* 255 Ark. 1036, 505 S.W.2d 25 (1974); *Burks, Inc.* v. *Blanchard, supra; Halstead Industries* v. *Jones,* 270

Ark. 85, 603 S.W.2d 456 (Ark. App. 1980); *Allen Canning Co.* v. *McReynolds,* 5 Ark. App. 78, 632 S.W.2d 450 (1982).

In *Williams* and *Logan* the issue of causal connection was described by use of the words "natural and probable consequences" and "intervening cause." We conclude that in the other cited cases it is clear the court, although still applying the causal relation test, described "natural and probable consequences" as a "recurrence of the first injury" and "intervening contributing cause" as "aggravation of a preexisting condition." We further conclude that in all our cases the test was and is the same: Is the second episode a natural and probable result of the first injury or was it precipitated by an independent intervening cause? We think that the Commission has correctly applied that test to the case now before us, regardless of the terminology employed.

The use of these different words descriptive of the rule being applied is best explained by the history of the development of our case law in this area, which has been derived largely from Larson's treatise on workmen's compensation. Larson places the "second medical complication" cases in two logical groups — those in which the second episode manifests itself in a non-industrial setting and those in which it arises in the course of employment. This is appropriate because of the different effect the claimant's own conduct may have on the employer's continued liability. Where the second episode results from non work-related negligent conduct on the part of the claimant which effects an independent intervening cause, no liability can be placed upon the employer. Where it occurs within the scope of the employment the neglect of the claimant leading to his injury is of no consequence. The employer at the time of the injury is liable for all consequences of that injury without regard to the claimant's conduct.

In §13.00 *Larson's Law of Workmen's Compensation,* the rule applicable to the non-industrial second episode is stated as follows:

RANGE OF COMPENSABLE CONSEQUENCES

> § 13.00 When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

In *Aluminum Co. of America* v. *Williams, supra,* the first of our cases in this area, the second episode occurred after Williams left his employment at Alcoa. While in his home he arose from a chair and suffered a "catch" in his back necessitating a second back operation. As this case involved a non work-related second episode our court adopted Larson's quoted statement of the rule applicable to those cases. *Williams* was followed by *Home Insurance Co.* v. *Logan, supra,* another non work-related second episode case. *Logan* also applied the "natural and probable consequence" language contained in *Williams.*

In § 95.12 Larson stated the rule applicable to second medical complication cases which are "work-related" as follows:

> If the second injury takes the form merely of a *recurrence* of the first, and if the second incident does not contribute even slightly to the *causation* of the disabling condition, the insurer on the risk at the time of the original injury remains liable. . . . On the other hand, if the second incident *contributes independently to the injury,* the second insurer is solely liable, even if the injury would have been less severe in the absence of the prior condition, and even if the prior injury contributed to the major part of the final condition. This is consistent with the general principle of the compensability of the *aggravaton of a preexisting condition.* (Emphasis supplied)

Burks, Inc. v. *Blanchard, supra,* was the first case to come before the court in which the second episode of medical complication arose in the course of a second employment and was work-related. There the claimant had suffered an initial injury while in the employ of one

employer and the second episode was precipitated while at work for a new one. In holding that there was no new independent second injury which would relieve the first employer of liability the court cited Larson's rule applicable to work-related second episodes as above quoted. The test is the same. Only the words are different. As most of the other cases we have cited were work-related cases, the courts have employed language cited from *Larson* in *Burks* — "recurrence of prior injury" and "aggravation of pre-existing condition" — rather than that in *Williams. Moss* v. *El Dorado Drilling Co., supra,* uses the phrases interchangeably. Both sets of phrases have been given the same meaning and both rules apply the same test.

It is also suggested in the brief and oral argument that the doctor in his use of the word "aggravation" might have given that word a different connotation. A careful reading of his deposition does not convince us that he did. Furthermore the testimony of medical experts is merely an aid to the Commission in resolving the issues of fact. The Commission has the duty to use its experience and expertise in translating the testimony into findings of fact. We conclude that it did so in this case.

Affirmed.

Andy FRANKLIN *v.* STATE of Arkansas

CA CR 82-103 644 S.W.2d 318

Court of Appeals of Arkansas
Opinion delivered January 5, 1983

Frederick S. "Rick" Spencer, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Andy Franklin was tried by a jury and convicted of the crimes of rape, aggravated robbery and theft of property. He was sentenced to two ten-year terms of incarceration on the rape and aggravated robbery convictions with the sentences to run consecutively. He was found guilty of misdemeanor theft and sentenced to a one year concurrent term in the county jail. At the time of the trial the appellant was sixteen years of age and contends on appeal that the trial court erred in not transferring the case to juvenile court pursuant to Ark. Stat. Ann. § 45-420 (Supp. 1981). We do not agree.

Prior to 1981 the rule governing transfer to the juvenile court of felony or misdemeanor charges against juveniles was within the sole discretion of the trial judge. Former Ark. Stat. Ann. § 45-420 (Repl. 1977) [Act 451, Ark. Acts of 1975, § 20] provided that the question of the transfer of a case of this nature to the juvenile court was discretionary with the trial judge and our cases have held that his ruling would not be disturbed unless that discretion was abused. *Sargent* v. *Cole, Judge,* 269 Ark. 121, 598 S.W.2d 749 (1980); *Little* v. *State,* 261 Ark. 859, 554 S.W.2d 312 (1977).

Act 390 of 1981 amended Ark. Stat. Ann. § 45-420 to provide that when a juvenile is charged with a felony or misdemeanor the judge shall, on his own motion or the motion of either party, conduct a hearing to determine whether the case should be transferred to another court having jurisdiction over the matter. It narrowed the exercise of the judge's discretion to the consideration of only the following factors:

> (a) The seriousness of the offense and whether violence was employed by the juvenile in the commission of the offense.
>
> (b) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts.
>
> (c) The prior history, character traits and mental maturity and any other factors which reflect on the juvenile's prospects for rehabilitation.

A hearing was conducted on appellant's motion to transfer. The trial court denied that motion. We cannot find that the trial court did not properly consider the prescribed criteria or that he erred in refusing to transfer this case to the juvenile court.

In retaining jurisdiction the court noted that the offenses were serious ones and involved violence. He pointed out appellant's previous patterns of behavior. He also noted that Dr. Butts, a court appointed psychiatrist, testified that the likelihood of rehabilitation of the appellant was not nearly so great as might be in the case of other juveniles. He noted Dr. Butts had concluded that there was absolutely no medical evidence for the court to indulge any assumption that there was a brain injury which affected the defendant's abilities to conform his conduct to the requirements of the law.

These findings by the court are fully supported by the testimony. The testimony of the victim, which was disputed only in part by the appellant, reflects that she was a fifty-eight year old widow, with grown children, who lived alone. In October of 1981 she arranged through appellant's grandmother for him to rake leaves. After he completed the work, the victim felt that she had been overcharged and told him so, indicating that she would not recommend him to her friends. The appellant "glared at her" but did not back down on the price.

The next time she saw him was at 4:40 a.m. on the morning of December 23rd when he awakened her, stating that he had been in a wreck and needed to use her telephone. She stated that she heard him carry on a purported conversation with his grandmother about the wreck, which he admitted was faked. She testified that while her back was turned he wrapped the telephone cord around her neck and tried to strangle her. When she struggled he repeatedly hit her in the head with "something sharp," wounding her so severely that "my blood was squirting up like a fountain." He then stated to her that the blood was getting all over everything and dragged her to the kitchen, pushed her head in the sink and turned on the water. He dragged her into the living room and forcibly disrobed her. As she attempted to repel him he gave her a karate punch in the kidney and back which rendered her helpless and then admittedly raped her. He then went to the kitchen and began to rub the blood off his clothing, sliced his own finger with a knife, and smeared his blood on his pants, stating that this would make it appear that the blood was his own. He then demanded her money. She had $18.00 in her purse and he took $9.00 and returned the rest. When he left the house he threatened to kill her if she summoned help or told the police.

She testified that he was not intoxicated, that at no time did she smell any alcohol on his person or breath. The police officers corroborated the blood stains and her injuries. As a result of her injuries she was hospitalized for three weeks and is still under the weekly treatment of a doctor for the back injury. The blows to her face ruptured several blood vessels

so severely that at the time of the trial she still had a "black eye."

The seriousness of these crimes and the violence with which they were perpetrated would alone appear to be sufficient to sustain the court's refusal to transfer these causes to the juvenile court.

At the hearing on the motion to transfer, appellant's mother testified that he had earlier sustained a fractured jaw in a karate contest. As a result of his injuries he sustained damage to his eye and partial paralysis of his face requiring surgical repair. He had not seen a doctor since this surgery. She stated that she noticed a change in his behavior after the accident, that he became hostile toward his parents and there was a total failure of communication between them. He ran away from home and went to Florida where he remained for a while with relatives. On his return to Arkansas he again left home and spent a short period residing with friends.

His mother admitted, however, that he had always had a quick temper which manifested itself in "yelling, slamming doors, kicking the wall and then going outside to cool off." When he was twelve he and a friend had stolen money from a neighbor's house and divided it. The charges against them were dropped. At fourteen he had unlawfully taken a vehicle and was apprehended by the police while "joyriding." The owner of the vehicle did not press charges on condition that the appellant obtain counseling at the youth bureau. She testified that the appellant attended one session of counseling but refused to return. Appellant admitted that on the day of the rape he had taken unauthorized control of another's truck and wrecked it.

It was suggested that as a result of the karate injury the appellant had sustained brain damage which affected his ability to conform to normal behavior. At the hearing Dr. Butts stated that the appellant had a non-psychotic character behavior problem but was very clear on cause and effect relationships. He stated that there was an extreme lack of remorse for his actions and an unwillingness to accept responsibility for his conduct. If he was not intoxicated at

the time of the incident, organic brain damage was an unlikely possibility and the doctor found no evidence of such damage. Dr. Butts stated that appellant understood both the nature of the proceedings against him and the gravity of the charges, but in spite of this he did not consider it realistic that he should pay the maximum penalty and expected only brief incarceration. He stated that the appellant had full ability to assist in his defense and appreciated the manifestations of his behavior at the time of the offense. He found him to be prone to act aggressively and lack volition or control because he escalated his anger above the level of control. On a hypothetical question based on the victim's account of his actions at the time the crime was committed, Dr. Butts concluded that this behavior implied considerable cognitive intent and premeditation and entailed realization of right and wrong. He stated that these were not the actions of an irrational person.

The appellant committed a serious, vicious and brutal crime in the rape, beating and robbing of this victim. The nature and severity of her injuries were fully corroborated by her attending physician and by photographs taken of her on the date of the crime. The court stated that he considered this first criterion in making his determination.

The second criterion is not fully applicable here for there was no evidence of a repetitive pattern of *adjudicated* offenses from which past efforts to treat and rehabilitate the juvenile could be evaluated. However, the December 23rd criminal episode was not an isolated occurrence; appellant had previously indulged in criminal activity of theft and two unauthorized uses of a vehicle, the second connected with the criminal episode of December 23rd. The appellant freely admitted that he had unlawfully taken a vehicle on the night in question and shortly before attacking the victim had wrecked it. At the time of his first offense of "joyriding" the charge had been nolle prossed on his agreement to seek rehabilitation, which he never did.

The third criterion was also considered. There was evidence of appellant's prior history of criminal activity, his character traits and his mental maturity. There was con-

siderable evidence from the doctor and appellant's mother as to his temper, hostility and total lack of remorse for his conduct, particularly for the injuries inflicted upon this victim. Not only the testimony of the doctor but that of the appellant demonstrated that his actions in raping and beating this victim were premeditated and voluntary since he deliberately wiped up the blood, cleaned blood off himself and cut his finger to make it look like any blood found on his clothes was his own.

We cannot say that the trial court abused his discretion or otherwise erred in retaining jurisdiction.

While no medical evidence was submitted on behalf of the appellant at the hearing to transfer, a psychologist was called to testify as to his responsibility for his actions during the trial. This medical witness disagreed in some respects with the testimony of Dr. Butts given both at the hearing on the motion to transfer and at the trial. At the conclusion of all of the evidence at the trial the appellant renewed his motion to transfer the cause to juvenile court. Any conflicts between the testimony of appellant's witnesses and that presented by the State were to be resolved by the trial court. In overruling the motion again the court clearly articulated those stated reasons clearly showing that he had given consideration to all of the criteria set forth in Ark. Stat. Ann. § 45-420 (Supp. 1981).

We affirm.

George James CHRISOS *v.* Joe EGLESTON

CA 82-129 644 S.W.2d 326

Court of Appeals of Arkansas
Opinion delivered January 5, 1983

[redacted]

Anderson & Anderson by: *Sam L. Anderson,* for appellant.

Hobbs, Longinotti & Bosson, P.A., by: *Louis J. Longinotti, III,* for appellee.

JAMES R. COOPER, Judge. The appellant, the stepfather of Jason Lewis Chrisos, sought to adopt him without the consent of the appellee, the child's natural father. The appellant relied on Ark. Stat. Ann. § 56-207 (a) (2) (Supp. 1981), which states:

> Consent to adoption is not required of . . . a parent of a child in the custody of another, if the parent for a period of at least one [1] year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree. . .

The trial court denied the petition for adoption, finding that the appellant had not proven by clear and convincing evidence that the appellee had failed, without justifiable cause, to communicate with the child and to support him. From that decision, comes this appeal.

The child was born on November 22, 1972. The appellee and Brenda Faye Chrisos, the child's mother, were divorced on February 19, 1974. The Chancery Court of Hot Spring County, Arkansas established visitation rights and set child support at $25.00 per week, payable through the registry of the court. Custody of the child was awarded to Brenda. In 1977, Brenda began living with the appellant, whom she married on March 23, 1981. On March 24, 1981, the appellant filed this lawsuit, seeking to adopt the child. Earlier in 1978, the appellant and Brenda sought the appellee's consent to the adoption of the child, which was refused.

In the case at bar, the appellant alleged that the appellee had failed to communicate with or to support the child for several years. The appellee testified that he attempted to see his child, but that after Brenda and the appellant began living together in 1977, he had increasing difficulty in exercising his visitation rights. The appellee testified that Brenda had threatened to kill him if he attempted to see the child, and that she had left the state several times without informing him of where she and the child were locating. On the other hand, Brenda and the appellant testified that the appellee made little effort to see the child, and that they did not interfere with his visitation rights.

The testimony was also in conflict regarding the payment of child support. Brenda testified that the appellee paid no more than $300.00 to $350.00 during the period of May, 1974, through November, 1978. She further testified that all of the support that she had received in 1979, 1980, and 1981 was actually paid by the appellee's mother. The child support for those years was current. Brenda also testified that the appellee had paid, or caused to be paid, medical bills for the child during 1980.

The appellee testified that he had paid all his child support payments since 1977. He states that although his mother had made some of the payments he had fully reimbursed her. He admitted that there was a period of time prior to 1978 when he was delinquent in paying child support, and that the delinquency was due to Brenda's refusal to allow visitation.

The trial court found that there was a period of at least one year, and in fact almost three years, when there were no child support payments made through the registry of the court. He found that the payments had been resumed and accepted for three years prior to the filing of the petition for adoption. Further, the trial court noted that the testimony was in conflict regarding the child support payments allegedly made directly to Brenda during the alleged period of delinquency. The trial court held that there was no clear and convincing evidence of a failure to significantly support the child for a period of one year.

Regarding the appellee's alleged failure to communicate with the child, the trial court found that the appellee began experiencing substantial difficulties in exercising his visitation rights after 1977. The trial court said that he believed the appellee's testimony that the appellee felt that there was no use in calling Brenda about seeing the child, because those calls invariably ended in a fight. The trial court found that the appellee had a justifiable cause for his failure to communicate with the child. The trial court also noted that pressure had been placed on the child regarding his relationship with his natural father. The trial court found that the appellant had not proven his allegations by clear and convincing evidence, and therefore he denied the adoption, finding that the appellee's consent was required.

In an adoption proceeding, the natural relationship between parent and child is subject to absolute severance. When the adoption is sought without the consent of a parent and against his or her protest, the courts are inclined to favor the maintaining of the natural relationship. *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979). The party seeking to adopt must prove by clear and convincing evidence that the non-consenting parent has failed significantly without justifiable cause either to communicate with or to provide for the care and support of the child for a period of at least one year. *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Harper* v. *Caskin, supra.*

In *Harper* v. *Caskin, supra,* the probate court refused to hold that the natural father's consent was unnecessary for the adoption. The Arkansas Supreme Court affirmed the probate court's decision, stating that the appellants failed to sustain their burden of proof when consideration was given to the fact that the failure of the non-consenting parent must be "without justifiable cause". Two factors seemed to influence the Court's decision. One was that from November of 1975 through the filing of the adoption petition in March of 1978, the ex-wife had prevented the natural father from seeing the child. The other was that the natural father suffered from epileptic seizures and had been unable to

obtain employment since his discharge from the armed services.

In the case at bar, there is evidence from which the trial court could find that the appellee had been delinquent in his support payments some four to six years earlier, but that at least three years prior to the filing of the adoption petition, he had paid the arrearages, resumed his payments, and had remained current on his obligation to support his child.

The appellant argues that the trial court erred in crediting the appellee with the payments made by appellee's mother. There is testimony from which the trial court could find that those payments were actually made by the appellee through his mother. The appellee testified that he fully reimbursed his mother for the payments she made.

There is also evidence from which the trial court could find that the appellee had a justifiable cause for his failure to communicate with the child. We note that there is conflicting evidence concerning this issue, and that the trial court is in the best position to determine the credibility of the witnesses.

In the case at bar, the trial court apparently felt that the appellee, even assuming a failure to support the child some four to six years earlier, had paid the arrearages and had resumed payments three years prior to the initiation of these proceedings. The resumption of payments was not, as in *Pender, supra,* as a result of compulsion, or as a result of the filing of the instant proceeding. The appellant seems to argue that a parent can never redeem himself from a failure to pay support, once he has failed to provide support for the requisite period. We need not consider this question, since the trial court found that the appellant failed to prove by clear and convincing evidence that the appellee had failed to support the child for a period of one year without justifiable cause.

In adoption proceedings, we review the record *de novo,* but we will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the

evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. Ark. Stat. Ann. § 62-2016 (g) (Repl. 1971); Arkansas Rules of Civil Procedure, Rule 52 (a), Ark. Stat. Ann. Vol. 3A (Repl. 1979); *Henson* v. *Money*, 273 Ark. 203, 617 S.W.2d 367 (1981).

The trial court held that the appellant had failed to meet his burden of proof, and, therefore, the appellee's consent was required before his child could be adopted by the appellant. We cannot say that that decision is clearly erroneous or against a preponderance of the evidence.

Affirmed.

CORBIN, J., concurs.

Garrett R. BROUWER *v.* Albert STEPHENS and Marie STEPHENS

CA 82-149 644 S.W.2d 329

Court of Appeals of Arkansas
Opinion delivered January 5, 1983

Hardin, Jesson & Dawson, by: *P. H. Hardin* and *Betsy Hall,* for appellant.

Sexton & Porter, P.A., for appellees.

TOM GLAZE, Judge. This appeal arises from the trial judge's decision that appellant removed topsoil from appellees' adjoining land, caused water to drain onto it, and damaged appellees in the sum of $2,047.37. For reversal, appellant contends (1) the chancellor failed to apply the proper measure of damages, and (2) his findings were against the preponderance of the evidence. We affirm.

The parties agree that the proper measure of damages is the difference between the fair market value of appellees' land before and after appellant caused the injury. *St. Louis Iron Mountain & Southern Railway Co.* v. *Miller,* 107 Ark. 276, 154 S.W. 956 (1913). Appellees presented evidence that they had spent $1,047.37 in attempting to put their land back the way it was before appellant removed the topsoil and to stop the flow of water from appellant's land onto their own. Appellees also called an expert witness, Lewis M. Ballard, to testify to the decrease in the value of the land. Mr. Ballard testified that the difference in before and after values was $3,750.00 in 1979 values and $5,000.00 in 1981 values.

The chancellor enunciated the proper measure of damages in his decree. Absent evidence to the contrary, we

must assume that he considered and applied this standard in awarding damages. He stated further that he had considered all testimony and evidence relating to damages in reaching the amount of the final award.

Appellant contends that the chancellor applied an improper measure of damages because no correlation exists between the damages suffered and the amount awarded. However, we believe that the chancellor had a basis for his award in the evidence presented, even though the amount awarded was not exactly the same as the difference between the before and after values set out by the appellees' expert witness. The Supreme Court has said that even though opinion testimony concerning value is uncontradicted, it is not conclusive and binding upon a jury since such testimony is only advisory or an aid to the jury in resolving an issue of fact. *Arkansas State Highway Commission* v. *Schanbeck,* 240 Ark. 277, 398 S.W.2d 897 (1966). The Court in *Schanbeck* relied on the rule that a jury has the unrestricted right to exercise its own independent thinking and judgment in translating the testimony into a finding of fact. *See also Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W.2d 49 (1928). The same rationale and rule is applicable to a court sitting as a fact-finder, when it decides the relative weight and sufficiency of opinion testimony.

Here, we believe the chancellor was justified in exercising his independent judgment in making a finding of fact concerning the amount of damage to the property in question. Although he awarded damages in an amount less than that to which appellees' expert testified, the amount awarded was not unreasonable in view of all of the other evidence presented. The chancellor, like a jury, was permitted to take into consideration not only the testimony of the witness, but the reasonableness of that testimony, the demeanor of the witness, his apparent candor and interest, and whether or not his testimony was in accord with sound judgment and common sense. *See Schanbeck, supra.*

Appellant's final contention is that the evidence of temporary or permanent damage to appellees' property was not sufficient to support a judgment. However, the chan-

cellor heard numerous witnesses testify about the removal of topsoil; he viewed photographs of the property which were introduced by both parties; and he personally viewed the property in question before finding that appellees had suffered permanent damage and were entitled to compensation. We cannot say that his findings were against the preponderance of the evidence or clearly erroneous, so we affirm. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

Affirmed.

Robyn MASINGILL *v.* STATE of Arkansas

CA CR 82-105 644 S.W.2d 614

Court of Appeals of Arkansas
Opinion delivered January 5, 1983
[Rehearing denied February 2, 1983.*]

*GLAZE, J., not participating.

Felver A. Rowell, Tom Donovan and *John Wesley Hall, Jr.,* for appellant.

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

TOM GLAZE, Judge. Appellant was convicted of tampering with physical evidence and received a sentence under the Class A misdemeanor provisions of Ark. Stat. Ann. §§ 41-901 and 41-1101 (Repl. 1977). During the trial, the State presented for the first time testimony that City Councilman Chester Hesselbein was involved in the crime. When appellant called Hesselbein as a witness to deny such participation, the State objected on the grounds that the appellant failed to furnish Hesselbein's name as a witness during the discovery process. The trial court sustained the State's objection, and appellant proffered Hesselbein's testimony. Hesselbein denied any knowledge or participation in the tampering charge. For reversal, appellant contends the trial court erred in excluding Hesselbein's testimony, and we agree.

In November, 1978, appellant assisted in the investigation of a break-in at the Highway No. 9 Liquor Store. Two men were subsequently charged with breaking or entering and theft of beer and whiskey. The beer and whiskey were inventoried, labeled and stored at the Morrilton Police Department.[1] On May 1, 1980, the men were convicted of breaking or entering but found not guilty of theft. After the trial, appellant took custody of the beer, which had been introduced into evidence, and again stored it in the evidence room at the Police Department. Later, in December, 1980, appellant was charged with tampering with this evidence.

At appellant's trial, the State presented Debbie Reynolds, a former Morrilton Police Department employee, as a witness. She testified that appellant had given the beer, used as evidence in the two men's earlier proceeding, to Councilman Hesselbein. Reynolds said that she gave appellant her

[1]Various descriptions were presented of the items actually stored as well as the types of containers in which they were stored. These conflicts have little significance or relevance to the legal issue under consideration in this appeal.

keys to the Department's evidence room; he and Hesselbein entered the room, and Hesselbein emerged with two six-packs of beer and one bottle of whiskey under his arm. However, appellant testified that he destroyed the beer that had been stored in the evidence room, and only after the State deputy prosecuting attorney told him that he could do so.

Obviously, the State's case centered around Reynold's testimony, which implicated both appellant and Hesselbein in the alleged tampering. However, the State's charges against appellant never revealed that any other person was involved in the alleged crime. In a criminal case, the Bill of Particulars must state the act relied upon by the State with sufficient certainty to apprise the defendant of the specific crime and to enable him to prepare his defense. *See* Ark. Stat. Ann. § 43-804 (Repl. 1977); and *Edens* v. *State,* 235 Ark. 996, 363 S.W.2d 923 (1963). Here, the State withheld details of the crime to which appellant was entitled and in doing so clearly served to frustrate his defense preparation.

In addition, appellant filed a motion for discovery pursuant to Rule 17.1 of the Arkansas Rules of Criminal Procedure requesting, among other things, the names of all State witnesses and any exculpating information in the prosecuting attorney's possession. When furnishing his list of witnesses to the appellant, the prosecutor did not mention Reynolds by name but did state that he would call representatives of the Morrilton Police Department. Of course, Hesselbein was neither named specifically nor under a broad representative category of potential witnesses. The record does reflect that appellant, on his own initiative, did attempt to interview Reynolds before trial, but that she refused.

In sum, there is nothing in the record that shows appellant had any reason to believe Reynolds would testify and implicate appellant *and* Hesselbein in the crime charged. To the contrary, we can only assume from the evidence presented that the prosecutor and Reynolds were the sole persons who knew of Hesselbein's alleged involvement in the crime. The State never charged Hesselbein as a principal or an accomplice. Nor did it intend to call Hesselbein as a witness. When he was called as a witness

—by appellant — Hesselbein's proffered testimony tended to negate appellant's guilt of the tampering charge. Under Rule 19.2 of the Arkansas Rules of Criminal Procedure, the prosecutor had a continuing duty to notify appellant of any additional material or information comprehended by appellant's prior discovery motion. In conclusion, the prosecutor not only failed to comply properly with appellant's discovery motion but also, as previously discussed, he improperly withheld details of the alleged crime which should have been set out in the State's Bill of Particulars. For these reasons, we reverse.

Appellant raised a second issue, arguing the trial court erred in refusing to reduce his conviction to a Class B misdemeanor. While we may find merit in his argument, it is unnecessary to address that issue since we reversed for other reasons. We have no reason to believe this second issue will recur at a retrial of this case.

Reversed.

THE HARTFORD FIRE INSURANCE COMPANY *v.* Earl STANLEY

CA 82-81 644 S.W.2d 628

Court of Appeals of Arkansas
Opinion delivered January 12, 1983

Friday, Eldredge & Clark, by: *Curtis L. Nebben,* for appellant.

Young, Patton & Folsom, by: *David Folsom,* for appellee.

MELVIN MAYFIELD, Chief Judge. The question in this case is whether the appellee had an insurable interest in a

piece of farm machinery at the time it was damaged by fire. The trial court, sitting as a jury, decided for the appellee and the insurance company has appealed. We affirm.

The machine involved is a cotton picker which appellee Earl Stanley purchased from Roberson Farm Equipment in 1976. The purchase was financed by International Harvester Credit Corporation and the property was insured by appellant. On December 5, 1977, Stanley contracted to sell his farm and most of his equipment to Charles Griffin and Larry Stotts, d/b/a Red River Farms. The selection of equipment was to be made on December 8, 1977, with delivery and payment to be made by January 1, 1978. The cotton picker was selected and moved from the Stanley farm to a building on property already owned by Red River Farms and while in that building the machine was damaged by fire on December 21, 1977. The appellant contends that under Ark. Stat. Ann. § 85-2-401 (Repl. 1961), there was delivery and passage of title and therefore the seller had no insurable interest in the property at the time it was damaged.

The trial court found, however, that at the time of the fire the seller was still indebted to International Harvester Credit Corporation for a portion of the purchase price of the machine. That finding is supported by the evidence and we believe it is conclusive of the question on appeal.

In *Gravning* v. *American Druggists' Ins. Co.,* 259 Ark. 523, 527, 534 S.W.2d 754 (1976), although the appellee had conceded that Mrs. Gravning had an insurable interest and only the amount due was in question, the court said:

> In *Hensley* v. *Farm Bureau Mutual Insurance Company of Arkansas,* 243 Ark. 408, 420 S.W.2d 76, the insured had signed a contract to sell the property to a third party before the fire occurred. The insured had remained liable on a mortgage on the property, however. The purchaser of the property also obtained coverage, and after the fire, was paid the full amount by his company. Thereupon, he paid Hensley. Hensley instituted suit to collect the full amount of his policy under the valued policy statute, but the trial court

> denied recovery on the basis that Hensley would be unjustly enriched. On appeal, we reversed and allowed full recovery. The point at issue was different from that in the present litigation, but, of course, we found that Hensley had an insurable interest for the full amount.

And in *Gravning* we also note that the court said the jury should have been instructed as requested by appellant, that "The interest of the mortgagor is not defeated by a voluntary sale of the premises where he remains liable for the mortgage debt."

In *Thurston Nat'l Ins. Co.* v. *Hays*, 260 Ark. 855, 544 S.W.2d 853 (1977), the appellees agreed to buy two houses. They made a down payment and agreed to pay the balance in cash. In holding that they had an insurable interest in the houses the court relied upon Ark. Stat. Ann. § 66-3205 (2) (Repl. 1966) which defines insurable interest as "any actual, lawful, and substantial economic interest in the safety of [or] preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment."

Under that statute and the above cases, we think it clear that as long as Stanley was legally liable for the purchase price of the cotton picker he had an insurable interest in it. We do not agree that passage of title to the machine destroyed that insurable interest. Assuming that title passed, as appellant claims, before the fire on December 21, it was not until December 28 that Stanley's obligation to International was discharged. We agree with *Couch on Insurance* which says:

> Generally speaking, a person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction. If he would sustain such loss, it is immaterial whether he has, or has not, any title in, or lien upon, or possession of, the property itself.

3 *Couch on Insurance* § 24:13 (2nd ed. 1960).

Appellant also points out that after the fire Griffin and Stotts, d/b/a Red River Farms, paid Stanley for all the machinery purchased from him, including the cotton picker, and appellant says the trial court's judgment allowing Stanley to collect for the damage to the machine allows him a double recovery. Appellant contends such a result should not be allowed and in support of that contention cites the cases of *Wilbanks & Wilbanks, Inc.* v. *Cobb,* 269 Ark. 936, 601 S.W.2d 601 (Ark. App. 1980) and *Acree* v. *Hanover Ins. Co.,* 561 F.2d 216 (10th Cir. 1977).

Wilbanks simply holds that insurance proceeds are not recoverable by one who has no insurable interest in the property damaged. The appellee in that case had no insurable interest in the *new* equipment damaged and could not recover any of the insurance money paid into court to cover that damage. Here, as we have discussed, the appellee did have an insurable interest in the cotton picker at the time it was damaged.

In the *Acree* case the owner of a house contracted to sell it but it was damaged by fire before the date that possession was to be delivered. After the fire, the buyer completed the contract, paid the full purchase price, and took possession. Both buyer and seller sought to recover on the insurance policy which the seller had in force at the time the fire occurred. In holding for the buyer the court said:

> Two opposing lines of cases have dealt with the right to insurance proceeds when the damaged property was under an executory sales contract. One line holds in essence that insurance is a personal contract of indemnity to protect the interest of the insured.... The other line recognizes an insurable interest in both the seller and buyer and holds that when a seller has received insurance proceeds for damage to property covered by an executory sales contract and the seller has later received the full purchase price, the seller holds the proceeds in trust for the buyer. (Citations omitted.)

In the instant case the appellee's brief states that he is not opposed to the proposition that he take the insurance

proceeds in trust for Griffin and Stotts, d/b/a Red River Farms. However, we think the Arkansas case of *Whitley* v. *Irwin,* 250 Ark. 543, 465 S.W.2d 906 (1971) requires us to follow the cases that hold that insurance is a personal contract of indemnity to protect the interest of the insured. There, in answer to the contention that such a holding allowed unjust enrichment, the court said, "One is not unjustly enriched by receipt of that to which he is legally entitled."

The judgment of the trial court is affirmed.

John D. TONEY, Sr. *v.* John T. HASKINS et al

CA 82-166 644 S.W.2d 622

Court of Appeals of Arkansas
Opinion delivered January 12, 1983
[Rehearing denied February 9, 1983.]

Hoover, Jacobs & Storey, by: *O. H. Storey, III,* for appellant.

Cearley, Mitchell & Roachell, for appellees.

GEORGE K. CRACRAFT, Judge. This is the second appeal in this case. The action was first commenced by John T. Haskins in the Circuit Court of Pulaski County as an action for damages based on breach of fiduciary duty and fraud and deceit. Numerous pleadings raising both legal and equitable issues were subsequently filed. On the first appeal the action of the trial court in dismissing an equitable counterclaim was reversed and the cause remanded with directions to transfer the matter to equity. *Toney* v. *Haskins,* 271 Ark. 190, 608 S.W.2d 28 (Ark. App. 1980). In its opinion the Court of Appeals most succinctly referred to that record as a "procedural morass yielding an issue easier to decide than to describe."

Upon transfer of the case pursuant to the mandate, both parties filed "amended and substituted pleadings." In his substituted complaint, Haskins alleged that Toney, while acting as his agent and in a fiduciary capacity had gained secret profits amounting to $66,193.51 in the real estate transaction. He prayed for damages in that amount and for punitive damages for breach of fiduciary duty and fraud and deceit practiced upon him. A part of the secret profit consisted of a note and mortgage executed by Haskins to Toney. The substituted complaint also asked that the note and mortgage be declared null and void. Toney denied the allegations of the complaint and counterclaimed for judgment on the note and for foreclosure on the mortgage securing it. This pleading also brought in other parties claiming under Haskins, asking that their interests also be foreclosed. These other parties are not involved in this appeal.

Both Haskins and Toney had wide experience in real estate transactions. Haskins, a successful attorney, had also been successful in buying, selling and investing in real estate. Toney was a real estate broker of many years' experience and was a member of the County Planning Commission at the time of the transactions involved in this suit. Both testified to the numerous real estate transactions in which each had participated as buyer, seller or developer. The transaction now in issue was the first one in which these parties had dealt with each other. Both were acquainted with Roger Mears, a former county judge, subsequently indicted for illegal transactions by a public official. The charges against Mears included the illegal taking of payments or profits derived form the location of county roads. Toney had originally been indicted along with Mears for his participation in these transactions but was granted immunity in exchange for his testimony against Mears.

HASKINS' TESTIMONY

According to Haskins he was first approached around May 1, 1977 by Toney, who sought to interest him in the purchase of 80 acres of land located near Sardis Road, and who represented that a county road would be put through it and its value substantially enhanced. Toney described it to him as a "sleeper and a good investment." They discussed the asking price and Toney indicated that the owners wanted $3,500 per acre, but he thought it could be bought for $3,000. Haskins asked Toney to pursue it. Toney compiled a list of comparable sales and other data reflecting value and later took Haskins to the area for an inspection of the property and surrounding area.

During these discussions they talked about the proposed road. Toney suggested that if the road was dedicated through the land the county would construct it because of a desire to connect Heinkie and Sardis roads. Haskins then called Mears and learned that the county did intend to construct a road through the property. For the next few days Haskins considered the proposition and reinspected the area. He concluded that the lands were in fact worth $3,000 per acre.

He again met with Toney at which time they further discussed the prospect of the county road. Toney suggested to him that in view of his position with the County Planning Commission it would be better if title was taken in his name as trustee to enable Toney to make the dedication and get the "legwork" done. Haskins knew of his position on that commission and thought it a good suggestion.

On June 13th the parties executed an offer and acceptance in which Toney appeared as "seller" and Haskins as "buyer." In the space provided for the name of the real estate agents they typed the word "none." The agreed price in the contract was $3,000 per acre and was conditioned upon Haskins' obtaining proper financing. Haskins was not able to obtain financing and asked Toney as his broker to see if "they would take less." Several days later Toney advised him that "they would take" $2,800 per acre and if Haskins desired 100% financing that Toney himself would take a second mortgage for $24,000.

On July 5th Toney brought to Haskins an amended offer and acceptance which provided that title would pass through Toney, who would execute the road dedication. Haskins was to furnish $200,000 on the date of closing and execute a note to Toney for $24,000 to be secured by a second mortgage. The addendum recited that Toney was buying from Weinstein (another broker representing the owners) and that Toney would participate in Weinstein's commission only. In this addendum Toney agreed to furnish title insurance.

Haskins testified that on May 20, 1977, during the period he was purportedly negotiating with the owners on his behalf, Toney entered into an offer and acceptance with the owners in his *own* behalf to purchase the tract "as trustee" at a price of only $2,000 per acre, a fact which was not disclosed to Haskins at the time the original offer and acceptance or the addendum obligating Haskins to pay $2,800 per acre was entered into. He testified that at all times Toney was acting as his broker and was negotiating in his behalf.

The transactions between Toney and the owners and between Toney and Haskins were closed simultaneously. The owners transferred title to Toney as trustee for $2,000 an acre. Toney executed the road dedication deed and then deeded the property to Haskins for $2,800 per acre. Haskins delivered the $200,000 cash consideration but was not present at the closing. The note for $24,000 and the mortgage were sent to Haskins, executed and returned for recording with the deed. Toney paid the owners the agreed $160,000 consideration from the $200,000 provided by Haskins. Without use of any of his funds, Toney thereby realized a profit of $64,000 in the transaction plus his portion of the owners' broker's commission amounting to $6,400. Haskins testified that at all times Toney was acting as his agent and that title was taken by agreement in Toney's name as trustee merely for the purpose of the road easement. Haskins testified positively that he did not learn until a year later that during the period of their negotiations Toney actually had an agreement to purchase the lands for $2,000 an acre or that Toney had made the secret profit by his betrayal of trust and the use of Haskins' money.

TONEY'S TESTIMONY

Toney testified that prior to his first dealings with Haskins he had already entered into an offer and acceptance with the owners to purchase the lands for $2,000 per acre. He stated that he entered into the transactin with Haskins as the seller and not as the agent and that he had no agreements with Haskins not contained in the written agreement and addendum. He specifically denied taking title in himself for the purpose stated by Haskins. He denied ever concealing from Haskins the purchase price he was to pay the owners and asserted that he told him he was making a profit of $800 per acre on the transaction when the addendum was signed.

THE GRAND JURY TRANSCRIPT

Haskins offered into evidence a transcript of Toney's testimony, given under the order of immunity, before the grand jury which was investigating Mears. In that investigation Toney had testified to several transactions in which he

and Mears had divided profits derived from transactions in which the value of real estate had been enhanced by location of county roads by Mears. The general import of that testimony was that Mears never appeared in the transactions and that the two of them often dealt through "straw men" who were also paid from the profits. The trial court excluded the testimony dealing with other transactions as being irrelevant. It did admit the grand jury testimony that dealt with the specific transaction involved here. The clear import of this testimony was that Haskins was a knowing participant in this scheme to profit by the location of a county road and that the fact that any profit realized by Toney would be shared with Mears was known and agreed to by Haskins from the very beginning. Haskins in his testimony at trial denied these allegations.

The chancellor found Toney's version of the transaction to be "not believable" and that, despite "oddities" in Haskins' evidence, it was the more believeable. The chancellor granted Haskins' prayer to cancel the note and mortgage and awarded him a judgment for all of the secret profit obtained by Toney. No prejudgment interest was awarded. Toney's cross-complaint was dismissed. The appellant Toney contends that the trial court's ruling was violative of the parol evidence rule and was not supported by the evidence. Appellee, on cross-appeal, contends that the chancellor erred in ruling portions of Toney's grand jury testimony inadmissible, for failing to allow appellee to recover the real estate commission paid by Weinstein to Toney, and in refusing to award prejudgment interest and punitive damages.

THE APPEAL

Toney's appeal is based on the contention that the chancellor erred in finding that the relationship of principal and agent existed between the parties. Haskins' testimony, if believed and admissible, would clearly establish both the relationship and that the agent had gained a secret profit by a breach of his duty to the principal.

The evidence before the trial court as to the relationship of the parties was in direct conflict. From our examination

of the exhaustive analysis of the evidence contained in the chancellor's written memorandum it is obvious that his decision turned primarily on credibilty. It is well settled that the findings of the chancellor will not be disturbed on appeal unless found to be clearly against the preponderance of the evidence and as preponderance turns heavily on questions of credibility we defer to the superior position of the trial court in that regard. Rule 52 (a). Ark. Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981). As the trial court found Haskins' testimony as to the relationship to be more credible, that finding will not be disturbed, unless, as appellant argues, that testimony was violative of the parol evidence rule.

Toney contends that Haskins' testimony to establish that relationship was violative of the parol evidence rule. He argues that as the lines in the written offer and acceptance designated for identification of the real estate agent involved in the transaction bore the notation "none," the evidence tending to show otherwise was incompetent under the well settled rule that where a written contract is plain, unambiguous and complete in its terms, parol evidence is not admissible to contradict or add to the contract. We agree that this is a proper statement of the parol evidence rule. *Brown* v. *Aquilino,* 271 Ark. 273, 608 S.W.2d 35 (Ark. App. 1980). We do not agree that the rule is applicable here.

Haskins alleged in his complaint that he had been induced to sign the contract by fraud and deceit. The testimony objected to would tend to show that Toney represented to Haskins that he was negotiating as Haskins' agent with the owners for a price of $3,000 when, in fact, he had already obtained in his own right a contract to purchase the property for substantially less. It would tend to show that at a subsequent date he again represented to Haskins that he had negotiated on his behalf and obtained a reduction of $200 an acre for the tract at a time while his personal contract for the lesser sum was still in force and effect and that he never disclosed these facts to Haskins.

These were fraudulent statements, if made, and the chancellor found that they were made. Our court has

consistently held that such statements are admissible and the parol evidence rule does not apply when fraud in the procurement of the instrument is relied upon. *St. L.I.M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S.W. 803 (1908); *Hamburg Bank* v. *Jones,* 202 Ark. 622, 151 S.W.2d 990 (1941); *Gainer* v. *Tucker,* 255 Ark. 645, 502 S.W.2d 636 (1973). We find no error in the court's admission of this testimony. The decree of the chancellor is affirmed on direct appeal.

THE CROSS APPEAL

The appellee first contends that the trial court erred in excluding portions of Toney's grand jury testimony with regard to other activities of Toney and Mears to reap a profit from Mears' political vantagepoint. He argues that the testimony was relevant as it had a tendency to make the existence of the facts in issue more probable or less probable than it would be without this evidence. Rule 401, *Uniform Rules of Evidence.* In view of the trial court's ruling in appellee's favor based upon the evidence, we fail to see the prejudice which resulted from the ruling, if it was erroneous.

The appellee next contends that it was error for the trial court not to give Haskins judgment against Toney for the $6,400 Toney received in the Weinstein agreement. We do not agree. The record reflects that Toney had an agreement with Weinstein (the real estate broker exclusively representing the owners of the tract in the sale) that in the event of a sale procured by or through Toney, Weinstein would give him 40% of the commission due Weinstein under his exclusive listing contract with the owners. At the time of closing Toney was paid $6,400 by Weinstein pursuant to the agreement. The funds with which Weinstein paid Toney were due Weinstein as commissions under his contract with the owners and had nothing to do with the secret profits.

In support of this contention the appellee relies on *Green* v. *Pickens, Adm'r.,* 251 Ark. 691, 473 S.W.2d 862 (1971). In *Green* there was a continuing contract between the principal and real estate agent for the acquisition of tracts of land for investment purposes. Under that contract all prices

were to be approved by the principal and the agent was to be paid a "standard commission" in each transaction.

In a series of these transactions entered into on behalf of his principal, the agent had reaped a secret profit by substantially the same means as that employed by Toney —purchasing lands for his principal at prices lower than that contracted for and pocketing the excess. The standard commission on some of the transactions had already been paid the agent before the principal discovered the betrayal. The agent brought an action against the principal to recover those commissions yet unpaid. The principal counterclaimed for recovery of the secret profits and the commissions already paid, and prayed that the agent's claim be denied. The court upheld the trial court's entry of judgment against the agent for secret profits obtained and commissions paid, and dismissed his claim for all other commissions.

The court declared that a broker is at all times required to make a full disclosure to his principal, not withholding any valuable information from him, and on a failure to make that disclosure the agent forfeits all rights to compensation and renders himself liable for any profits derived. A broker, like any other agent, owes his principal the utmost good faith and loyalty and has a duty to fully disclose to him the facts of any interest of his own or another client which may be antagonistic to that of his principal. He cannot be permitted to take advantage of his position to make a gain for himself by undermining his principal. *Taylor* v. *Godbowl,* 76 Ark. 395, 88 S.W. 959 (1905). As Toney did not disclose to his principal that secret interest in the property that he had by virtue of his contract to purchase it in his own name for the lesser price, he has not been permitted to retain any profit that he has made at his principal's expense. Nor can he under this rule collect any commission or other compensation from his principal even if he had contracted for it. His breach of faith disqualifies him from receiving anything from the betrayal principal. It does not follow, however, that the agent must also forfeit compensation justly due him from one other than the

betrayed principal. Especially is this so where the principal has been made fully aware of that compensation agreement.

Here the addendum to the offer and acceptance between Toney and Haskins disclosed, and Haskins admitted knowledge of, the fact that Toney was to receive a "split" commission from the owners' broker under the contract between that broker and the owners. No part of the $6,000 which Toney received from the owners was to be passed on to Haskins. Toney's interest in Weinstein's contract from commissions was fully disclosed. We find no error in the chancellor's ruling on this point.

Appellee next contends that the chancellor erred in refusing to award prejudgment interest on the amount of the judgment for the secret profits. We agree.

The test in prejudgment interest cases is whether there is a method of determination in both time and amount of the value of the property at the time of the injury. If such a method exists prejudgment interest should be allowed. *Lovell* v. *Marianna Fed. S. & L. Assn.,* 267 Ark. 164, 589 S.W.2d 597 (1979). The amount of the secret profits obtained by the appellant in this case was capable of exact determination both in time and in amount. Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. This interest must be allowed for any injury where at the time of loss damages are immediately ascertained with reasonable certainty. Where prejudgment interest is collectible at all, the injured party is entitled to it as a matter of law. *Wooten* v. *McClendon,* 272 Ark. 61, 612 S.W.2d 105 (1981). In the present case the secret profits had an exact value on the date of the closing of the transaction. The appellee has been wrongfully deprived of the use of these funds since that date. Therefore he is entitled not only to the amount of the secret profits but to interest from the date of his loss at the rate of 6% per annum as required by Article 19, § 13, Constitution of Arkansas.

The appellee also argues that the conduct of the appellant in this case warranted an award of punitive

damages. Exemplary damages are not recoverable as a matter of right, even though the facts in a given case might be such as to make their allowance proper. The allowance of such damages rests within the discretion of the trier of fact. *Bergdorf* v. *Chandler,* 220 Ark. 727, 249 S.W.2d 562 (1952). Assuming that the evidence would have supported an award for punitive damages, it is noted that in the amended and substituted complaint of the appellee he sought equitable relief by way of release from the consequences of the contract. Equity will not ordinarily enforce penalties and it has been held that one who appeals to a court of equity for relief waives the award of punitive damages as a matter of right. *Stolz* v. *Franklin,* 258 Ark. 999, 531 S.W.2d 1 (1975); *Hendrix* v. *Black,* 132 Ark. 473, 201 S.W. 283 (1918).

The decree of the chancellor is affirmed as modified in this opinion with respect to the allowance of prejudgment interest on the secret profits recovered at the rate of 6% per annum from the date of payment to the date of the decree previously entered.

Affirmed as modified.

CORBIN, J., dissents.

Gerald BOYD and Patsy BOYD, His Wife *v.*
GREENE COUNTY, Arkansas

CA 82-122 644 S.W.2d 615

Court of Appeals of Arkansas
Opinion delivered January 12, 1983

[redacted]

Cathey, Goodwin, Hamilton & Moore, by: *Donis B. Hamilton,* for appellants.

Gibson & Bearden, for appellee.

TOM GLAZE, Judge. This case involves the drainage of surface waters over appellants' property. Appellants own an approximate ten-acre tract of crop land which on the south side is bordered by a county road. Rainwater and drainage from nearby rice fields overflowed the road ditches along the county road and ran diagonally through appellants' field, draining from the southeast corner to the northeast corner. To ward off this drainage, appellants constructed a levee on their property alongside the roadway. Subsequently, the county road flooded. Appellee then filed suit, alleging appellants had blocked a natural watercourse. The trial court agreed with appellee and issued a mandatory injunction compelling appellants to remove their levee. On appeal, appellants' sole argument is the chancellor's finding that a watercourse existed across appellants' land is clearly against the preponderance of the evidence.

As early as 1882, our Supreme Court has recognized the common law "natural flow" rule that "each proprietor upon running water, flowing in a definite channel, so as to constitute a watercourse, has a right to insist that the water shall continue to run as it has been accustomed; and that no one can obstruct or change its course injuriously to him without being liable in damages." *Little Rock and Fort Smith Railway Co.* v. *Chapman,* 39 Ark. 463, 474 (1882). Where no watercourse exists, Arkansas has adopted the common law rule that a landowner is justified in defending against surface runoff without incurring liability for damages unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense, could be avoided. *McCoy* v. *Board of Directors of Plum Bayou Levee District,* 95 Ark. 345, 129 S.W. 1097 (1910); and *Little Rock and Fort Smith Railway Co.* v. *Chapman, supra.* Which of the two, foregoing rules is applicable to the facts at bar depends upon whether a watercourse exists across appellants' land. If one exists, appellants have no right to obstruct the flow of water within the watercourse. However, if no watercourse exists, the appellants' have a right, without incurring liability for damages, to defend themselves against surface water unless they unnecessarily injure or damage another. *See Leader* v. *Mathews,* 192 Ark. 1049, 95 S.W.2d 1138 (1936).

In *Boone* v. *Wilson,* 125 Ark. 364, 188 S.W. 1160 (1916), the Supreme Court defined a watercourse as follows:

> [A] running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. *It must flow in a definite channel, having a bed and banks,* and usually discharges itself into some other stream or body of water. *It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes.* [Emphasis supplied].

In the instant case, at least two reasons compel our finding that no watercourse runs across appellants' land.

First, it is virtually undisputed that the water involved here is mere surface drainage from neighboring rice fields and/or rainfall. This conclusion is supported not only by appellants' testimonies, but also by that of the appellee's witnesses as well. Appellee argues that the particular source of the water is immaterial, and the fact that water is mere surface drainage does not preclude a finding that a watercourse exists. Appellee cites 93 C.J.S., Waters, § 4 (c) in support of its argument. While some other states may have adopted this proposition urged by appellee, Arkansas has not. To do so now would require this court to modify or reject the Supreme Court's definition of watercourse as set forth in *Boone* v. *Wilson, supra,* which has since been followed in a host of cases. *See, e.q., Solomon* v. *Congleton,* 245 Ark. 487, 432 S.W.2d 865 (1968); *Turner* v. *Smith,* 217 Ark. 441, 231 S.W.2d 110 (1950); *Brasko* v. *Prislovsky,* 207 Ark. 1034, 183 S.W.2d 925 (1944); *Leader* v. *Mathews, supra;* and *Chism* v. *Tipton,* 269 Ark. 907, 601 S.W.2d 254 (Ark. App. 1980). We decline to do so.

Our second reason for finding no watercourse is that the evidence before us reflects that the surface water does not flow in a definite channel, having a bed and banks. In the early case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Ramsey,* 53 Ark. 314, 13 S.W. 931 (1890), the Supreme Court, when discussing navigable streams, adopted the following definition of the bank and bed of a river:

> *The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the bank by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water.* But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the

> banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. * * * *But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged by water.* [Emphasis supplies].

Id. at 322-23, 13 S.W. at 933.

We are unaware of any reason why the bank and bed definition in *Ramsey* should not be applicable to watercourses. This definition is certainly consistent with the manner in which the Supreme Court has treated the subject when it has been called upon to decide whether a watercourse existed. For instance, in *Leader* v. *Mathews, supra,* one of the reasons the Court found no watercourse was because some of the land and so-called bed, over which the water flowed, was in cultivation. In the cases of *Stacy* v. *Walker,* 222 Ark. 819, 262 S.W.2d 889 (1953), and *Reddmann* v. *Reddmann,* 221 Ark. 727, 255 S.W.2d 668 (1953), the Court found no watercourse existed because in each case the water drained following the natural contour of the land and left no well-defined channel.

Here, appellee's witnesses testified the surface water drainage followed the contour of the land in the vicinity. One testified that there were hills on each side of appellants' property. Another witness said that the contour of the land was such that a ten-feet high ridge is located on one side of appellants' property, causing surface drainage onto the lower land owned by appellants. Finally, appellants' undisputed testimony showed that the land alleged to be a natural watercourse was row-cropped and cultivated every

year. Our review of the evidence overwhelmingly leads to the conclusion that only surface drainage is involved, that the water flowed naturally onto appellants' land because it was the low ground in the vicinity and that the water never flowed in a definite channel with a bed and banks. Because we find the evidence fails to support the trial court's finding of a watercourse, we reverse.

We must also remand this cause for further proceedings because on the record before us, we are unable to determine whether appellants unnecessarily inflicted damages on others while justifiably preventing surface water from draining onto their land. Because the trial court erroneously found a watercourse existed, it simply did not address this second issue nor did the parties fully develop the evidence on the issue. For instance, there is no evidence regarding who discharged the rice field water which flowed onto the appellants' property or whether such discharge was reasonable or tortious. Further, the evidence was incomplete concerning what alternatives were available to the appellants and others in dealing with the water problem. We therefore reverse and remand this case for further development and proceedings consistent with this opinion. *See Moore* v. *City of Blytheville,* 1 Ark. App. 35, 612 S.W.2d 327 (1981).

Reversed and remanded.

Mervel L. McINTURFF *v.* Robert Donald McINTURFF

CA 82-164 644 S.W.2d 618

Court of Appeals of Arkansas
Opinion delivered January 12, 1983
[Rehearing denied February 9, 1983.]

[redacted]

Howell, Price & Trice, P.A., for appellant.

Boyett, Morgan & Millar, P.A., for appellee.

TOM GLAZE, Judge. This case involves a post-decretal divorce action in which the trial court modified its decree which incorporated the parties' agreement styled "Child Custody, Support and Property Settlement." Pursuant to the agreement, appellant was awarded custody of the two minor children, and appellee was credited with a lump-sum payment to cover his child support obligation by releasing his equity interest in the parties' house and lot. Less than two years after the divorce, the children moved in with appellee; appellee gained legal custody of the children and petitioned the court for a pro-rata refund of the lump-sum payment made under the parties' agreement. The court granted appellee's petition, and this appeal followed. We find the court erred.

We have a wealth of case authority dealing with when an agreement, in divorce actions, can and cannot be modified once it is merely approved by the court or incorporated and made a part of the decree.[1] None of these cases, however, is dispositive of the issue posed by the facts here.

In the instant case, the parties executed an independent contract which was incorporated and made a part of the divorce decree. Their expressed intent was to settle all rights in their real and personal property, financial matters, custody of and visitation with the children, and alimony and child support obligations. In cases in which the parties' contract is incorporated into the decree, the general rule is that the court cannot alter or modify it. *See Armstrong* v. *Armstrong*, 248 Ark. 835, 454 S.W.2d 660 (1970); and *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700 (1908). An exception to this rule has been recognized by our courts in custody and child

[1]An excellent analysis and summary of Arkansas cases on this subject is set forth in Annot., 61 A.L.R.3d 520 (1975).

support matters. Provisions in such independent contracts dealing with custody and child support have been held not binding on our courts. *See Hitt* v. *Maynard,* 265 Ark. 31, 576 S.W.2d 211 (1979); and *Reiter* v. *Reiter,* 225 Ark. 157, 278 S.W.2d 644 (1955). However, even though child support has been a recognized exception to the general rule, the Supreme Court has on one occasion refused to modify a parties' independent agreement when it provided for a $200 monthly payment which was designated as alimony *and* child support. In other words, the amount attributable to child support was not severable from the alimony award. *Bachus* v. *Bachus,* 216 Ark. 802, 227 S.W.2d 439 (1950).

Appellee argues that the provisions the trial court modified involved child support and therefore under the rule in *Hitt* and *Reiter,* the court had the power to alter that part of the parties' agreement. We cannot agree. Our *de novo* review of the record reflects that, much like the situation in *Bachus, supra,* the provisions for support are not severable because appellee's equity interest designated as child support was also the basis of or consideration for the division of property contained in other provisions. In fact, we find the parties' well-drafted agreement is integrated in such a fashion that the property, debt, alimony and support provisions constitute reciprocal consideration. For example, appellee conveyed his $43,200 equity interest in the family residence and lot to appellant, subject to appellant's assuming the mortgage indebtedness on the property. This lump-sum amount was stipulated and was to cover appellee's child support obligations during the children's minority. A second mortgage indebtedness on the house in the amount of $15,000 was assumed by appellee. Appellant further undertook the responsibility of two additional notes totalling $29,000, one of which was appellee's sole debt in the sum of $23,000. Appellant, in turn, released all her interests in appellee's two businesses. In a provision captioned "ALIMONY," the parties agreed that "due to the division of property belonging to the parties . . . and other considerations that HUSBAND [appellee] shall not pay WIFE [appellant] support or alimony now or in the future." Although there are additional provisions, those mentioned here are sufficient to show the reciprocal nature of the entire

agreement. It was intended as a final, irrevocable and total settlement between the parties.

When parties execute an integrated property and support settlement agreement which is incorporated in their divorce decree, we believe the better rule is that the court cannot later alter or modify that decree unless the parties have provided for or agreed to such modification. *See Plumer* v. *Plumer,* 48 Cal.2d 820, 313 P.2d 549 (1957). Our review of the parties' contract and the other evidence before us leads us to one conclusion: The contract was integrated, it was intended to be a final settlement with respect to all property, financial, alimony and support matters, and it did not provide for modification. Therefore, we hold the trial court erred in modifying the parties' agreement, and we reverse accordingly.

In conclusion, we do not hold that the trial court is powerless to consider appellant's obligation, if any be shown, to pay child support while the children are in appellee's legal custody. Certainly, there is nothing in the parties' agreement which in any way precludes appellee from petitioning for child support. Thus, in reversing and remanding this cause, the trial court may consider that issue if it is properly raised.

Reversed and remanded.

COOPER, J., concurs.

Tony RAMSEY *v.* William F. EVERETT, Director of Labor, and PROTECTION, INC.

E 82-148 644 S.W.2d 621

Court of Appeals of Arkansas
Opinion delivered January 12, 1983

Dan Harmon, for appellant.

Thelma Lorenzo, for appellee.

TOM GLAZE, Judge. This is an Employment Security case in which the claimant contends that insufficient evidence existed for the Board of Review to find that claimant's actions constituted misconduct within the meaning of Ark. Stat. Ann. § 81-1106 (b) (2) (Repl. 1976). Because of our recent holding in *Mark Smith* v. *Everett,* 6 Ark. App. 337, 642 S.W.2d 320 (1982), review denied January 10, 1983, we must remand this case for further proceedings before we can dispose of claimant's argument in this appeal.

We note that *Mark Smith* was decided when the instant case was on appeal.

In *Mark Smith* v. *Everett, supra,* the Board of Review reversed the Appeal Tribunal's award of benefits, basing its decision primarily upon an affidavit submitted to the Board by the employer after the Appeal Tribunal decision. We reversed the Board and remanded for a hearing consistent with *Leardis Smith* v. *Everett,* 276 Ark. 430, 637 S. W.2d 537 (1982), in which the Supreme Court said that benefits cannot be denied unless a claimant has an opportunity to confront and cross-examine adverse witnesses at an evidentiary hearing. We further held in *Mark Smith* v. *Everett, supra,* that the Board of Review is without jurisdiction to accept additional evidence in appeals pending before it.

Here, as in the *Mark Smith* case, the Appeal Tribunal found for the claimant after both the claimant and a representative of the employer testified at a hearing. On appeal from the Appeal Tribunal's decision, the employer and the claimant submitted additional evidence to the Board. The employer submitted letters and copies of business records to support its position that claimant was fired for misconduct in connection with the work. Much of this new evidence contained matters never presented at the Appeal Tribunal level. The claimant and his wife subsequently wrote letters refuting this new evidence. In reversing the Tribunal's award of benefits, the Board in its findings referred to statements submitted by the employer for the first time on appeal. Thus, we must assume that the Board based its decision upon the new evidence — a practice prohibited by our holding in *Mark Smith* v. *Everett.*

We therefore reverse the Board's decision and remand consistent with our holding and directions in *Mark Smith* v. *Everett, supra.*

Reversed and remanded.

Premanand Vinayak WAGH *v.* Frances Rosalie WAGH

CA 82-186 644 S.W.2d 630

Court of Appeals of Arkansas
Opinion delivered January 19, 1983

Paul D. Gordon, for appellant.

Henry & Duckett, by: *Richard L. Lawrence,* for appellee.

TOM GLAZE, Judge. This is an appeal from certain property settlement provisions of a divorce decree in which the appellant alleges that the trial court erred as follows: (1) in awarding a $400 credit to appellant for his jewelry which appellee sold; and (2) in awarding appellee the use and possession of the parties' home. We affirm the chancellor's decree in both respects.

The parties lived apart for several years before they were divorced. A Decree of Separate Maintenance was entered in

October 1977 which set out the division of certain items of personal property, including the jewelry at issue, and which granted the appellee the use and possession of the family home for herself and the parties' children. A divorce hearing was held January 14, 1981. Another hearing was held May 19, 1981, at which time the court rendered its final decision. A decree of divorce was entered in October 1981 *nunc pro tunc* to the date of the May hearing.

No record was made of the May hearing; consequently, no transcript is available to determine the basis for the chancellor's final awards. A transcript of the January 14 hearing reflects appellee's testimony, that she sent three necklaces to California for her sister to sell and that appellee received proceeds of $900 from the sale. Two of the three necklaces belonged to appellant; the third to appellee. The appellant contends on appeal that his jewelry was worth $4,000, and that the trial court erred in giving him a credit of only $400 against child support and house payment arrearages he owed appellee. Without a transcript of the May hearing, we are unable to determine exactly how the chancellor arrived at the $400 figure. Rule 6 (d) of the Rules Appellate Procedure provides a method of reconstructing a record of proceedings when a stenographic record is not kept. However, appellant made no attempt to make a record in compliance with the rule. In this situation, we must presume that the matters presented in the unrecorded hearing support the trial court's findings. *Armbrust* v. *Henry*, 263 Ark. 98, 562 S.W.2d 598 (1978); *Watson* v. *Jones*, 233 Ark. 203, 343 S.W.2d 415 (1961).

Appellant contends that the court also erred in awarding appellee the use and possession of the home which they owned as tenants by the entirety rather than in ordering the house sold and the proceeds divided between the parties. He bases his assertion upon Ark. Stat. Ann. § 34-1215 (Supp. 1981), and upon the alleged financial straits of the appellant at the time of the divorce. We find this argument without merit. Under § 34-1215, parties who hold property as tenants by the entirety automatically become tenants in common at the time of divorce. In construing § 34-1215, the Supreme Court in *Yancey* v. *Yancey*, 234 Ark. 1046, 356 S.W.2d 649

(1962), held that the trial court, upon granting the divorce, may place one of the parties in possession of the premises, or it may order the property sold and the proceeds divided.[1] Thus, in the instant case, the chancellor's action in placing appellee in possession of the parties' property was certainly authorized under Arkansas law. In view of the record presented us in this case, we must presume that the chancellor's decision to put appellee in possession was not clearly against the preponderance of the evidence.

[1]In *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981), the Supreme Court held that Act 705 of 1979, which amended the general property division statute, codified as Ark. Stat. Ann. § 34-1214 (Supp. 1981), did not effect a change in § 34-1215. We also note that a 1975 amendment to § 1215 provided that the change in estates is automatic at divorce, rather than being merely within the authority of the chancellor. This 1975 Amendment did not affect the rule and holding announced in *Yancey*.

Roger PICKLER and Marilyn PICKLER d/b/a
VIKING REALTY & DEVELOPMENT COMPANY *v.*
John FISHER and Marlene FISHER

CA 82-192 644 S.W.2d 644

Court of Appeals of Arkansas
Opinion delivered January 26, 1983

Bill W. Bristow, P.A., of *Seay, Bristow & Rees,* for appellants.

Dennis Zolper, for appellees.

GEORGE K. CRACRAFT, Judge. Roger Pickler and Marilyn Pickler appeal from a jury verdict awarding John Fisher and Marlene Fisher damages for breach of an implied warranty of good workmanship and fitness for habitation of a new home constructed by the Picklers, contending that adequate notice of all defects was not given them before trial. During the course of the construction of the dwelling certain changes were made in the plans and specifications for which the contractors claimed additional compensation, the amount of which was in dispute. On April 23, 1980 the appellees moved into the house. There was evidence that before April 23rd appellees had pointed out certain defects in construction to the appellants and that within a few days after April 23rd other defects were made known to the appellants. According to the appellees they had no response from the appellants to these complaints and on June 19, 1980 appellees sent a letter to the appellants which listed eight specific defects and demanded that they be corrected "before the date of closing." These defects were not corrected and, according to the appellees, they received no response to that letter. The appellees then filed this action on July 20, 1980 seeking a declaratory judgment as to the amount due under the contract as a result of the dispute in charges made for changes and additionally sought to recover under their implied warranty of fitness for the defects in workmanship. That complaint listed nineteen such defects including those

listed in the letter of June 19th. It sought damages for the breach in the amount of $20,000.

The appellants denied any breach of warranty and asked for judgment of $13,590.06 for the additional work and materials required by changes made during the course of construction.

The case was tried before a jury on January 11, 1982. At the trial the appellees offered proof as to cost of curing thirty-six defects over the objection of the appellants who argued that the proof of damages should be limited to the eight specific defects for which written notice had been given on June 19th. The jury returned a verdict in favor of the appellees for the breach of warranty of fitness in the amount of $14,029.45 and for the Picklers for compensation for extra work of $1,383.19. Appellees do not appeal.

The appellants do not question that they were aware of some of the complaints at the time appellees took possession; that they received the written notice on June 19th listing eight such defects or that the complaint listed eleven more defects for workmanship. Nor do they contend that the initial notice of June 19th was not given within a reasonable time. They contend only that in an action based on an implied warranty on the sale of new housing, the purchaser is required to give timely notice of each and every defect complained of and upon failure to do so will have waived any defects not contained in a timely written notice. The narrow issue before us is the extent of such notice required to be given as a prerequisite to an action by a buyer for breach of implied warranty for workmanship and fitness against a builder-vendor.

Both parties argue that the principles announced in *Wawak* v. *Stewart,* 247 Ark. 1093, 449 S.W.2d 922 (1970) and those cases following it are applicable to this case. In *Wawak* the court declared that the rule of *caveat emptor* no longer applies to the sale of new housing by a vendor-builder and that there is an implied warranty in such a transaction that the house is constructed in a workmanlike manner and is fit for human habitation. This implied warranty extends to all

integral parts and systems of the house where the breakdown is tied to its design or installation. There is no material difference in the rules to be applied where the purchaser supplied the plans for the construction when there is poor workmanship or faulty design in the implementation of those plans by the builder. *Coney* v. *Stewart,* 263 Ark. 148, 562 S.W.2d 619 (1978); *Daniel* v. *Quick,* 270 Ark. 528, 606 S.W.2d 81 (Ark. App. 1980). None of those cases addressed the question of the extent of the notice of a breach of warranty which must be communicated to the seller. They indicate only that the waiver of such defects is a question of fact to be determined by the circumstances of each case and that payment and occupancy of the premises without more does not constitute a waiver as a matter of law.

The appellant argues that the proper rules to apply with regard to notice are those provided for in similar commercial transactions in Ark. Stat. Ann. § 85-2-607 (3) (a) (Add. 1961) which provides that where tender has been accepted the buyer must within a reasonable time after he has or should have discovered any breach notify the seller of a breach or be barred from any remedy. As it is apparent from a reading of *Wawak* that the judicially declared implied warranties created by it were motivated by a desire to equalize the indefensible contrast between the rules of law applicable to the sale of personal property and those applicable to the sale of real property, it is not inappropriate to look to the law governing the sales of chattels for guidance in this case. The comment to § 85-2-607 contains the following:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all of the objections that will be relied on by the buyer, as under . . . Ark. Stat. Ann. (§ 85-2-605 [2]). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be

such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

While we do not declare that the provisions of the Uniform Commercial Code govern all cases involving breach of warranty as to new housing, we do find that the standard set out there is a reasonable one for application to the case now under review. We do declare that in such cases the buyer is not required to list each and every objection that he would rely on as constituting the breach. Notification in such cases need only be with sufficient clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him sufficient opportunity to inspect the premises and correct the defects. The sufficiency of the notice and whether it was given within a reasonable time are ordinarily questions for a jury to determine.

In such cases it is proper for the trier of fact to consider the superior position of the builder in determining the extent of a defect, the need for correcting it and the consequences of failing to do so. Here, there is evidence that prior to the date appellees took possession there were leaks in the basement wall and other defects which appellees testified had been brought to appellants' attention. The notification of June 19th listed those defects and contained others, including leaks in other places. According to the testimony of the appellees some of those defects about which he testified were not "new ones" but "progressions of old ones" which resulted from failure to correct the original ones. We cannot conclude that the court erred in submitting these issues to the jury.

Affirmed.

Terry KELLEY *v.* STATE of Arkansas

CA CR 82-127 644 S.W.2d 638

Court of Appeals of Arkansas
Opinion delivered January 26, 1983

Guy H. "Mutt" Jones, Phil Stratton and *Casey Jones,* by: *Phil Stratton,* for appellant.

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

GEORGE K. CRACRAFT, Judge. Terry Kelley appeals from his convictions of battery in the third degree against Emmet Don Clark and Wesley Boyce in violation of Ark. Stat. Ann. § 41-1603 (Repl. 1977). At the trial, while admitting the use of a knife in the affray which led to both battery charges, the appellant interposed the defense of justification. He advances two procedural errors for the reversal of both

convictions. We find no merit in either of them. We do agree, however, that the conviction for battery committed upon Boyce is not supported by substantial evidence. On appeal we view the evidence in the light most favorable to the State and will affirm if there is substantial evidence to support the conviction. *Profit* v. *State,* 6 Ark. App. 51, 637 S.W.2d 620 (1982); *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981). Our recitation of the factual background leading up to the incident is viewed in that light.

The appellant and both complaining witnesses were employees of the Kroger Company. The appellant had been employed for a longer period than the others and under a collective bargaining contract he was entitled to preference in job assignment, work hours and rates of pay. It was admitted that throughout the past year, notwithstanding that provision, the appellant had not been assigned as many hours as the complaining witnesses and had finally announced that he would assert his rights under the contract. Neither complaining witness denied that appellant had that right under the contract.

On the day of the incident Clark worked the morning shift and the appellant worked the afternoon. The appellant was clocking in at the same time Clark was clocking out. Clark testified that as they passed the appellant "elbowed him." In an argument appellant stated that Clark was getting more hours than he was and that he was going to "bump" him. He stated that if he "did not like it, we could meet after work and have a fight." Clark agreed to meet him in the parking lot after the work day.

Clark, fearing that the appellant would not come alone, brought Gerald Wesley Boyce, Paul Harrison and Robert Scott Leffert along to assure that the fight would be a fair one restricted to Clark and the appellant. The appellant came out of the building alone and, seeing Clark and his associates, accused them of being "four on one." All four testified that they assured appellant that no one would interfere and that the fight was to be solely between Kelley and Clark. Appellant then hailed a passing car containing three individuals who agreed to join in if any of Clark's

associates did so. According to Clark and his associates appellant stated that he intended to exercise his contract rights, "bump" Clark, and challenged him to "do something about it if you will." Clark struck the appellant, knocking him to the ground. Appellant rose, backed off a few feet, pulled a knife from his pocket and stabbed Clark in the chest. Clark retreated to a wall of the building and the appellant advanced and stabbed him again in his side.

Boyce, who had not participated, moved toward the two men because he thought Clark was about to fall due to his wounds. The appellant turned, charged at Boyce and cut him on the shoulder. All four prosecuting witnesses testified that only Clark had engaged in the fight and that Boyce had made no threatening moves toward appellant before he lunged at him with the knife. According to the medical testimony Clark received two wounds, one severing a small artery in the chest wall and damaging a lung. He remained in the hospital for five days after emergency surgery as a result of what the doctor described as "life threatening wounds." The wounds to Boyce were less severe but he sustained a cut or scratch on his shoulder.

Two weeks before the trial, the appellant served notice that it would take the discovery deposition of an official of the Kroger Company and issued a subpoena duces tecum directing a corporate official to bring with him to the designated place all records relating to the work and pay records of Clark, Boyce, Harrison and Leffert. The appellant contended there, as it does here, that this information was relevant to his defense of justification as it would show motivation for a conspiracy by the prosecuting witnesses to intimidate him into forgoing rights afforded him under the collective bargaining agreement and that it was appellant's announced intention to assert those rights which led to the affray. The trial court ruled that whether Clark and Boyce were improperly allowed to earn more or resented appellant's intent to "bump" them was irrelevant to the issue of whether he was justified in stabbing the two. The subpoena was quashed.

While we agree with the trial court that whether the appellant had been discriminated against by the employer was irrelevant to the stabbing of the two complaining witnesses, we sustain the action of the trial court for an even more compelling reason.

The subpoena duces tecum in question was not requested and issued to require the attendance of the corporate officer and his records at the trial as provided in Ark. Stat. Ann. § 43-2004 (Repl. 1977). It sought to compel the attendance of the witness with his records at a discovery deposition to be taken in advance of a criminal trial. It is well settled that the right to take a deposition rests upon statutory authority and in no case can that right be exercised unless that authority exists. *Russell* v. *State,* 269 Ark. 44, 598 S.W.2d 96 (1980).

The notice recited that the deposition was to be taken pursuant to Rules 30 and 34, Arkansas Rules of Civil Procedure, and Ark. Stat. Ann. § 43-2011 *et seq.* (Supp. 1981). The discovery procedures permitted in Rules 30 and 34, Arkansas Rules of Civil Procedure, are applicable only to civil actions. Arkansas Rules of Civil Procedure, Rule 81 (a). They are not applicable in criminal proceedings unless there is a specific statute so providing.

Ark. Stat. Ann. §§ 43-2011, 43-2011.1 (Supp. 1981) do authorize the taking and use of depositions in criminal cases but are expressly limited to the deposition of a material witness where there are reasonable grounds to believe that before the trial the witness will die, or become mentally incapable of giving testimony, or physically incapable of attending the trial, or otherwise be incapable of attending the trial. Where there is a proper showing of the existence of the reasonable grounds to believe that the witness will become unavailable the court may order the taking of the deposition and production of documents for the purpose of reading it into evidence at trial.

Ark. Stat. Ann. § 43-2011.2 (Repl. 1977) and our Rules of Criminal Procedure provide adequate methods of the discovery and inspection of documents in the possession,

custody or control of the State which are known or in the reasonable exercise of diligence may become known to the prosecuting attorney. Here the material about which the defendant wished to inquire was not in the possession of the State but in that of a third party over which the State had no control.

Appellant has not cited to us, and we find no statutory authority for, the taking of a pre-trial deposition in the circumstances presented by this record or for the purpose for which it was sought in a criminal proceeding.

Appellant next argues that the trial court erred in limiting his closing argument to fifteen minutes. We do not agree. The rule is well settled that the subject and range, as well as the length, of an argument of counsel must necessarily be left to the sound discretion of the presiding judge and, unless that discretion is grossly abused to the prejudice of a party it is not subject to review. *Hardin* v. *State,* 225 Ark. 602, 284 S.W.2d 111 (1955); *Reynolds* v. *State,* 220 Ark.188, 246 S.W.2d 724 (1952).

The appellant first asked for "unlimited time" for his argument. The court stated that he would be allowed fifteen minutes. The appellant then requested an "unfettered thirty minutes" for his argument. The trial court denied that request stating that the evidence was not in sufficient conflict to warrant lengthy argument.

The record reflects that there were five eye witnesses to the affray. They all agreed that the entire incident lasted less than one minute. Clark, Boyce, Leffert and Harrison all testified that only Clark advanced on or in any way threatened the appellant in the fight and that the others were present only to assure that the fight was a fair one and limited to Clark and Kelley. Two of Clark's associates fled before the stab wound was inflicted. Boyce advanced only after the first wound was inflicted and only for the purpose of assisting Clark who was about to fall. The appellant testified that they all were advancing upon him and that he had reasonable grounds to believe that he was about to be the victim of all four, two of whom were skilled in the martial

art of karate. All of the parties agreed that appellant had the right to "bump" them and that he was in fact entitled to more work hours than they were under the collective bargaining contract. The affray, the cause of it and appellant's beliefs could be reviewed and argued in a very short time.

The only other matters in evidence were whether the wound suffered by Boyce was of sufficient severity to warrant conviction and appellant's reputation for truthfulness and as a peaceful person.

Even if the trial judge did not properly exercise his discretion, and we think he did, appellant would still be required to demonstrate from the record that he was prejudiced. The arguments of counsel were not transcribed. We therefore cannot tell from the record whether the argument was adequately presented or even if all of the allotted time was used. The appellant proffered nothing in the record and points out nothing to us which would tend to show what, if anything, he was unable to tell the jury as a result of the court's ruling.

The conviction for battery committed on Clark is affirmed.

The appellant next contends that the evidence was insufficient to sustain the conviction of battery in the third degree as to Boyce. We agree.

Ark. Stat. Ann. § 41-1603 (1) (a) (Repl. 1977) defines the offense as follows:

> A person commits battery in the third degree if, with the purpose of causing physical injury to another person, he causes physical injury to any person.

"Physical injury" is defined as "the impairment of physical condition or the infliction of substantial pain." Ark. Stat. Ann. § 41-115 (14) (Repl. 1977). The testimony of Boyce with regard to his injuries was as follows:

Q. Now were you also cut?

A. Yes sir.

Q. Where?

A. On the right shoulder.

Q. Did you require stitches or medical attention?

A. No sir, it wasn't that severe.

Q. Through your clothes?

A. I believe it did, sir. I'm not sure about that it's been so long.

Paul Harrison, one of Boyce's associates, compared Boyce's injuries to a "fingernail scratch." We conclude that the evidence as to the injuries to Boyce was insufficient to establish that his physical condition was impaired or that he was inflicted with substantial pain. We conclude that the conviction of battery in the third degree committed upon Boyce is not supported by substantial evidence.

That conviction is reversed and dismissed.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I agree that the trial court erred but I think the majority has chosen the wrong thing as error.

The error, in my opinion, occurred when the court limited defense counsel to fifteen minutes for jury argument. I strongly support the proposition that a trial judge must have a large degree of discretion in managing and controlling the proceedings at a trial, but I am also firm in the belief that this means "that sound judicial discretion the exercise of which is a matter of review." *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256, 259, 85 S.W. 428 (1905).

Here, the fifteen-minute limitation, in my judgment, was not the exercise of sound judicial discretion. I also disagree with the majority opinion's assertion that the appellant was required to demonstrate prejudice by placing in the record what "he was unable to tell the jury as a result of the court's ruling." How can an artist show us the picture he was not allowed to paint?

In one of the few in-depth considerations of judicial discretion, Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above,* 22 Syracuse L. Rev. 635, 665 (1971), it is said, "a trial judge relying upon discretionary power should place on record the circumstances and factors that were crucial to his determination." The court here asked how much time the attorneys wanted for closing argument. The prosecuting attorney asked for fifteen minutes and defense counsel wanted "unlimited time." The judge's only explanation of his selection of the fifteen-minute period was:

> Phil, the court heard five witnesses all of whom testified to the same set of circumstances. There wasn't a hill of beans difference in any of the way the witnesses said it happened. When you tell it one time, you wipe out all the witnesses, and the rest of your case is character witnesses.

I believe much more was involved than simply rehashing what the witnesses to the "fight" said happened. In the first place the trial judge was wrong if he thought only five witnesses testified to what occurred. There were actually seven such witnesses. In all, a total of fourteen witnesses testified, including a doctor who performed surgery on Emmet Don Clark. The testimony covers 173 legal-size pages. The trial started at 9:00 a.m. and the jury retired to consider its verdict at 4:25 p.m. The court gave the jury 24 instructions and 7 verdict forms. The instructions cover 9 legal pages and the verdict forms use 3 more pages. The defendant could have received 20 years imprisonment and a $15,000.00 fine on each charge. Of course, it was within the court's discretion to refuse the appellant's request for "unlimited time" for jury argument, but the above circum-

stances demonstrate to me that the exercise of sound judicial discretion required more than an agreement to the limit suggested by the prosecuting attorney based upon the trial court's perception that "there wasn't a hill of beans difference in any of the way the witnesses said it happened."

Thus, I would reverse the convictions and remand on both charges, but I would not reverse the conviction of battery on Boyce on the basis that he was not caused "substantial pain." To put that charge in perspective it should be noted that battery in the first degree comprehends life-endangering conduct, second degree punishes conduct resulting in serious physical injury, and third degree requires only physical injury which is defined as "the impairment of physical condition or the infliction of substantial pain."

In addition to the evidence set out in the majority opinion, Boyce testified that the appellant "cut me on the shoulder"; appellant himself said that Boyce received "a small nick across the arm"; and the witness Harrison testified that the cut brought blood. I submit that whether this cut caused "substantial pain" was a question for the jury. In *The Scott-Burr Stores Corp.* v. *Foster,* 197 Ark. 232, 242, 122 S.W.2d 165 (1938), the court said that many questions and answers about the pain and suffering caused by injuries are "unnecessary attempts at proof of facts known by everyone who understands the extent of injuries." And, after all, in the instant case the trial court instructed the jury that they were not required to set aside their common knowledge, but had a right to consider all the evidence in the light of their own observations and experiences in the affairs of life. I would let them do that. Not only is it proper under the law but I am satisfied the jury knew as much about whether the cut caused Boyce "substantial pain" as this court does.

CLONINGER and CORBIN, JJ., join in this dissent with regard to the limitation of the jury argument.

Stanley HEGG *v.* Markel E. DICKENS
and Wife, Neda Faye DICKENS

CA 82-178 644 S.W.2d 632

Court of Appeals of Arkansas
Opinion delivered January 26, 1983
[Rehearing denied February 16, 1983.*]

Philip Farris, of *Highsmith, Gregg, Hart & Farris,* for appellant.

Charles E. Clawson, Jr., of *Brazil, Roberts & Clawson,* for appellees.

JAMES R. COOPER, Judge. This is the second appeal in this case. In the first case, *Hegg* v. *Dickens,* 270 Ark. 641, 606 S.W.2d 106 (Ark. App. 1980), this Court reversed the trial court's finding that the appellant's counterclaim which was based on fraudulent misrepresentation was without merit. We remanded the case for a trial on the issue of damages, with the measure of damages being the "difference between the real value of the property in its true condition at the time of the transaction and the price for which he purchased it."

*CORBIN and GLAZE, JJ., would grant rehearing.

On retrial, the trial court found that the appellant had been damaged in the sum of $2,000.00. From that decision, comes this appeal.

On remand, various witnesses testified regarding the value of the property in question. The appellant's expert witness, Mr. R. M. Weaver, testified that his opinion as to the value of the property in question was $50,000.00. The trial court found that testimony to be unreliable because of the basis on which it rested. The trial court noted that Mr. Weaver had viewed the property only the evening before, had considered no comparable sales in the vicinity, and had formed his opinion based on his limited observation of the property and the testimony of the appellees' expert witnesses. One witness for the appellees testified that she had attempted to purchase the property herself for a price of $75,000.00. Another witness testified that he believed the property had a value of between $85,000.00 and $95,000.00. The trial court found that the value of the property was $85,000.00, and awarded the appellant judgment accordingly.

The appellant argues that, because of the fraudulent misrepresentation concerning the net income, the appellant must have been damaged more substantially than $2,000.00 since he paid $87,500.00 for the property based on the representation of its net income. That is a compelling argument, but not necessarily true. It would certainly be possible for an individual to purchase property, having been fraudulently induced to do so, and yet the property still have a fair market value equal to or in excess of the price actually paid. Hence, in such a situation, the purchaser would suffer no actual damages, although he had been fraudulently induced into making the purchase.

In chancery cases, we review the record *de novo,* but we will not reverse the chancellor on appeal unless his findings of fact are clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. Arkansas Rules of Civil Procedure, Rule 52 (a), Ark. Stat. Ann. Vol. 3A (Repl. 1979); *Reeder* v. *Arkansas Louisiana Gas Co.,* 6 Ark. App.

385, 644 S.W.2d 291 (1982); *Baugh* v. *Johnson,* 6 Ark. App. 308, 641 S.W.2d 730 (1982).

There was conflicting evidence regarding the value of the property and the chancellor, after having heard all the witnesses, determined that the credibility of the appellees' witnesses was greater than the credibility of the appellant's expert witness. Although the appellees' witnesses used comparable sales from the city of Conway which concerned larger motel units, they testified that they had taken into consideration the difference in the size of the towns and the size of the motels in arriving at the value opinions.

Although this is a close case, and one which we might have decided differently had we been sitting as the trier of fact, with the opportunity to judge the demeanor of the witnesses, we cannot say that the trial court's finding is clearly erroneous or against the preponderance of the evidence. Therefore, we must affirm.

Affirmed.

CLONINGER, CORBIN and GLAZE, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. R. M. Weaver, the appellant's expert witness, testified as to his real estate experience. He received his broker's license in 1968 and was one of the first G.R.I.'s (Graduate Real Estate Institute) in the state. He had attended approximately eighty-five short courses all over the nation dealing primarily with appraisals of light commercial real estate. He also had experience in brokering, owning, and selling restaurants and motels and was of the opinion that the fair market value of the Hickory House Motel and Cafe on February 12, 1979, was $50,000.00. As an expert witness, Weaver was permitted to remain in the courtroom and hear the other witnesses testify. His opinion as to the value of the property was based primarily on the fact that Mr. and Mrs. Dickens purchased the property in 1977 for $45,000.00 and spent another $5,000.00 in repairs for a total investment of $50,000.00. The actual purchase price in 1980 at the foreclosure sale was $49,500.00, out of which $2,967.81 was for attorney fees, taxes, and court costs.

The Dickens were required to produce income tax and sales tax records for the years that they owned the motel and restaurant. The sales tax records had apparently burned. Mrs. Dickens testified that they had never run both the motel and restaurant themselves for a year because "they had leased it or something." The Schedule C income tax return listed a net profit of $3,131.50 for the year 1977. After the year 1977, she leased the restaurant for three years. The people to whom she leased it kept it one year and the Dickens took it back in November of 1978. She testified that she leased it most of the year 1978 and the lease price was $400.00 per month. Mrs. Dickens stated that she didn't have her books for the year 1978 and couldn't remember how much she had netted off the operation of the motel. She did testify that she lost money in the operation of the business. Mrs. Dickens also said that the bank would not loan them more than $40,000.00 on the motel and cafe in 1977. Later that amount was increased to $45,000.00.

The appellees introduced testimony from two expert witnesses. Dennis Miller had been a licensed real estate broker for four years in Conway. He was the listing broker in the sale of the property to Hegg from the Dickens and had personally made $2,900.00 off the sale. His opinion as to the value of the property in February 1979 was between $85,000.00 and $90,000.00. This figure represented the value of the land and buildings without any consideration of the business itself. He went on to testify that the highest and best use of the property would depend on its management but that its highest and best use in 1979 was as a motel and restaurant. Miller based his opinion on what he labeled as comparable sales and described as follows:

> A grocery store on Highway 65 north of Greenbrier which sold for $60,000.00 in 1973; a house and five acres on Highway 65 north in Greenbrier for $45,000.00 in 1977; a dari-diner in Greenbrier for $43,000.00 recently; the Stacy Motel (19 units) in Conway, Arkansas for $140,000.00 in 1980; the Continental Motel (21 units) in Conway sold for $175,000.00 in 1978; and four boat docks in Conway.

His description of each of the foregoing sales on cross-examination clearly shows they were not comparables. Miller stated that the house and five acres which sold in 1977 on Highway 65 north was residential property. He also admitted that boat docks, motels and restaurants were not the same thing. He further testified that a grocery store was different from a motel and that the sales price of $60,000.00 for the store included its inventory. When questioned about the motel which sold in Conway, Arkansas, Miller stated that Conway had a population of 27,000 people in the fall, winter and spring and that the city intersected with an interstate highway as well as with Highways 60, 64, and 65.

Appellees also offered the testimony of Janice Mack, who had been a real estate broker in Greenbrier, Arkansas for four years. Mack also offered comparable sales of property to buttress her opinion of the value of the Hickory House Motel and Cafe, placing a value on it of between $80,000.00 and $90,000.00. Her comparables consisted of property in and around the Greenbrier area described as follows:

> A drugstore building which sold in 1980 for $30,000.00; a dari-diner which Dennis Miller had previously mentioned for $43,000.00 in 1980; a house which sold in 1980 and could have been used for commercial purposes for $38,000.00; her office which was purchased in 1979 for $25,000.00; the Greenbrier Recreation Club which consisted of a swimming pool and recreation facility on Highway 65 and five acres which were purchased for $55,000.00 in 1978; a warehouse at the corner of Highways 65 and 225 purchased in 1977 for $30,000.00; and two old houses sitting on two acres for $37,000.00 in 1979.

Like those values offered by Miller, the property sales given by Mack simply cannot be called comparables.

Nonetheless, the chancellor considered both Miller's and Mack's opinion testimony but disregarded Weaver's. In doing so, the chancellor stated:

> That the testimony of the expert submitted by the defendant, Stanley Hegg, was based purely on conjecture, speculation and testimony given by other witnesses during the trial and that there was no basis in fact or otherwise for this opinion to which the Court gave little credence.

If any of the values offered could be labeled conjectural or speculative, it had to be that offered by appellees' experts. Weaver's opinion was based primarily on the Dickens' purchase of the property in 1977 for $45,000.00. In disregarding Weaver's opinion, the trial court committed clear error. The Arkansas Supreme Court has ruled in several cases that evidence as to comparable sales should not be excluded on the basis that they were made at a time either preceding or subsequent to the date on which the valuation was to be set. *Housing Authority of City of Little Rock* v. *Sparks,* 234 Ark. 868, 355 S.W.2d 166 (1962).

It is plain that the court had no comparable sales whatsoever upon which to base its opinion. If comparables are to be of any evidence at all, the ones used in this case indicate that the Dickens' property was worth even less than that to which Weaver testified. In *Arkansas State Highway Commission* v. *Dipert,* 249 Ark. 1145, 463 S.W.2d 388 (1981), the same issue was addressed. There, appellee's expert witness testified concerning the value of the property in Damascus, Arkansas but he based his opinion on residential property in Conway, which at that time had a population of 15,510, and Russellville, which at that time had a population of 11,750. The Court noted that the appellee's property was of a personal nature and located in Damascus, population 255. The Court said:

> As we understand it, appellee asserts that this was permissible because no commercial sales had occurred in this small rural town during the preceding 10 years and, therefore, they should be permitted to resort to utilization of residential sales in minimally developed subdivisions in Conway and Russellville and relate them to sales of residential property located on the highway in the Damascus area in order to establish

> commercial value of appellee's property. When it is necessary to go outside an area for evidence about comparable commercial sales, we observed that the better rule is to restrict the evidence to comparable sales of commercial property in an area or town which has more similarity in nature and size.

Plainly, the comparables offered by the appellees' witness, Dennis Miller, are not comparable within the meaning of the law and should have been given no consideration by the chancellor. To compare those property values in the City of Conway with the small town of Greenbrier, Arkansas, is totally unrealistic.

Even if the property in dispute was worth as much as the highest comparable sale given by Miller or Mack (the sale of the grocery store including inventory), the Hickory House Motel and Cafe would only be worth the sum of $60,000.00. In that event the appellant would be entitled to recover his down payment of $25,000.00.

I would reverse and allow the appellant to recover $25,000.00.

CLONINGER and GLAZE, JJ., join in this dissent.

Othorell COCHRAN *v.* Rosetta Skaggs COCHRAN

CA 82-196 644 S.W.2d 635

Court of Appeals of Arkansas
Opinion delivered January 26, 1983

John Norman Warnock, for appellant.

Travis Mathis, for appellee.

LAWSON CLONINGER, Judge. The trial court denied the motion of appellant, Othorell Cochran, to be relieved from further alimony payments to appellee, Rosetta Skaggs Cochran. It was alleged, and not disputed, that appellant's sole source of income was from disability payments from the United States Army and Social Security. We find that the trial court correctly denied appellant's motion and we affirm.

Appellant and appellee were divorced in 1978, at which time appellant was ordered to make alimony payments of $250 per month. Appellant contended in his motion, and contends here, that ex-spouses have no right to share in federal disability benefits through state court orders for alimony. In her response to appellant's motion, appellee alleged that she remains permanently and totally disabled and is dependent upon appellant. Appellee's allegations of disability and dependency were not disputed.

The only question properly before this court is whether a state trial court can give consideration to disability income

derived from United States Army and Social Security in determining the amount of alimony to be paid.

In support of his argument, appellant cites two Arkansas cases: *Paulsen* v. *Paulsen,* 269 Ark. 523, 601 S.W.2d 873 (1980); and *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976). However, both of these cases are concerned with the division of marital property pursuant to a divorce. Both cases held that a husband's retirement pay from the armed forces is not personal property within the meaning of the marital property statute [See Ark. Stat, Ann. § 34-1214 (Supp. 1981)], and therefore is not subject to division between the husband and wife. Furthermore, the *Paulsen* case held that although military retirement pay is not marital property such payments may be considered as any other economic circumstance in setting the amount of child support and alimony payments.

McCarty v. *McCarty,* 101 S. Ct. 2728 (1981), is inapplicable to the facts of this case, since *McCarty* merely held that federal law precludes a state court from dividing military retirement pay pursuant to state community property laws.

Appellee has made no attempt to reach any payments due appellant from any source by garnishment or other method of attachment, and there has been no intimation that the payments are marital property. It was proper for the trial court to consider the needs of appellee and the ability of appellant to pay, giving consideration to appellant's income from whatever source derived in determining the amount of alimony to be paid.

Affirmed.

Resa Joan CLIMER, Incompetent Dependent of Joe A. CLIMER, Deceased Employee *v.* DRAKE'S BACKHOE, Employer; TRANSAMERICA INSURANCE COMPANY, Insurance Carrier

CA 82-367 644 S.W.2d 637

Court of Appeals of Arkansas
Opinion delivered January 26, 1983

Richard S. Paden of *Bailey & Paden, P.A.*, for appellant.

Ken Reeves of *Pinson & Reeves,* for appellees.

LAWSON CLONINGER, Judge. On this workers' compensation appeal, the claimant's sole point for reversal is that the Arkansas Workers' Compensation Commission erred in not allowing a controverted attorney's fee. We believe the Commission was correct and we affirm.

Claimant, appellant Resa Joan Climer, is the incompetent dependent of Joe A. Climer, deceased employee of appellee, Drake's Backhoe. After Mr. Climer's death on April 12, 1978, appellee, Transamerica Insurance Company, commenced payments at the rate of 50% of the average weekly wage of Mr. Climer, 35% being paid for appellant's mother and 15% for appellant as a dependent child. Appellant's mother died on May 3, 1981, at which time payments were discontinued. A hearing was held on April 16, 1982 on appellant's petition for a lump sum award. At that hearing appellant contended that she was entitled to benefits of 50% as an only child under the provisions of Ark. Stat, Ann. § 81-1315 (d) (Repl. 1976). Appellee carrier contended that appellant was entitled only to a continuation of the benefits she had received, i.e., 15%. The Administrative Law Judge found that it would not be in the best interest of appellant to receive a lump sum award. After the hearing appellee carrier conceded that appellant was entitled to benefits of 50%.

The Law Judge denied appellant's petition for a lump sum award and found that the case had not been controverted. The Law Judge specifically found that appellee carrier was justified in not paying any benefits, whether they be 15% or 50%, because a guardian was not appointed to receive payments upon the death of appellant's mother. The full Commission affirmed and adopted the decision of the Law Judge.

The record reveals that prior to July 1, 1980, appellant's attorney was notified that appellee carrier intended to terminate appellant's benefits because appellant was over 18 years of age. The carrier was notified that although appellant was of age, she was disabled and remained dependent upon her mother. Thereafter, over a period of months, appellee carrier requested medical reports verifying appellant's disability, but no reports were furnished. Eventually a

psychological evaluation was furnished, but appellee carrier objected to it because it was five years old. The carrier offered to bear the expense of an up-to-date evaluation, but the offer was not accepted. An evaluation dated April 25, 1978 was submitted to the Commission and appellee carrier on July 22, 1981, and that report indicated that appellant had some work potential. No more recent evaluation was presented until after the case was set for hearing. On July 20, 1981 the Law Judge wrote appellant's attorney suggesting that a guardian be appointed for appellant. A guardian was not appointed until the day of the hearing, April 16, 1982.

Appellant is not entitled to a controverted attorney's fee in this case as a matter of law, as she contends. The question of whether a claim is controverted is one of fact to be determined from the circumstances of the particular case. *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976). Decisions of the Workers' Compensation Commission must stand if supported by substantial evidence, and in determining sufficiency of evidence to sustain the finding of the Commission testimony must be weighed in its strongest light in favor of the Commission's finding. *Pike County Poultry Company* v. *Kelley,* 243 Ark. 460, 420 S.W.2d 523 (1967).

There is substantial evidence in the record to support the decision of the Commission. There was evidence from which the Commission could find that appellee carrier acted in a prudent manner and that the litigation was made necessary by claimant's failure to provide a current medical evaluation and failure to appoint a guardian to receive any benefits paid. In *Hamrick* v. *The Colson Company,* 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981), the court held "... it is well settled that the mere failure of an employer to pay compensation benefits does not amount to controversion, especially in instances where the carrier accepts the injury as compensable and is attempting to determine the extent of disability." The court in *Hamrick* held that the carrier had acted in good faith, and stated that it was difficult to understand what more the carrier could have done.

In the case now before this court, appellee carrier requested a current evaluation on several occasions, but none was forthcoming until the hearing was set. Also, even after the Law Judge suggested the appointment of a guardian on July 20, 1981, none was appointed until the day of the hearing. We believe the Commission would be justified in finding that appellee carrier would have been imprudent if it paid any benefits until appellant's condition was medically documented and a guardian was appointed.

The decision of the Commission is affirmed.

Rickey WILLIAMS *v.* STATE of Arkansas

CA CR 82-97 645 S.W.2d 697

Court of Appeals of Arkansas
Opinion delivered February 2, 1983

James M. Simpson, for appellant.

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

MELVIN MAYFIELD, Chief Judge. Rickey Williams and Katherine Rogers, jointly, were charged with forgery and theft by receiving in connection with a welfare check. Rogers pled guilty and was sentenced. Williams went to trial and a jury found him guilty. A subpoena was issued for her to testify at his trial but she was not served and this appeal involves the testimony of a witness who was allowed to repeat statements which he said she made.

A witness named Rowe testified that he was in a cafe-poolhall when Williams and Rogers came in and Williams asked if Rowe would take them to cash a check. Rowe agreed and the three of them got in his pickup truck and went to a Safeway store. Rogers went into the store and there was evidence that she tried to cash a check, that the store employee became suspicious, and that Rogers left while the employee was showing the check to the store manager.

Rogers got back into the pickup truck with Rowe and Williams and they told Rowe to drive to Browning's Liquor Store. The Safeway store manager followed the truck and pulled it over about the time it got to the liquor store. He testified that the occupants of the pickup got out and he talked to Rowe and Rogers at the back of the truck while the appellant stood at the front. During this conversation, Rogers told the store manager that Williams had "put her up" to cashing the check because it was in a female's name and he knew he couldn't cash it and that he was going to give her half the money. At this point, according to the store manager, Williams walked to the back of the truck and when

the manager asked him about what Rogers had said Williams denied knowing anything about the check.

The store manager asked someone in the liquor store to call the police and a policeman came out, talked to everyone, and placed Williams and Rogers under arrest.

At the trial, counsel for Williams objected to the store manager's repeating what Rogers had told him during their conversation at the back of the pickup truck. The trial court overruled the objection on the grounds that the evidence was admissible under Uniform Evidence Rule 801 (d) (2) (v), Ark. Stat. Ann. § 28-1001 (Repl. 1979), as "a statement made by a coconspirator of a party during the course and in furtherance of the conspiracy."

Appellant first contends that the statement was not admissible because it was not connected by other evidence which established a conspiracy independently of the statement. *Patterson* v. *State,* 267 Ark. 436, 591 S.W.2d 356 (1979). We think, however, that this requirement was fully satisfied. In *Smithey* v. *State,* 269 Ark. 538, 602 S.W.2d 676 (1980), the court said that admissions and statements of a codefendant are admissible as against the other even in the absence of a conspiracy charge "where there is independent evidence of a concert of action," and that the rule is not confined to those who are codefendants at the same trial. Here, without considering any statement or admission of Rogers, we have evidence that Williams asked Rowe to take them to cash a check; that they rode together to the Safeway store where Rogers tried to cash a check made to a lady who testified she never received the check and never signed it; and when the clerk in the store became suspicious, Rogers left the check, got back in the pickup with Williams, and they left together. We find that evidence as strong as the evidence found sufficient in *Jackson* v. *State,* 267 Ark. 891, 591 S.W.2d 685 (Ark. App. 1979).

We also have no problem with the requirement that Rogers' statements must be made during the course of the conspiracy in order to be admissible against her cocon-

spirator, but we cannot agree that her statements were made in *furtherance* of the conspiracy.

The necessity of the "in furtherance" requirement is made quite clear by the history of our Uniform Evidence Rule 801 (d) (2) (v). In a law review article by Richard H. Field, Story Professor of Law Emeritus, Harvard Law School, *A Code of Evidence for Arkansas?,* 29 Ark.L.Rev. 1 (1975), it is pointed out that the Uniform Rules of Evidence were "grounded" upon the Federal Rules of Evidence and, in fact, our Rule 801 (d) (2) (v) is exactly the same as Federal Rule of Evidence 801 (d) (2) (E).

In *Krulewitch* v. *United States,* 336 U.S. 440, 443 (1949), the court said:

> This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts.

And in *Wong Sun* v. *United States,* 371 U.S. 471, 490 (1963), the court said it had "consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking."

The Federal Rules of Evidence became effective July 1, 1975. See the enacting clause of Public Law 93-595, 88 Stat. 1929 (1974). The notes of the Advisory Committee in regard to Federal Rule 801 (d) (2) (E) state that "the limitation upon the admissibility of statements of coconspirators to those made 'during the course and in furtherance of the conspiracy' is in the accepted pattern" and the *Krulewitch* and *Wong Sun* cases are cited. See Federal Rule of Evidence 801, 28 U.S.C.A. 531. And in the case of *United States* v. *Harris,* 546 F.2d 234, 237 (8th Cir. 1976), the court said:

> Before the present Rule 801 (d) (2) (E) was promulgated, Senator John L. McClellan of Arkansas strenuously advocated the abolishment of the "in further-

ance of" requirement, substituting in its place a more relaxed standard and thereby enlarging the existing hearsay exception. This suggestion was rejected, however, by Congress.

The reason for the "in furtherance" requirement is explained in 4 Weinstein & Berger, *Weinstein's Evidence,* 801-171 (1981), as the desire to strike a balance between the need to admit statements of coconspirators and the need to protect the accused against idle chatter of criminal partners. At any event, the requirement is clear — although whether a statement meets the requirement may not be.

In *United States* v. *Harris, supra,* the court said the statements involved could be viewed in two different lights, but found it unnecessary to make the determination. The *Krulewitch* case, *supra,* was relied upon by this court in *Smith* v. *State,* 6 Ark. App. 228, 640 S.W.2d 805 (1982), where we said it held that this exception to the hearsay rule does not "extend to concerted action to conceal the crime." In *United States* v. *Moore,* 522 F.2d 1068 (9th Cir. 1975), a "casual admission of culpability" was found in no way to have furthered the conspiracy. And in *United States* v. *Wilson,* 490 F.Supp. 713 (E.D. Mich. 1980), *aff'd,* 639 F.2d 314 (6th Cir. 1981), an admission to a company official was held not in furtherance of a conspiracy by employees to defraud the company because the admission was merely telling the official what had occurred and there was no attempt to draw him into the conspiracy.

From the above, we have to conclude that Rogers' statements in the instant case were not made in furtherance of the conspiracy. The *Krulewitch* case, *supra,* cited the case of *Hooper* v. *State,* 187 Ark. 88, 58 S.W.2d 434 (1933), as a case not totally in support of the *Krulewitch* view, but *Hooper* held that the conspiracy there involved did not end until the money taken in a robbery had been divided among the robbers. That is certainly a different situation from the one at bar. There are other Arkansas cases holding that the acts of the participants in an effort to escape are part of the continuous scheme or conspiracy, *e.g., Johnson* v. *State,* 252 Ark. 1113, 482 S.W.2d 600 (1972). But *Johnson* and the cases

it cites are situations where persons sought to escape from the crime scene and used someone as a shield in hopes that law enforcement officers would not shoot. Again, that is not the situation here.

In this case we see no way Rogers' statements that the appellant had "put her up" to cashing the check could help further the attempt to cash the check, divide the proceeds, conceal the crime, help the escape, or enlist the store manager in the conspiracy.

We reverse and remand for a new trial.

William James BRITT *v.* STATE of Arkansas

CA CR 82-129 645 S.W.2d 699

Court of Appeals of Arkansas
Opinion delivered February 2, 1983

Howell, Price & Trice, P.A., by: *Carey E. Basham,* for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. William James Britt was charged with the crime of battery in the first degree upon allegations that he did unlawfully and with the purpose of causing serious physical injury to William Hall shoot him in the back with a pistol. Appellant's defense was justification. Appellant was found guilty by the court sitting without a jury and was sentenced to serve five years in the Department of Correction. The sole argument for reversal is that the trial court erred in excluding testimony purporting to prove a violent character trait of the victim by a specific instance of prior violent conduct which was not shown to have been within the knowledge of the defendant. We do not agree.

According to the victim Hall, he and his wife were sitting in a truck stop discussing business with a prospective

customer when the appellant walked up and began to abuse them in loud tones. The two men went outside the cafe where Britt threatened to "whip him." Hall stated that Britt grabbed him and that he then threw Britt to the ground asking him to leave him alone because he did not want to fight. Britt grabbed him a second time and in the scuffle Britt was again thrown to the ground. Hall testified that he thought it was "all over" and walked away. After he had gone about twenty feet Britt shot him in the back, seriously wounding him.

Bill Bruton, the only eye-witness to the shooting, stated that he did not see any part of the scuffle between the men. He stated that as he came out of the cafe he saw Hall walking toward him. Britt, who was about twenty feet away, said "I will kill you," pulled up the gun and fired at Hall.

Britt testified that Hall was the aggressor and that he did not want to fight. He stated that he merely approached him about payment of a debt. He testified that they went outside to discuss that problem but Hall struck him, knocked him down and then stomped him. He fell near his own vehicle and was able to reach inside and get a pistol that he kept there. In a pre-trial statement to the police he stated that he had shot Hall as Hall was walking away, as testified to by both Hall and Bruton. At the trial, however, in his own defense he stated that he fired the shot while Hall was still "astraddle my legs and stomping me." He testified that Hall ran *after* the shot was fired.

Don Grice was called as a defense witness. When asked if the victim had ever threatened him with violence to his person Grice answered affirmatively. At that point the court sustained the objection of the prosecuting attorney, ruling that on the issue of self-defense, evidence of the character of the victim must be made by reputation or opinion and not by evidence of specific instances of conduct. A similar objection and ruling were made when the victim himself was asked if he had ever threatened a man named Bob Smith. We find these rulings to be correct. Testimony pertaining to a victim's traits of character is admissible for the purposes enumerated in Rule 404 (a) Arkansas Rules of Evidence. The

method for proving traits of character is set out in Rule 405 as follows:

> Methods of proving character. — (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The method of proving character is specifically limited on direct examination to "testimony as to reputation or testimony in the form of an opinion." Under Rule 405 (b) testimony of specific acts can be used only if necessary to prove an "essential element of the defense."

In *McClellan* v. *State,* 264 Ark. 223, 570 S.W.2d 278 (1978) the court held that the character trait of a victim as an aggressor is *not an essential element* in the defense of self-defense. There the trial court excluded testimony of a defense witness as to a specific act of violence directed at the witness by the victim. The incident did not involve the defendant and there was no indication that he had knowledge of it. The Supreme Court, in holding that the ruling to exclude this testimony was correct, stated:

> In the case at bar the question, then, is whether Sitz's [the victim] character as an aggressive person was "an essential element" of McClellan's defense of self-defense. Obviously it was not. One might plead self-defense after having killed the most gentle soul who ever lived. *In such a situation the decedent's character as a possible aggressor is being used circumstantially, not as a direct substantive issue in the case.* The trial judge was therefore correct in disallowing the proffered

> proof of a specific instance of aggression on the part of the decedent. (Emphasis supplied)

The defense of justification in the use of physical force under Ark. Stat. Ann. § 41-405 (Repl. 1977) requires both that the actor *reasonably believes* that unlawful physical force is about to be used upon him and that he *reasonably believes* that the degree of force used to repel it was necessary. The defense of justification in the use of deadly physical force under Ark. Stat. Ann. § 41-507 (Repl. 1977) is also conditioned on the *reasonable beliefs* of the actor. The fact of the victim's aggressive character is probative of whether the victim was aggressor at the time of the crime, but the fact of who aggressed is not an element of the defense of justification under either section. Who aggressed is only one factor or circumstance tending to shed light on the essential element of the defense, i.e., defendant's beliefs at the time of the crime. The fact of who aggressed does not prove defendant's beliefs directly.

A different rule has been applied where the specific acts of violence by the victim are known by the accused. In *Pope* v. *State,* 262 Ark. 476, 557 S.W.2d 887 (1977) the court reversed the trial court for excluding testimony tending to show that the accused was aware that his victim had killed three people and whipped several others severely. As the accused had interposed the defense of justification the Supreme Court ruled that his knowledge of those facts at the time of the crime was probative on the issue of what he reasonably believed.

In support of his position appellant relies upon the following language from *Smith* v. *State,* 273 Ark. 47, 616 S.W.2d 14 (1981):

> Evidence of a victim's violent character, including evidence of specific violent acts, is admissible where a claim of justification is raised. Such evidence is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force.

Any apparent conflict between *Smith* and *McClellan* was clearly resolved by the court in its subsequent decision in *Halfacre* v. *State,* 277 Ark. 168, 639 S.W.2d 734 (1982). *Halfacre* specifically holds that the rules announced in *McClellan* are applicable to cases such as those presently before us for review. In those cases in which the specific acts were directed at the defendant or were within his knowledge before the crime, they are admissible as being probative of what he reasonably believed and therefore directly relevant to his plea of self-defense. Testimony of specific acts not shown to have been within the knowledge of the defendant are not directly probative of defendant's beliefs. It was not error for the trial court to restrict character trait evidence to reputation and opinions in the case now before us. It is noted that the trial court did properly admit reputation evidence tending to show the victim's trait for violence as probative of the issue of who was the aggressor.

We find no error.

Gerald Scott SAVANNAH *v.* STATE of Arkansas

CA CR 82-128 645 S.W.2d 694

Court of Appeals of Arkansas
Opinion delivered February 2, 1983

[redacted]

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

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant was charged as an accomplice to the aggravated robbery of a liquor store in El Dorado, Arkansas. He was convicted by a jury and sentenced to ten years imprisonment. For reversal, appellant contends the trial judge erred in failing to give the lesser included offenses of (1) theft, (2) conspiracy to commit theft, (3) conspiracy to commit aggravated robbery, (4) conspiracy to commit robbery, and (5) robbery.

First, we may dispose of the first four named offenses because they are not lesser included within the definition of aggravated robbery. Regarding theft, the Supreme Court has specifically so held in the recent cases of *Hill* v. *State,* 276 Ark. 300, 634 S.W.2d 120 (1982); and *Higgins* v. *State,* 270 Ark. 19, 603 S.W.2d 401 (1980). Nor can we agree that lesser included offenses of aggravated robbery include the conspiracy crimes listed by appellant. He was charged as an accomplice to aggravated robbery, and as such, could only be convicted if the State proved the crime was committed. *See* Ark. Stat. Ann. § 41-303 (Repl. 1977) and its Commentary. This would not be so if he had been charged as a conspirator.

A conspiracy is an inchoate offense, and under Arkansas law it is a crime in and of itself. Its elements are set out in Ark. Stat. Ann. § 41-707 (Repl. 1977), as follows:

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense he:
>
> (1) agrees with another person or other persons:
>
> (a) that one or more of them will engage in conduct that constitutes that offense; or
>
> (b) that he will aid in the planning or commission of that criminal offense; and
>
> (2) he or another person with whom he conspires does any overt act in pursuance of the conspiracy.

To prove a conspiracy existed in the instant case, the State would be required only to show that appellant agreed with another to commit the crime and that either of them performed an overt act in pursuance of committing the crime. A conspiracy offense under the Arkansas Criminal Code is intended to be a separate crime, and liability is not imposed on a conspirator for the substantive offenses that are the object of the conspiracy. *See* Commentary to Ark. Stat. Ann. § 41-707. To the contrary, an accomplice's liability does not attach until the State proves that the substantive crime was completed. For these reasons alone, the trial court was correct in refusing the conspiracy instructions offered by appellant.

Finally, we consider appellant's proposed instruction on robbery which has been held to be a lesser included offense of aggravated robbery. *Hill* v. *State, supra;* and *Hamilton* v. *State,* 262 Ark. 366, 556 S.W.2d 884 (1977). Even though robbery is a lesser included offense, the trial judge was obligated to give the lesser instruction only if there was a rational basis for acquitting appellant of aggravated robbery and convicting him of the lesser offense of robbery. *See* Ark. Stat. Ann. § 41-105 (3) (Repl. 1977), and *Hill* v. *State, supra.* For purposes of this case, aggravated robbery is distinguished from robbery because in the former, the person is, or represents he is, armed with a deadly weapon. In robbery, the person employs or threatens to employ physical force. *See* Ark. Stat. Ann. §§ 41-2102 and -2103 (Repl. 1977). In the instant case, this distinction becomes important if the evidence showed that appellant aided or advised another in planning or committing a robbery but that the other person committed the greater inclusive offense of aggravated robbery. Under these circumstances, appellant's liability would be limited to the lesser included offense of robbery. *See* Ark. Stat. Ann. § 41-303 (Repl. 1977) and its Commentary.

In view of the foregoing authority, we must decide whether there was a rational basis upon which the jury could have found appellant guilty of robbery instead of aggravated robbery. Our courts have consistently held that a trial court commits reversible error when it refuses to give a correct instruction defining a lesser included offense and its

punishment when there is testimony on which the defendant might be found guilty of the lesser rather than the greater offense. *Caton* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972); *Brewer* v. *State,* 271 Ark. 254, 608 S.W.2d 363 (1980); and *Bongfeldt* v. *State,* 6 Ark. App. 102, 639 S.W.2d 70 (1982). Such testimony is present here, and we are compelled to reverse because the trial court failed to instruct the jury on robbery.

In his argument, appellant admits some degree of participation in the liquor store robbery. He argues the evidence presented reflects the extent of his participation was, at most, that of a "wheel-man" who drove the car used in the crime. Throughout his testimony, appellant steadfastly denied that he had any knowledge that Willie Berkshire, his riding companion who entered and robbed the store, had a weapon. Appellant testified further that he first became aware that Berkshire had a weapon after the robbery. Appellant related that he had driven past the liquor store when he was asked by Berkshire to pull over so he could "go to the liquor store and check it out." Appellant said that he did not know Berkshire actually intended to rob the store until he returned to the car, pointed a pistol at appellant and said, "Go, go, go." Appellant testified that he drove away at gunpoint, but subsequently wrecked his car; he and Berkshire abandoned the car, went separate directions but met later at appellant's parents' house. Appellant claimed Berkshire left shortly thereafter, leaving his pistol at the house.

The State offered no direct evidence to contradict appellant's denial of knowledge that Berkshire possessed a pistol before the robbery. However, the State did show that the investigating officers on the day of the robbery recovered the pistol and other items from the home of appellant's parents, with whom he lived. Not knowing this, appellant called the police the same day claiming his car had been stolen — a story he recanted upon being told that the police possessed the pistol and other evidence believed were employed in the robbery. The State's evidence arguably and inferentially shows that the pistol actually belonged to appellant, a conclusion worthy of belief especially in view of

the story concocted and told by appellant to the police after the robbery.

Nevertheless, it is the jury's sole prerogative to evaluate the conflicting evidence and to draw its own inferences regarding whether appellant knew Berkshire had a pistol when the robbery was committed and why the pistol was found at appellant's residence after the robbery. *Cf. Milburn* v. *State,* 260 Ark. 553, 542 S.W.2d 490 (1976). *But see Utley* v. *State,* 266 Ark. 794, 586 S.W.2d 242 (Ark. App. 1979). If the jury believed and accepted appellant's version of the robbery, it could find that he was guilty of robbery, not aggravated robbery. Thus, we hold the trial court erroneously failed to give robbery as a lesser included offense and we therefore reverse and remand for a new trial.

Reversed and remanded.

Lloyd ELKINS, Jr. *v.* STATE of Arkansas

CA CR 82-122 646 S.W.2d 15

Court of Appeals of Arkansas
Opinion delivered February 2, 1983
[Rehearing denied March 2, 1983.]

Felver A. Rowell, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. The appellant, Lloyd Elkins, Jr., is a sixteen-year-old minor who was charged in the juvenile court of Conway County, Arkansas, with theft of property pursuant to Ark. Stat. Ann. § 41-2203 (Repl. 1977). The juvenile court adjudged him guilty of the theft of a NAPA battery and thus delinquent. He was ordered com-

mitted to the Arkansas Department of Youth Services for an undetermined period of time. The matter was appealed to the circuit court of Conway County, Arkansas. The circuit court denied his motion for a jury and heard the appeal *de novo*. The circuit court affirmed the decision of the Juvenile Court of Conway County, Arkansas. We affirm.

Appellant first contends that there was insufficient evidence to find him guilty of theft of property and a delinquent.

Theft of property is defined by Ark. Stat. Ann. § 41-2203 (Repl. 1977) as follows:

> A person commits theft of property if he: (a) 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.

In the instant case, there is ample evidence to sustain the finding of guilt. Leon Kellar positively identified the battery which was in evidence as a battery which was stolen from the county in May, 1981. Deputy Sheriff Coby Shipp positively identified the battery in evidence as the one he picked up from Ronald Sumner's residence. Albert Moses, criminal investigator, positively identified the battery in evidence as the one he received from the deputy sheriff and marked into evidence. Sumner claimed that he was unable to positively identify the battery as the one he bought from the appellant, although he testified that he bought a battery from him which appellant and his father had unloaded. Sumner admitted that in an earlier hearing he testified that he made contact with appellant's sister and mother to buy the battery, but that that testimony was wrong. Robert Bridgman testified that he got a battery from appellant to sell for a split of profits, but he could not positively identify the battery in evidence as the battery he had received. He was unable to sell it and returned it to the appellant. Wesley Howell testified that he obtained the battery from Lloyd Elkins, Jr., to give to Robert Bridgman to sell. Howell could not positively identify the battery in evidence as the same battery he

received and attempted to sell. In a statement Howell made shortly after the battery's recovery, he made a positive identification of it.

The Arkansas Supreme Court quoted from an earlier decision in *Harshaw* v. *State,* 275 Ark. 481, 631 S.W.2d 300 (1982), as follows:

> When circumstantial evidence rises above suspision and is properly connected, and when, viewing that evidence in the light most favorable to the state, the jury is not left to speculation and conjecture alone in arriving at its conclusions, it is basically a question for the jury to determine whether the evidence excludes every other reasonable hypothesis. *Ledford* v. *State,* 234 Ark. 226, 351 S.W.2d 425; *O'Neal* v. *State,* 179 Ark. 1153, 15 S.W.2d 976; *Caradine* v. *State,* 189 Ark. 771, 75 S.W.2d 671. See also *Walker* v. *State,* 174 Ark. 1180, 298 S.W. 20; 30 Am. Jur. 2d 295, Evidence § 1125. It is only every other reasonable hypothesis, not every hypothesis, that must be excluded by the evidence. *Bartlett* v. *State,* 140 Ark. 553, 216 S.W. 33; *Bost* v. *State,* 140 Ark. 254, 215 S.W. 615. See also, *Walker* v. *State, supra.* The jury certainly should test the reasonableness of any other hypothesis.

The Supreme Court espoused a well-known rule in *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1979), when it said:

> In pointing out the pertinent testimony on the question of sufficiency of the evidence, we will view the evidence in the light most favorable to the state, considering only that testimony that lends support to the state, considering only that testimony that lends support to the jury verdict and disregarding any conflicting testimony which could have been rejected by the jury on the basis of credibility.

Finally, appellant argues that the specific charge of theft of property rather than mere delinquency was in this

specific case a punishment for a crime which invaded the appellant's right to trial by jury.

The definition of "juvenile delinquent" under Ark. Stat. Ann. § 45-403 (2) (Supp. 1981) is as follows:

> Any juvenile who (a) has committed an act other than a traffic offense which, if such act had been committed by an adult, would subject such adult to prosecution for a felony, misdemeanor or violation under the applicable criminal law of this State.

The appellant was charged in juvenile court with a violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). This offense involves theft of property which would subject appellant to criminal liability if he were an adult.

In *Martin* v. *State,* 213 Ark. 507, 211 S.W.2d 116 (1948), the Court dealt with the charge of delinquency as follows:

> A criminal charge is treated as evidence of delinquency when established. Felonious conduct and misdemeanors are not dealt with as such, but are considered only in determining what is best for the minor when all of the circumstances of birth, environment, opportunity, habit and demonstrated tendencies are measured.

Ark. Stat. Ann. § 45-407 (Repl. 1977) provides:

> All hearings under this Act shall be conducted without a jury.

Ark. Stat. Ann. § 45-440 (Repl. 1977) provides in part:

> Appeals from any decision of the county judge may be taken as a matter of right to the circuit court . . . . . A trial de novo without jury shall then be conducted by the judge of the circuit court.

A reading of the above two sections makes it clear that when, as here, appellant is charged as a delinquent, he has

no right to a jury trial. This is to his benefit in light of the stated purpose of the Juvenile Code at Ark. Stat. Ann. § 45-402 (Repl. 1977). This avoids the placement of a minor in our penitentiary system with adult criminals, and hopefully, wards off any future criminal activity by minor delinquents.

Affirmed.

POPEYE'S FAMOUS FRIED CHICKEN and CONTINENTAL INS. CO. *v.* Linda WILLIS

CA 82-284 646 S.W.2d 17

Court of Appeals of Arkansas
Opinion delivered February 9, 1983
[Rehearing denied March 9, 1983.]

Chester C. Lowe, Jr., for appellants.

Donald Frazier, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an employer's appeal from the Workers' Compensation Commission and the question presented is whether the commission erred in authorizing a claimant to see another doctor at the employer's expense.

It is agreed that the claimant sustained a compensable injury to an elbow in a fall which occurred on November 20, 1980. The employer sent her to a doctor who made x-rays, put her arm in a sling, prescribed "warm soaks, Naprosyn and Tylenol," and released her to go back to work the next day. However, she continued to complain of pain and other

symptoms associated with the elbow and eventually went to see Dr. Kenneth Jones of the Little Rock Orthopedic Clinic. It was stipulated that Dr. Jones was selected by the claimant and that all his bills which has been presented up to the day of the hearing had been paid by the employer.

The hearing before the law judge was held on June 30, 1981. Five letters were introduced pertaining to claimant's treatment by Dr. Jones and his associate, Dr. Millard. One of the letters, dated April 10, 1981, and addressed to claimant's attorney, concluded as follows:

> Today there are no significant findings, other than those previously reported by Dr. Millard and myself. I must admit that at this moment I am at a loss to explain this patient's unusual complaints, with minimal findings. I therefore have recommended that this patient return to your office, with the consideration that you refer her to some other orthopedic office, as it would seem that neither Dr. Millard or myself have anything else to recommend to this patient in the way of treatment.

The only witness to testify at the hearing was the claimant who said her arm had never stopped hurting and that it swells up when she lifts boxes, as she has to do at times in her present job, and if she does very much housework. She described the pain, how she soaked her elbow in hot water, how she took pain medication, and how the elbow "pops" when she moves it.

It was the contention of claimant's attorney that claimant was entitled to further medical treatment and if Dr. Jones had nothing else to offer, the law judge should authorize her to see another doctor. The respondent's attorney contended claimant should not be allowed to change doctors at respondent's expense and it was agreed that claimant would go back to Dr. Jones and that he would be asked to examine her again and make another report. This was done and his report was as follows:

> The above patient returned to the clinic on July 3, 1981, for reevaluation.

> She stated that her symptoms are getting worse. Once again, except for tenderness over the lateral aspect of the right elbow joint, there are no significant findings. It may be that surgical exploration of this elbow joint, or even an arthrogram, might be revealing. However, I do not have enough findings to justify this undertaking in this clinic.
>
> Once again, as previously stated, I would recommend that this patient consider consulting another orthopedic office for a second opinion, or perhaps I should say a third opinion as she has seen Dr. Millard as well as myself.
>
> I would again state that I have nothing further to offer this patient in the way of treatment. I therefore once more dismiss her from our medical observation. As to permanent partial disability, I can only estimate as I have done earlier, on the basis of the patient's complaints and not on the findings, a 2.5% partial disability to the right upper extremity.

Upon receipt of the above letter the law judge found that the claimant had shown circumstances justifying a change of physician as provided by Ark. Stat. Ann. § 81-1311, as amended by Section 3 of Act 290 of 1981, and he authorized her to be evaluated by one of the two doctors he named in his order. This decision was approved on appeal to the full commission, although one member dissented and the other two did not agree as to the basis of their approval. One member apparently agreed with the law judge that Ark. Stat. Ann. § 81-1311 applied as amended and one agreed as to the result, but said he thought the section applied as it existed prior to the amendment.

We think the section applies as amended. It should be noted that Act 290 of 1981 contained an emergency clause which made it effective on the date of its approval, March 3, 1981. Although claimant's injury occurred before that date, the hearing before the law judge, his decision, and the decision of the commission, all occurred after the act had become effective. In fact, the act was in effect when Dr. Jones

wrote his letter of April 10, 1981, saying he had nothing else to recommend in the way of treatment and suggesting that claimant's attorney consider referring her to some other orthopedic office. Thus, when the claimant requested the commission to authorize her to see another doctor, the provisions of section 81-1311 as amended by the 1981 act were in effect.

If there is a question of whether the 1981 act applies retroactively, the answer seems clear. In *Aluminum Co. of Amer.* v. *Neal,* 4 Ark. App. 11, 626 S.W.2d 620 (1982), the contention was made that an amendment to the Workers' Compensation Law should be construed as having a prospective operation and we quoted with approval from *State ex rel. Moose* v. *Kansas City & Memphis Railway and Bridge Co.,* 117 Ark. 606, 174 S.W. 248 (1914), as follows:

> The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should . . . be given a retrospective effect whenever such seems to have been the intention of the Legislature.

Section 81-1311 already contained a provision allowing the commission to authorize a claimant to change doctors and section 3 of the 1981 act did not disturb any vested right nor create any new obligation. It merely supplied "a new or more appropriate remedy to enforce an existing right or obligation" and we find that it applies to the issue in this case.

Applying Ark. Stat. Ann. § 81-1311 as amended by the 1981 Act which provides that when the claimant has selected a physician the commission may not order a change of physicians at the employer's expense unless it finds there is a "compelling reason or circumstance justifying a change," and using the rule that we must view the evidence in the light most favorable to the action of the commission, *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979), we think the claimant's testimony that she suffered

disabling pain on a daily basis and the doctor's report that he had no further treatment to offer and that she should consider consulting another orthopedic office, are sufficient to support the commission's decision in this case. And, while the majority of the commission was not in agreement as to the basis of their decision, we will affirm if the decision appealed from is right even if a wrong reason for the decision is given, *Morrison* v. *Lowe,* 274 Ark. 358, 625 S.W.2d 452 (1981); *Mayhew* v. *Loveless,* 1 Ark. App. 69, 613 S.W.2d 118 (1981).

Affirmed.

Richard Joe JOHNSON *v.* STATE of Arkansas

CA CR 82-152 646 S.W.2d 22

Court of Appeals of Arkansas
Opinion delivered February 9, 1983

William R. Simpson, Jr., Public Defender, by: *Kelly Carithers,* Deputy Public Defender, for appellant.

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

GEORGE K. CRACRAFT, Judge. Richard Joe Johnson appeals from his conviction of burglary and misdemeanor theft of property. Ark. Stat. Ann. § 41-2002 (Repl. 1977) defines burglary as entering or remaining unlawfully in an occupiable structure with the purpose of committing any offense punishable by imprisonment. The appellant's sole contention on appeal is that although the State may have adequately proved that the appellant unlawfully entered an occupiable structure from which a purse containing $20 was taken, there was insufficient proof that he took the purse. He argues that as there was no proof that he committed the crime while in the house the essential element of his criminal intent which must accompany the proof of unlawful entry cannot be sustained. We do not agree.

On appeal we view the evidence in the light most favorable to the State and will affirm if there is substantial evidence to support the conviction. *Profit* v. *State,* 6 Ark. App. 51, 637 S.W.2d 620 (1982). The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Cooper* v. *State,* 275 Ark. 207, 628 S.W.2d 324 (1982); *Small* v. *State,* 5 Ark. App. 87, 632 S.W.2d 448 (1982). Intent is a state of mind which is not ordinarily capable of proof by direct evidence so it must be inferred from the circumstances. *White* v. *State,* 271 Ark. 692, 610 S.W.2d 266 (1981).

The evidence most favorable to the State discloses that at 3:00 a.m. on the morning of November 17, 1981, Earnestine Dykes was awakened by a telephone call from a neighbor informing her that her house was being unlawfully entered. She and the other occupants of her apartment looked through the apartment but the intruder had fled. They found the back door, which had been securely locked, was open and that entry had been gained through a kitchen window from which the screen had been unscrewed. Eliza Cobb, who lived with her daughter Earnestine Dykes, testified that when she went to bed she had hung her purse containing $20 on the doorknob of her bedroom. When she was awakened by her daughter she discovered the purse was missing. It was later recovered but the currency had been removed.

Minne Sims, who occupied an apartment, the back of which faced the back porch of the Dykes' apartment, testified that she was well acquainted with the appellant. She was awake at 3:00 a.m. because her son had not yet come home and she was worried about him. She went to her kitchen window and saw the appellant peering into the windows of two or more apartments across from hers. He then went back to the Dykes' apartment and unscrewed the light bulb on her back porch and began fumbling with the window screen. The witness then left the window to telephone a warning to a neighbor. When she returned to the window she saw the appellant run out of the Dykes' back door. She stated that when he ran out of the back door he had some object in his hand but she did not know what it was.

The appellant argues that as there was no proof that he took the missing purse the essential element of his intent was not proved and cannot be presumed by merely showing that he unlawfully entered the occupiable structure. He relies on the decision of *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980). In *Norton* the accused was seen coming out the front door of an office building which had been securely locked for the night. Entry had been gained by breaking out a window. The owner testified that although his entry had been unlawful nothing was taken from the office. The appellant was convicted of burglary. The Arkansas Supreme

Court reversed that conviction stating that the burden was on the State to prove each essential element of the crime of burglary and that a specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of illegal entry into an occupiable structure. The prosecution must prove every element of the offense beyond a reasonable doubt and cannot shift to the defendant the burden of explaining his illegal entry by merely establishing it.

Norton is easily distinguishable. In *Norton* nothing was taken. In the case now under review it was firmly established that the missing purse was hanging on the doorknob when its owner went to bed and was found missing right after the appellant fled the apartment. From these facts and circumstances a jury could easily infer that the appellant's unlawful entry was accompanied by the intent to commit a theft and that he did do so.

We find no error.

Lionel GREEN *v.* STATE of Arkansas

CA CR 82-179 646 S.W.2d 20

Court of Appeals of Arkansas
Opinion delivered February 9, 1983

Jerry E. Mazzanti, for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant was convicted by jury of committing sexual abuse in the first degree and sentenced to six years imprisonment. He argues, through new, substituted counsel on appeal, that the trial court erred in (1) overruling his motion for directed verdict, (2) failing to give instructions on certain lesser included offenses, and (3) allowing the prosecuting attorney to make a prejudicial statement in closing argument.

We are unable to reach the merits of appellant's second and third issues. Regarding the appellant's second point, he is bereft of his instructions argument because he failed to proffer any instructions that contained what he believed to be correct lesser included offenses of first degree sex abuse. Because no lesser included instructions appear in the transcript or in the abstract of record, we are unable to consider this assigned error. *Williams* v. *Fletcher,* 267 Ark. 961, 965 (1980) (*per curiam denying reh'g*). Next, we do not consider appellant's point three because no objection was made at trial to the prosecuting attorney's remarks which are alleged to be prejudicial. Because this asserted error was not presented to the trial court and is raised for the first time on appeal, we do not reach its merits.

We now consider appellant's final contention that the trial court should have granted his motion for a directed verdict. In support of his argument, appellant contends that there was no proof that he had sexual contact with the eight year old girl whom he was convicted of sexually abusing. In our review on appeal, we are guided by the established rules that a directed verdict is proper only when no fact issue exists and that this court must review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence. *Tucker* v. *State,* 3 Ark. App. 89, 622 S.W.2d 202 (1981).

Appellant was convicted under Ark. Stat. Ann. § 41-1808 (Repl. 1977), which, in pertinent part, provides:

> Sexual abuse in the first degree. — (1) A person commits sexual abuse in the first degree if:
>
> (c) being eighteen (18) years or older, he engages in sexual contact with a person not his spouse who is less than fourteen (14) years old.

"Sexual contact" is defined in Ark. Stat. Ann. § 41-1801 (8) (Repl. 1977) as "any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female."

In reviewing the record, we find that the eight year old girl testified the appellant spoke to her as she was leaving the swimming pool located in the Lake Chicot State Park. After a brief conversation she said the appelant raised her bathing suit and stuck his finger between her legs. After the incident, she went home and told her mother what had occurred. The girls's mother testified (without objection) that her daughter was crying when she came home and said, "When I got out of the swimming pool, there was a man and he grabbed me and put his finger up my swimming suit."[1] On cross-

[1]Appellant attempts to minimize the effect of each parent's testimony by calling it hearsay. No objection was made to such testimony, and it is certainly arguable that the testimony, concerning their girl's remarks after the incident, was admissible as an "excited utterance" under Rule 803 (2) of the Uniform Rules of Evidence. Nonetheless, we do not address this issue because it was not raised below.

examination, the mother said that she asked her daughter exactly what happened and she related all the events which had occurred at the swimming pool, including that the appellant "reached up his hand and pulled her bathing suit apart and stuck his finger up her."

The girl's father also testified that his daughter told him the same story as she told her mother. Her father testified (without objection) that his daughter said that a man stopped her and "had put his hand under her bathing suit and put his finger in her poo-pooh." The father took his daughter back to the swimming pool, and she identified appellant. Another witness, a Ms. Owens, testified that she had observed appellant with the girl at about the time the incident allegedly occurred. Appellant testified, denying that he touched the girl.

In sum, the parents' and girl's testimonies demonstrate that appellant, in violation of §§ 41-1808 and -1801 (8), *supra,* engaged in "sexual contact" with the girl. The trial court's decision, overruling appellant's motion for directed verdict, was based on substantial evidence. Therefore, we affirm this case in all respects.

Affirmed.

Willie LINCOLN *v.* STATE of Arkansas

CA CR 82-155 646 S.W.2d 30

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Ken Cook, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant was convicted of burglary and attempted rape and sentenced to serve consecutive terms of 10 years imprisonment on each charge.

His only point on appeal is that the trial court erred in allowing a red bandana — or handkerchief — to be introduced into evidence. It is appellant's contention that there was no foundation for the introduction of the exhibit but that, even though there was no evidence to show it

belonged to appellant or was ever in his possession, the jury was left with a strong impression that he was in some way connected with it.

There was evidence that a man attacked a 17-year-old girl who was baby-sitting a 9-year-old boy. After the man left the room where they were, they attempted to leave the house and were again confronted by the man who was then wearing a red bandana over the lower portion of his face. During the boy's testimony he was shown a red bandana and asked if it "looks like the one the man had," and the boy said it did. Essentially the same evidence was given by the girl.

We think it proper for these witnesses to describe the attacker's appearance and how he was dressed. Even evidence of crimes other than the one charged have been allowed in order that the jury might know all the circumstances surrounding the commission of the crime charged. *Thomas* v. *State,* 273 Ark. 50, 615 S.W.2d 361 (1981). If the bandana shown the witnesses helped them to explain and the jury to understand what the attacker had over his face, then it would be proper to use the bandana for that purpose. *Morrison* v. *Firemen's Ins. Co.,* 4 Ark. App. 351, 631 S.W.2d 310 (1982). *McCormick on Evidence,* § 212 (2nd ed. 1972), states it this way:

> It is today increasingly common to encounter the offer of tangible items which are not contended themselves to have played any part in the history of the case, but which are instead tendered for the purpose of rendering other evidence more comprehensible to the trier of fact.

Upon request, the trial court would have been required to instruct the jury that the bandana was admitted for that limited purpose. Uniform Evidence Rule 105. However, no such request was made and "whether the admission of a particular exhibit will in fact be helpful, or will instead tend to confuse or mislead the trier, is a matter commonly viewed to be within the sound discretion of the trial court." *McCormick, supra.* We find no abuse of the trial court's discretion in this case.

We affirm.

GLAZE, J., concurs.

KEMPNER'S and DODSON INSURANCE GROUP *v.* John Q. HALL

CA 82-246 646 S.W.2d 31

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Boswell & Smith, by: *David E. Smith,* for appellants.

Pope, Shamburger, Buffalo & Ross, by: *Robert D. Ross,* for appellee.

GEORGE K. CRACRAFT, Judge. Kempner's and Dodson Insurance Group, their workers' compensation carrier, appeal from a determination by the Arkansas Workers' Compensation Commission that they are liable for disability benefits and medical expenses incurred by appellee John Q. Hall as a result of a heart attack and bypass surgery. They contend that the appellee's disability and surgery were necessitated by a preexisting coronary artery disease and were not work related. We do not agree.

The appellee was manager of Kempner's Shoe Store at McCain Mall in North Little Rock. In November, 1979, while at his home, he engaged in some activity which brought on chest pains for which he was treated by Dr. Eugene Jones, a cardiologist. Dr. Jones determined that Hall was suffering from arteriosclerosis which was manifesting itself in pain defined as angina. Medication was prescribed to stabilize the pain but no myocardial infarction was confirmed. Dr. Jones advised hospitalization until the angina stabilized but Hall chose not to do so because he had no health insurance in effect at the time.

Hall returned to his work at Kempner's and on Saturday, December 20, 1980, while lifting some boxes of merchandise he felt immediate, oppressive pain in his chest. He worked until closing that day and spent Sunday in bed experiencing continued episodes of pain. He returned to work Monday although he still experienced pain. On Tuesday, December 23rd, he worked throughout his busiest day, with only a thirty minute break at 4:00 p.m., until closing time at 10:00 p.m. When he left the store he could hardly walk or drive his car. He was able to drive himself to Memorial Hospital where tests were performed upon him indicating the need for bypass surgery. He was transferred to Baptist Medical Center on January 2, 1980 where the surgery was performed by Dr. Weiss. The Commission found that there was a causal connection between the attack he suffered on December 20th and his employment at Kempner's. It awarded him disability benefits and medical expenses in-

curred as a result. The appellants contend that the bypass surgery was an elective operation to alleviate the pain caused by arteriosclerosis which preexisted appellee's employment with Kempner's and was not related to his employment.

In order to understand the argument and issue on this appeal two medical terms must be defined and the action our courts have previously taken with respect to this type case should be reviewed. These definitions are generally accepted and are supported by the medical testimony in the record before us. "Angina" is defined not as a disease but as a *symptom* of the underlying disease. The angina is the pain resulting from the underlying disease. In appellee's case it was a symptom of his arteriosclerosis or hardening of the arteries. We have recently held that aggravation of the *symptoms* of a preexisting condition are not compensable. In *Black* v. *Riverside Furniture Co.,* 6 Ark. App. 370, 642 S.W.2d 338 (1982) we held that where working conditions merely aggravated the angina, the symptoms of the preexisting, underlying arteriosclerosis, the employer was not liable for medical expenses or other consequences.

Myocardial infarction has been generally defined as an actual injury to the heart resulting in the death of cells. When enough cells have died an enzyme change in blood samples occurs. Where myocardial infarction is shown to have been aggravated or precipitated by the employment, awards of benefits have been sustained. *Reynolds Metals Co.* v. *Cain,* 243 Ark. 483, 420 S.W.2d 872 (1967); *Hoerner Waldorf Corp. et al* v. *Alford,* 255 Ark. 431, 500 S.W.2d 758 (1973). The appellants point out that Dr. Jones testified that he was treating the appellee for pre-infarction angina and found no myocardial infarction after the November and December incidents. It is further pointed out that on December 24th Dr. Kimber Stout treated appellee while he was in Memorial Hospital and also diagnosed the condition as coronary artery disease with significant angina and that "myocardial infarction was sought and ruled out." It is further pointed out that it was not until January 4, 1981, two days after the surgery was performed, that Dr. William Bishop in post-operative observation first made mention of a lateral myocardial infarction. Appellants do not contend

that there was no infarction. They argue that this evidence proved that the infarction occurred after the alleged incident and after he had been hospitalized to stabilize his angina. This argument and the evidence supporting it might have supported a contrary conclusion to the one made by the Commission. On appellate review, however, the question is whether the evidence supports the finding it did make. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 601 S.W.2d 586 (Ark. App. 1981). The record included a lengthy hypothetical question put to Dr. Weiss, the cardiovascular surgeon performing appellee's bypass operation, in which all of the facts and circumstances in evidence were recited. The hypothetical question also stated that he was not being requested to state an opinion with scientific precision or certainty. It further stated that they were not seeking his opinion as to whether or not the work related activities of appellee were the sole or only cause of the heart attack and the subsequent disability. The question squarely put to him was:

> . . . [W]hether or not his work activities were a cause, along with any other active or underlying factors, in contributing to or producing the heart attack and subsequent disability.

Dr. Weiss first stated that his role in the matter was that of the cardiovascular surgeon who performed the surgery on Mr. Hall following a previous myocardial infarction. He further stated:

> *It is my professional opinion that there can definitely be causal connection between effort, emotion, stress, exertion and other job-related activities to the precipitation of a myocardial infarction if the primary cause is present, that is, coronary atherosclerosis.* The heart is simply a mechanical pump, like any other mechanical pump, which requires energy in the form of blood and oxygen in order to do its job. It normally, at rest, the heart is working at about 30% of its capacity. As physical or occasionally emotional activity increases, the heart simply responds by increasing the cardiac output in order to meet the demand that the body and

> its tissues are demanding. The heart will do this, in a manner of speaking, with total disrespect for its own welfare. If there is significant atherosclerosis of the coronary arteries and the heart continues to try to meet the demands that are placed on it, then eventually in many cases, the cardiac muscle becomes ischemic [deprived of adequate blood supply] and this can lead to death of the muscle cells or a heart attack. Obviously, angina represents a warning that impending damage exists and is the warning which tells a person to stop this activity. It should be noted that 25% of patients who sustain a myocardial infarction have had no angina whatsoever. (Emphasis supplied)

There is no requirement that a finding by the Commission be based on evidence which is mathematically or medically certain. Dr. Weiss testified that there had in fact been an infarction and that it could have resulted from the events of December 23rd. The Commission found that it did and we cannot say that reasonable minds after considering all of the evidence in this record could not have reached that conclusion.

Affirmed.

PINECREST MEMORIAL PARK, INC., and NORTHWESTERN NATIONAL INSURANCE COMPANY *v.* Margaret Ann MILLER, Widow of Colver L. MILLER, Deceased

CA 82-391 646 S.W.2d 33

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Laser, Sharp, Haley, Young & Huckabay, P.A., by: *Ralph R. Wilson,* for appellants.

John L. Johnson, P.A., for appellee.

GEORGE K. CRACRAFT, Judge. The sole issue in this workers' compensation case is whether a widow who was working and making substantial contributions to the household expense prior to her husband's compensable death is entitled to maximum benefits under Ark. Stat. Ann. § 81-1315 (c) (Supp. 1981) or should be restricted to those benefits provided for partial dependency under § 81-1315 (i) (Repl. 1976). On undisputed testimony the Commission found that Margaret Ann Miller and Colver L. Miller were legally married and lived together at the time of his work-related death while he was in the employ of Pinecrest Memorial Park, Inc. At the time of his death his wife was earning a salary of $1500 per month and he was earning $250 per week. They pooled their salaries in a joint bank account

from which all household and living expenses were paid. According to the wife her husband's income was necessary to maintain her in the manner to which she had become accustomed and the loss of his income would detrimentally affect her standard of living.

The appellants contend that because the deceased earned only 45% of the combined family income, the claimant was entitled to only 45% of the maximum benefits as a partial dependent under Ark. Stat. Ann. § 81-1315 (i) (Repl. 1976). The Commission ruled that the degree of dependence established was sufficient under the statute and our case law to require the award of maximum benefits. We conclude that the Commission was correct in this ruling and that their finding that the widow was wholly and actually dependent upon the deceased is supported by substantial evidence.

Prior to 1976 our Workers' Compensation Act provided death benefits to those who were "wholly dependent" upon the deceased worker. In *Chicago Mill and Lumber Company* v. *Smith,* 228 Ark. 876, 310 S.W.2d 803 (1958) the court held that a wife or a child who was not being supported by the decedent at the time of his death could be "wholly dependent." In defining that term the court said:

> It would be possible to construe this provision of the Act as depriving a widow or child of any compensation when, as here, the husband and father was completely void of any sense of his family obligation. But it is a rule that remedial legislation shall be liberally construed. *We believe the Legislature used the term 'wholly dependent' in the sense of applying to those ordinarily recognized in the law as dependents, and this would certainly include wife and children.* (Emphasis supplied)

Smith declared what amounted to a conclusive presumption that a wife and child were "wholly dependent" upon a deceased worker by virtue of their legal status. In 1976 the Legislature amended Ark. Stat. Ann. § 81-1315 (c) to read as follows (1976 changes emphasized):

81-1315. Compensation for death. — (a) * * *

(c) [Beneficiaries — Amounts.] Subject to the limitations as set out in Section 10 [§ 81-1310] of this Act, compensation for the death of an employee shall be paid to those persons who were wholly *and actually* dependent upon the deceased employee in the following percentage of the average weekly wage of the employee, and in the following order of preference.

First. To the widow if there is no child, thirty-five percent (35%), and such compensation shall be paid until her death or remarriage. *Provided, however, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided herein.*

To the widower if there is no child, thirty-five percent (35%), and such compensation shall be paid until his death or remarriage. *Provided, however, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided herein.*

Second. To the widow or widower if there is a child; the compensation payable under First above and fifteen percent (15%) on account of each child.

Third. To one child if there is no widow or widower, fifteen percent (15%) for each child, and in addition thereto, thirty-five percent (35%) to the children as a class, to be divided equally among them.

. . . .

(i) Partial dependency. (1) If the employee leave dependents who are only partially dependent upon his earnings for support at the time of injury, the compensation payable for such partial dependency shall be in the proportion that the partial dependency bears to total dependency.

In *Roach Mfg. Co.* v. *Cole,* 265 Ark. 908, 582 S.W.2d 268 (1979) the court interpreted those changes in light of its prior definition of the words "wholly dependent":

> We assume — under our settled law we must assume —that the Legislature, in deciding to amend the statute, knew the meaning that we had attributed to 'wholly dependent.' . . . *It unavoidably follows that the addition of the word 'actually' was intended to change what amounted to a conclusive presumption of dependency under our prior cases. It follows at least that when, as here, the widow and child were not living with the employee at the time of his death, there must be some showing of actual dependency. (Emphasis supplied)*

In Roach a deceased father had not supported his wife or child for eleven months preceding his death. As the wife and child were not living with the employee at the time of his death, there was no presumption of dependency and there was a requirement of some showing of actual dependency. The Commission found that the child had a "reasonable expectation of future support" and awarded her maximum benefits under the Act. The Commission also found, however, that the wife had not established dependency to any degree and denied her benefits. The Supreme Court affirmed both findings.

In *Doyle's Concrete Finishers* v. *Moppin,* 268 Ark. 167, 594 S.W.2d 243 (1980) a minor child living with his divorced mother was receiving child support from the father of $108 per month, an amount not sufficient for his total support. The Commission found him to be entitled to maximum benefits. The court pointed out that if in *Roach* a child who received no financial support was entitled to maximum benefits it "must be said that a child who receives some financial support should be entitled to no less than maximum benefits." There was no widow in *Moppin* because the child's mother and the deceased were divorced. However, certain observations contained in that decision are pertinent here. In *Moppin,* after pointing out the changes made in the death benefits section by the 1976 amendment, the court made the following statement:

> Summarizing, the Act was amended to require (1) the purported dependent to be wholly 'and actually' de-

> pendent on the deceased, and (2) the widow to 'establish, in fact, *some dependency* upon the deceased employee before she will be entitled to benefits as provided herein.' (Emphasis supplied)

The court emphasized that in *Roach* it was held that when the widow and child are not living with the employee at the time of his death, there must be some showing of actual dependency to support an award of full benefits. In *Moppin,* as in *Roach,* the claimant was not living with the deceased employee at the time of his death.

The language used in *Roach* and *Moppin* was carried forward in the subsequent cases of *Continental Insurance Co.* v. *Richards, Adm'r,* 268 Ark. 671, 596 S.W.2d 333 (1980); *Porter Seed Cleaning, Inc.* v. *Skinner,* 1 Ark. App. 230, 615 S.W.2d 380 (1981); *Bankston* v. *Prime West Corporation,* 271 Ark. 727, 610 S.W.2d 586 (Ark. App. 1981). This line of cases has made it clear that "at least in situations where the surviving spouse or child is living apart from the deceased at the time of his death" the test of "wholly dependent" is met by proof of that legal status and that "actually dependent" does not require a showing of total dependence. A finding of some measure of actual support or a reasonable expectation of it will suffice. Whether this "actual dependence" exists is a question of fact for the Commission to determine.

In *Moppin, Continental* and *Porter Seed,* although the claimants were living apart from the deceased parent, there was no claim made by a surviving widow. In *Roach* and *Bankston* the surviving widows, though living apart from their husbands, did not show any measure of actual support or a reasonable expectation of it. In *Swafford* v. *Tyson's Foods, Inc.,* 2 Ark. App. 343, 621 S.W.2d 862 (1981) we reviewed for the first time a case involving a claim of a surviving spouse who was living with and dependent in some degree upon the deceased spouse at the time of death. There the deceased spouse was a wife whose earnings constituted at least 50% of the total family income. It was shown that the surviving spouse could not maintain the household in the manner to which he had been accustomed upon his earnings alone. The Commission found he had

some dependency upon the deceased employee and that he had therefore met the test of "actually dependent" and we affirmed.

We conclude from these cases and from a reading of the statute that the Commission need only find some dependency upon the deceased employee to entitle his widow to the maximum benefits provided for in the Act. The fact that the husband was not the sole support of his wife does not subject her to the section of the Act providing benefits for partial dependents. There was evidence in this case that the husband was contributing a substantial portion of the family income and the wife was not able to maintain her accustomed station in life without that income provided by him. There was evidence that the loss of his wages detrimentally affected her station in life. This evidence alone would support a finding of fact of some dependency upon him. A showing of actual dependency does not require proof that without the husband's contribution she would lack the necessities of life but only that the decedent's contributions were relied upon by the claimant to maintain her accustomed mode of living. *Smith* v. *Farm Services Cooperative,* 244 Ark. 119, 424 S.W.2d 147 (1968); *Williams* v. *Cypress Creek Drainage,* 5 Ark. App. 256, 635 S.W.2d 282 (1982); 2 Larson, *Workmen's Compensation Law,* § 63:11.

We affirm.

GLAZE, J., not participating.

Henry W. SHEPHERD *v.* EASTERLING CONSTRUCTION CO. and NORTHWESTERN NATIONAL INSURANCE GROUP

CA 82-311 646 S.W.2d 37

Court of Appeals of Arkansas
Opinion delivered February 16, 1983
[Rehearing denied March 16, 1983.]

Wayne B. Ball, for appellant.

Davis, Cox & Wright, by: *Constance G. Clark,* for appellees.

LAWSON CLONINGER, Judge. In this workers' compensation case, appellant, Henry W. Shepherd, was employed as a carpenter for appellee, Easterling Construction Company, when he fell and suffered an injury to his left knee on May 12, 1978. The employer was promptly notified of the injury, and the employer's carrier paid a medical bill for $92.55 at the time. Appellant continued to work and received no workers' compensation benefits other than the payment of the medical bill.

On March 24, 1981, appellant filed a claim for medical expenses related to surgery performed on the knee on December 23, 1980, for temporary total disability while off work, and for permanent partial disability. By stipulation of the parties, the only question presented to the Commission and on this appeal is the issue of the statute of limitations.

The Commission held that the claim of appellant was barred by the applicable statute of limitations, and the claim was denied. For reversal, appellant contends that (1) the Commission erred in finding that claimant failed to prove that he filed his claim within the statutory period, that (2) the Commission erred in finding that appellant failed to prove that he filed his claim within the statutory period without also considering appellant's justifiable delay, and that (3) the Commission failed to consider the effect of appellant's plea of waiver and estoppel.

We must reverse the decision of the Commission on the basis of appellant's first point, and it will be unnecessary to discuss the other issues raised.

Ark. Stat. Ann. § 81-1318 (a) (Repl. 1976) provides that a claim for compensation for disability on account of an injury shall be barred unless filed with the Commission within two years from the date of the injury. Section 81-1318 (b) provides that in cases where compensation for disability

has been paid on account of an injury, a claim for additional compensation shall be barred unless filed within one year from the last payment of compensation, or two years from the date of the injury, whichever is greater.

Ark. Stat. Ann. § 81-1302 (e) (Repl. 1976) defines disability as incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of his injury.

We believe the case of *Donaldson* v. *Calvert-McBride Printing Company,* 217 Ark. 625, 232 S.W.2d 651 (1950), is decisive in this case. In *Donaldson,* the claimant was injured on March 10, 1947. He was paid no compensation and continued to work, but the employer paid medical expenses of $25.00. In October of 1948, because of claimant's injury, he was assigned to a lighter job, at which time his wages were reduced. On May 24, 1949, claimant filed a claim for compensation, setting out the injury of March 10, 1947 and back surgery as a result of that injury. The Arkansas Supreme Court held that the "time of injury" means a compensable injury, and that claimant's injury did not become compensable until October, 1948 when he first suffered a loss in earnings. The court distinguished the *Donaldson* case from the case of *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S.W.2d 796 (1949), in that in the *Sanderson* case a compensable injury resulted on the date of the accident.

In *Donaldson* v. *Calvert-McBride Printing Company, supra,* the court stated:

> Finally, appellees say: 'Medical expense of $25.00 was paid by respondents. This constituted 'compensation' as defined in § 2 (i), 81-1302 (i). The employer was required to furnish it promptly. (§ 81-1311). Claimant accepted it so he was paid 'compensation' in this manner. But he still failed to file claim for two years, three months and seventeen days and is barred.'
>
> We think this contention without merit for the reason that § 81-1318 (a) above, refers to 'time of injury,' which we hold to mean time of compensable injury

(October, 1948). This section also provides 'except that if payment of compensation has been made in any case on account of such injury (that is compensable injury) . . . a claim may be filed within one year after the date of the last payment.'

It is undisputed that appellant received his injury on March 7, 1947, 'was off work from March 10, 1947, to March 17, 1947,' that he was paid no compensation during this period for the reason that he was not off work long enough to entitle him to compensation under the provisions of the Act (§ 81-1310), but medical expenses in the amount of $25.00 were paid by the appellees for this period.

Obviously, this medical payment was not and could not have been, a 'payment of compensation . . . on account of such injury (compensable injury)' of October 1948.

In the instant case, the testimony of appellant is uncontradicted that he continued to work long hours with the same employer until September 18, 1979 when he broke his right ankle in a non-work related accident. While it is not clear from the record, apparently appellant was unable to thereafter perform his regular job due to the difficulty of movement brought about by an injured left knee and a fractured right ankle. When the rule laid down in *Donaldson* is applied to the facts of this case, we hold that appellant's injury did not become compensable until he suffered a loss of earnings on September 18, 1979, and that the two year statute of limitations provided for in § 81-1318 (a), *supra,* did not commence running until that time. The claim for compensation was filed on March 24, 1981, which is within two years from September 18, 1979.

The medical payment of $92.55 was not a payment of compensation on account of the compensable injury of September 18, 1979. See *Donaldson* v. *Calvert-McBride Printing Company, supra.*

This case is reversed and remanded to the Workers' Compensation Commission for a determination of whether appellant is otherwise entitled to medical and disability compensation.

Lewis J. NOBLES, Jr., and Geraldine B. NOBLES, His Wife; and George F. BURCHARD and Ida Jo BURCHARD, His Wife *v.* STROUT REALTY, INC.

CA 82-205 646 S.W.2d 24

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Pilkinton & Pilkinton, by: *James H. Pilkinton, Jr.,* for appellants.

Graves & Graves, by: *John Robert Graves,* for appellee.

DONALD J. CORBIN, Judge. Appellants, Lewis J. Nobles and Geraldine B. Nobles, his wife, and George F. Burchard and wife, Ida Jo Burchard, appeal from an action of the Hempstead County Circuit Court in granting appellee's motion for directed verdict. The Court rendered judgment for appellee, Strout Realty, Inc., in the sum of $34,047.00 plus costs and interest. We reverse and remand.

Appellants owned several tracts of land in Hempstead County, Arkansas, among which were a 1,261 acre tract and a 350 acre tract. Appellants gave a number of open non-exclusive real estate listings on their tracts to real estate brokers in southwest Arkansas.

On March 23, 1978, Roy Taylor of Stretch Realty showed Boyd Morrow of Louisiana the 1,261 acre tract and the 350 acre tract. Taylor advised Morrow that Stretch Realty had 1,611 acres for sale at $600.00 per acre. The showing consisted of telling Morrow of the listed land and driving the road on the boundary of the property. Morrow advised Taylor that he was not interested in purchasing that much land. Taylor sent a notice of showing to appellant George

Burchard, advising him that he had shown the 1,611 acres at $600 per acre to Boyd Morrow.

In the spring of 1978, Boyd Morrow contacted appellee seeking to purchase soybean land. On July 10, 1978, while appellants were listing another tract of their land with appellee Strout Realty, Inc., appellee obtained an open listing on the 1,261 acre tract and the 350 acre tract at the price of $600.00 per acre. On July 13, 1978, appellants amended the open listing price with appellee to $450.00 per acre. On July 14, 1978, appellee through one of its agents wrote Morrow and advised him that appellee had some new land listed which Morrow might be interested in. Two weeks later appellee's agent, John Samuels, drove over the 1,611 acres with Morrow and appellant Burchard.

Boyd Morrow testified that he told Strout Realty, Inc., he was interested in the property but that he and his brother only had a small amount of money to put up as earnest money and would have to rely on Farmer's Home Administration for financing. He further testified that Horace Samuels, an agent of appellee, informed him that FHA should only handle financing for residents of the state. He testified that he later contacted appellant, George Burchard, and Burchard advised him that any offers would have to come through a realtor. Roy Taylor of Stretch Realty learned from appellant Burchard that they were in a hurry to sell and had reduced the purchase price to $450.00 per acre and would sell in separate tracts. Taylor contacted Morrow to advise him of the changes in the listing which he had shown him in March and obtained an offer which appellants accepted. The loans were ultimately funded and the sales were closed on or about May 11, 1979, some fourteen months after Taylor first exposed Morrow to the property and some nine and one-half months after Taylor began serious negotiations with the Morrow brothers under the open listing. Appellants paid Stretch Realty a five percent commission of $28,372.50.

The record reflects that the only contact appellee had with the Morrows was the showing of the property in July

and a letter referring to the possibility of arranging a smaller earnest money deposit but still insisting on a quick closing.

Appellee moved for a directed verdict on the basis that appellant Burchard admitted on the stand that the Morrow brothers were prospects of the Samuels of Strout Realty, Inc. In granting this motion, the trial judge agreed and stated that appellant Burchard was bound by his testimony and his admission acknowledging that the Morrows were procured by the Samuels of Strout Realty, Inc.

The following testimony by appellant Burchard was apparently the basis of the judge's ruling on the motion for a directed verdict:

> Q. Do you know when you next saw the Morrow brothers?
> A. I don't recall the date, but it was the day after they called me.
> Q. They did come up there?
> A. They did come back.
> Q. All right, what was the purpose of the visit?
> A. They were wanting to see if they could work out some kind of deal to buy the place.
> Q. Did they tell you why?
> A. Yes, sir.
> Q. Why?
>
> Mr. Graves: Object
> The Court: Sustained.
>
> Q. All right, Did you work a deal out with them?
> A. No, sir.
> Q. What did you tell them?
> A. I told them that there was no way that I could put the deal together, that I had it listed with three or four realtors on an open listing, and I knew that I could not sell the land, because it had been showed by another realtor. But my advice to them, and our conversation was short, 'You will have to see one of the realtors that has it listed, and they will put the deal together for you.'

In *Westside Motors* v. *Curtis,* 256 Ark. 237, 506 S.W.2d 563 (1974), the Supreme Court quoted the rule pertaining to directed verdicts from an earlier decision as follows:

> It is a rule of universal application that, where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached; but, where there is any substantial evidence to support the verdict, the question must be submitted to the jury. In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict.

In *Thompson* v. *Harper,* 225 Ark. 47, 279 S.W.2d 277 (1955), the Arkansas Supreme Court stated:

> In 8 Am. Jur. 1069, in discussing the effect of abandonment on the part of the broker, the holdings are summarized in this language:
>
> > If a broker, after introducing a prospective customer to his employer to no purpose, abandons his employment entirely, or if, after procuring a person who proves to be unwilling to accept the terms of his principal, he merely ceases to make further endeavors to negotiate a deal with that particular individual and all negotiations in that direction are completely broken off and terminated, he will not be entitled to a commission if his employer subsequently renews negotiations with the same person, either directly or through the medium of another agent, and thus effects a sale without further effort on the part of the broker first employed.

In an Annotation in 9 Ann. Cas. 435 many cases are cited to sustain this statement:

> If a broker does not procure a purchaser on the terms authorized and he abandons further efforts to sell to a prospective purchaser, or if negotiations between the broker and the purchaser are completely broken off and terminated, the broker will not be entitled to a commission if the owner subsequently enters into negotiations with the same party and effects a sale.

We believe questions of fact existed for the jury to determine who the procuring broker was and whether or not the actions of appellee constituted an abandonment of the Morrows as prospects and thereby released the owners to negotiate with the Morrows either directly or through another agent. Since appellee's agent, John Samuels, admitted on the stand that Boyd Morrow advised him that he had looked at part of the land before, a question of fact existed as to which broker procured the sale.

As stated in *Murray* v. *Miller,* 112 Ark. 227, 166 S.W. 536 (1914):

> Of course, if, during the life of appellant's contract, Miller, the owner, had made a sale of the property directly to a prospective purchaser with whom appellant had been negotiating, and whose effort had brought about the direct negotiations with the owner which resulted in the sale, then he would be entitled to a commission. But even if the sale had been made under those circumstances by the owner through another agent who had an equal right with appellant to negotiate a sale, and whose effort contributed equally in bringing about the sale, then the agent who finally secured the purchaser, and not appellant, was entitled to the commission, and the owner is not liable to appellant if he acted in good faith and did not interfere with appellant's efforts to consummate the sale.

In the case at bar, the agents of appellee admitted that they never obtained an offer from the Morrows. In *Brinkman*

v. *Peel,* 222 Ark. 345, 260 S.W.2d 448 (1953), the Supreme Court noted:

> The law is that as between realtors who have non-exclusive listings, the agent first producing a buyer whose offer meets the seller's terms has earned his commission.

We believe the trial court erred in taking the case away from the jury as it clearly deprived appellants of the right to have questions of fact which raised a jury question presented to the jury. Reversed and remanded.

F. M. GRAVES *v.* Helen Joyce GRAVES

CA 82-216 646 S.W.2d 26

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Henry C. Morris, for appellant.

William H. Hodge, for appellee.

TOM GLAZE, Judge. This case involves an ante-nuptial agreement. Appellant contends the agreement was invalid because it failed to describe the land that he agreed to convey to appellee upon (or no later than thirty days from) the consummation of their remarriage.[1] The trial court upheld the agreement because the description of the land to be conveyed was contained in appellant's will, a document executed contemporaneously with the ante-nuptial agreement. We believe the court was correct, and accordingly, we affirm.

The facts are undisputed. Following an earlier divorce, the parties remarried. Immediately prior to the marriage on September 11, 1981, they executed the ante-nuptial agreement in issue. In it, appellant agreed to convey to appellee the property, or property of equivalent value, listed on Annex "A." Unfortunately, Annex "A" was never attached to the agreement, but appellant conceded at trial that his will, executed on the same date as the agreement, was the omitted Annex "A" document. Under the will, appellant devised to appellee a fractional eighty-acre tract which was specifically described as land lying in Sevier County, Arkansas. From the testimony and other evidence adduced at trial, the court found that appellant's will was a means by which appellee's interest in the eighty-acre tract was protected until that tract was conveyed to her by deed pursuant to the terms of the parties' ante-nuptial agreement. The trial

[1]Act 548 of 1981 is not in issue in this appeal.

court's finding on this issue was clearly supported by the evidence.

Appellant contends that the agreement was unenforceable because it failed to disclose a description of the land — a requirement which, he argues, cannot be supplied by parol evidence. Because the trial court relied upon appellant's testimony and will to supply the description omitted from the agreement, he argues the court violated the Statute of Frauds and the rules of property announced in *Creighton* v. *Huggins,* 227 Ark. 1096, 303 S.W.2d 893 (1957). We find the holding and rules in *Creighton* to be inapposite to the facts here. The applicable law is found in *W. T. Rawleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S.W.2d 886 (1938), wherein the Supreme Court adopted the following rule:

> When different instruments are executed at the same time, but are all parts of one transaction, it is the duty of the court to suppose such a priority in the execution of them as shall best effect the intention of the parties. The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye[s] of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance.

Here, appellant and appellee agreed that the ante-nuptial agreement and the will were parts of one transaction, executed on the same date and consummated for a single purpose. It is also undisputed that the land mentioned in the agreement and described in the will was one and the same. Although appellant contends that he only intended to devise — not convey — this land to appellee, this contention simply cannot be substantiated without doing severe damage to the plain meaning of the terms used by the parties in both documents. Appellant signed both documents and is clearly chargeable under the clear terms of the ante-nuptial agreement. *See* Ark. Stat. Ann. § 38-101 (Repl. 1962).

In conclusion, we note appellant's misplaced reliance on *Sorrells* v. *Bailey Cattle Co.,* 268 Ark. 800, 595 S.W.2d 950 (Ark. App. 1980). In *Sorrells,* the contracts in issue conflicted in substantial ways; they were not contemporaneous documents nor did they involve the same parties. The facts in *Sorrells* and the instant case are distinguishable, and each set requires the application of a different, separate rule of construction.

We find no error and affirm.

Affirmed.

McArthur TURNER and Mary N. TURNER
v. Ed PENNINGTON et ux

CA 82-275 646 S.W.2d 28

Court of Appeals of Arkansas
Opinion delivered February 16, 1983

Young, Patton & Folsom, by: *Nicholas H. Patton,* for appellants.

Pilkinton & Pilkinton, by: *James H. Pilkinton, Jr.,* for appellees.

TOM GLAZE, Judge. Appellants seek reversal of the chancellor's decision that appellee was entitled to have a certain deed reformed to include a mineral reservation which had been omitted. The trial judge also upheld appellee's alternative claims of entitlement to the mineral interests based on laches, estoppel and adverse possession. Appellants contend the chancellor's findings were contrary to the law. Because we find the evidence and the law support the chancellor's decision to reform the deed, we limit our discussion and opinion to that issue only.

The law is well settled that reformation of a written instrument is permitted in equity to show the true intent of the parties where there is a mutual mistake. *Bicknell* v. *Barnes,* 255 Ark. 697, 501 S.W.2d 761 (1973). The parties seeking reformation, however, must present evidence that clearly and convincingly warrants a finding that a mutual mistake occurred; however, the proof need not be undisputed in order to achieve reformation. *Bicknell* v. *Barnes, supra.* In the instant case, both parties agree that the chancellor's decision to reform the deed was premised on a finding of mutual mistake. The parties disagree, however, on whether the evidence supports that finding. In reviewing this factual issue on appeal, we do not reverse the chancellor's decision unless his ruling is clearly erroneous. *Dicus* v. *Allen,* 2 Ark. App. 204, 619 S.W.2d 306 (1981). Guided by these recognized principles of law, we proceed to review the evidence.

On August 27, 1970, appellee deeded two lots in Lewisville, Arkansas, to appellants.[1] Appellee testified that he intended to sell only the surface rights to the lots, and that in accordance with an oil and gas lease which he previously had signed covering these lots, he continued to receive periodic royalty payments after the sale to appellants. Although appellants now assert that they intended to purchase both surface and mineral interests from appellee, the facts belie such an assertion. We consider the facts which existed at the time of conveyance, and those which occurred afterward.

At the time of the conveyance, appellants, at the very least, had constructive notice that appellee had conveyed an oil and gas lease of the lots to an oil producing company. Appellee was receiving royalties pursuant to that lease. Appellants made no inquiry concerning the lease even though it previously had been signed and recorded. In fact, appellants admitted they purchased the two lots to build a house. Accordingly, they directed the Farmer's Home Administration to prepare an abstract limited to the surface only. Although no title opinion was introduced into evidence, the parties agree that appellants obtained one prior to the conveyance. The mineral and surface taxes on the lots had been separated and were on record when the title opinion was rendered and before the sale was closed. Appellee testified that because he had little formal education, he asked if his regular attorney could prepare the deed. His request was denied. Appellee claimed that his attorney had previously prepared appellee's deeds to other properties, reserving the mineral interests in each instance. Another indication the parties did not intend to include the minerals in the conveyance was the sale was made at a reduced price. An appraiser valued the two lots at $1,000 each, excluding minerals, but the appellee sold the lots to appellants for only $500 each.

For eleven years subsequent to the 1970 conveyance, appellee received royalties and paid mineral taxes on the

[1]Appellee's wife joined in the conveyance but she died later. Appellee remarried and his present wife was named in this cause as having a possible dower interest.

lots. Appellants asserted no claim to the royalties until an agent for the oil producing company contacted them when the company became aware of the 1970 deed appellants had received from appellee. While it is true that appellants deny appellee intended to reserve the mineral interests in issue, the parties' treatment of the property and its taxes over the years is consistent with such an agreed reservation. On the evidence presented, we cannot say the chancellor's finding to this effect was clearly wrong.

For the most part, the evidence is undisputed. Those few facts which were in conflict became questions for the chancellor to resolve, and in doing so, he was in a better position than we to observe the witnesses and determine their credibility. *Mack Financial Corp.* v. *Carter Oil Co.*, 2 Ark. App. 48, 616 S.W.2d 769 (1981). Upon our *de novo* review of this cause we find the chancellor's decision to reform the parties' deed because of mutual mistake is supported by the evidence and the law.

We affirm.

Affirmed.

CORBIN, J., not participating.

William E. ROBINSON *v.* STATE of Arkansas

CA CR 82-79 646 S.W.2d 714

Court of Appeals of Arkansas
Opinion delivered February 23, 1983
[Rehearing denied March 23, 1983.]

Felver A. Rowell, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The appellant was convicted of burglary. On appeal he raises issues concerning the discovery of evidence and instructions to the jury. We affirm.

Prior to trial, the appellant filed a motion which included requests for permission to inspect, copy or photostat all written or recorded statements made by him and all tangible objects which would be used against him. A response was filed agreeing to that request. The motion also said "furnish in writing verbatim all statements made by defendant which the State will use on direct or cross-examination at the trial." The response agreed to that request also.

The response was filed on February 17, 1981, and the case went to trial on September 2, 1981. At trial the court allowed the state to introduce into evidence a written statement, signed by appellant, admitting the burglary and also allowed into evidence three photographs showing a footprint and point of entry to the house burglarized. This evidence was objected to on the grounds that it was not furnished or made available to appellant prior to trial.

During discussion of the objection it was disclosed that after the response to appellant's requests was filed, counsel for appellant never made any contact with the deputy

prosecuting attorney's office in an effort to inspect, copy, or obtain the statement of the defendant or the photographs offered in evidence, even though defense counsel and prosecutor had offices next door to each other.

With regard to the statement, the appellant's argument is based on the fact that the state agreed to furnish it but never did. The state's answer is that it had no affirmative duty to furnish — mail or deliver — the statement, but that it was available in the prosecutor's office from February 17, 1981, to date of trial, September 2, 1981. We find no reversible error in the trial court's allowance of the statement into evidence. Ark. Stat. Ann. § 43-2011.2 (Repl. 1977) provides that upon motion the court may order the prosecuting attorney to permit the defendant to inspect and copy certain things, and provides authority for the court to exercise the control necessary to carry out its orders, but it does not require that the prosecutor furnish those things to defendant or his counsel. Neither do we find any specific duty to furnish set out in the rules regulating the prosecuting attorney's obligations in discovery matters. *See* Criminal Procedure Rules 17.1 and 17.2.

Appellant points to Ark. Stat. Ann. § 43-2011.3 (Repl. 1977) as authority for the state to produce a statement in its possession, but that provision is referring to a statement of a witness ordered to be produced *after* the witness has testified on direct examination. *Rush* v. *State,* 252 Ark. 814, 481 S.W.2d 696 (1972). We do not hold that the court does not have authority, even in the absence of statute, to require the state to furnish the defendant a copy of his statement. *See Mobley* v. *State,* 251 Ark. 448, 473 S.W.2d 176 (1971). We do hold, however, that under the circumstances of this case, there was no abuse of discretion in the court's failure to exclude the appellant's written statement from evidence.

As to the pictures, the appellant argues that the evidence shows the prosecutor did not have them in his office until about two weeks before trial and after receiving them he did not notify defense counsel of their existence or that the state intended to introduce them into evidence. But for more than six months appellant had been told, by the state's response,

that he could inspect or photostat all tangible objects which would be used in his trial and he made no attempt to inspect at any time. Under a similar situation the Supreme Court of Arkansas found no abuse of discretion in allowing the photographs in evidence. *Thomerson* v. *State,* 274 Ark. 17, 621 S.W.2d 690 (1981). And in *Renton* v. *State,* 274 Ark. 87, 96, 622 S.W.2d 171, 175 (1981), the court said:

> Rule 17.1 only allows a criminal defendant the *opportunity* to discover the state's testimony prior to trial. As this court stated in *Dupree* v. *State, supra,* "[A] defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation."

Moreover, with regard to both the statement and the photographs, the appellant made no objection prior to trial to the state's compliance with his requests and at trial he made no motion for continuance.

As to the jury instructions, the appellant says the trial court should have instructed upon breaking or entering and upon criminal trespass, as lesser included offenses of the crime of burglary. We agree that the trial court is required to instruct on a lesser included offense when there is testimony furnishing a reasonable basis upon which the accused may be found guilty of the lesser offense. *Bongfeldt* v. *State,* 6 Ark. App. 102, 639 S.W.2d 70 (1982). But that is really not the situation presented in this case.

Here, the appellant took the stand and admitted to the burglary (no point is made by either side that this makes any issue moot) and there is no evidence tending to disprove any element of the crime of burglary. Although the appellant was charged only with burglary, there is evidence that he may also have broken into an automobile in the carport of the home burglarized. Thus, *in addition* to the crime of burglary committed by breaking into the occupiable structure, Ark. Stat. Ann. § 41-2002 (Repl. 1977), the appellant may also have committed the crime of breaking or entering or the crime of criminal trespass by breaking into the vehicle. This, however, does not mean that there was any reasonable basis on which the jury could have found that

appellant was not guilty of the burglary with which he was charged.

Affirmed.

CRACRAFT and CORBIN, JJ., concur.

GEORGE K. CRACRAFT, Judge, concurring. While I concur with both the reasoning and result reached by the majority I would affirm this case even if convinced that the court committed error in admitting the evidence objected to at the time it was offered. The appellant took the witness stand in his own defense and judicially confessed to having committed the crime for which he was convicted. In his sworn testimony he reaffirmed his voluntary written confession, pled for mercy and offered to make restitution to his victim. When he did this the jury had conclusive proof of his guilt and any improper admission of evidence could not be prejudicial. *Mize* v. *State,* 267 Ark. 743, 590 S.W.2d 75 (Ark. App. 1979); *Hays* v. *State,* 208 Ark. 701, 597 S.W.2d 821 (Ark. App. 1980).

In *Hays* it was stated:

> A trial is, or should be, a search for the truth of the guilt or innocence of the accused, and not an exercise in legal theatrics to determine whether all the rules of evidence and procedure (with the many shades of gray) can be kept inviolate. Where guilt is assured from the accused's own testimony in the form of judicial confession we think the scrutiny of appellate review should be relaxed, at least where the penalty is within the law.

This rationale is clearly applicable to this case whether or not the State argued it. A criminal defendant cannot be permitted to complain on appeal about technical objections to the admission of a voluntary confession or other evidence tending to establish his guilt when he has given that same information to the jury under oath in a plea in mitigation of punishment.

I am authorized to state that CORBIN, J., joins in this concurrence.

RIDGEWAY PULPWOOD and TRI-STATE INSURANCE COMPANY *v.* Macel D. BAKER and ROCKWOOD INSURANCE COMPANY

CA 82-285 646 S.W.2d 711

Court of Appeals of Arkansas
Opinion delivered February 23, 1983

Bridges, Young, Matthews, Holmes & Drake, for appellants.

Kenneth E. Buckner, for appellee Baker.

Mayes & Murray, by: *Walter A. Murray,* for appellee Rockwood Insurance Company.

GEORGE K. CRACRAFT, Judge. Ridgeway Pulpwood and Macel D. Baker and their respective workers' compensation insurance carriers bring this appeal and cross-appeal from a decision of the Workers' Compensation Commission finding them to be jointly liable for medical expense and disability benefits due Charles Henry Dailey. Baker also contends that the Commission erred in finding that he had controverted the claim in its entirety.

It was stipulated that Dailey was employed as a timber cutter by B. W. Robertson, a timber contractor. At the time Dailey was injured Robertson was cutting and removing both pulpwood and sawlog timber from property owned by John Boyd. Robertson sold all of the pulpwood to Baker and all of the sawlog timber to Ridgeway. Robertson was an uninsured employer but it was stipulated that under his contracts with Ridgeway and Baker, if an employee was cutting pulpwood at the time of an injury then Baker would be responsible for workers' compensation benefits and if the employee was cutting sawlogs at the time then Ridgeway would be responsible for those benefits. It was further

stipulated that the sole issue before the Commission was the type of timber being harvested at the time of the injury.

Dailey and his brother testified that the difference between sawlogs and pulpwood is that sawlogs are larger and pulpwood is chipped for manufacturing paper. Trees twelve inches and up in diameter are considered sawlogs and anything smaller is pulpwood. They both testified that at the time of his injury Dailey was cutting pulpwood as he had been instructed to do by Mr. Robertson.

John Boyd, the owner, testified that he was on his property at the time Dailey was injured. Boyd testified definitely that at the time of the injury the timber men were pulling out logs twelve to twenty inches in diameter and that these logs were not used for pulpwood. Macel Baker testified he was selling the pulpwood to Georgia-Pacific on a quota and that his quota for that week had already been met before Dailey was injured. B. W. Robertson stated that on the day Dailey was injured they cut pulpwood in the morning but that at the time his injury occurred they were cutting sawlogs and had been for over an hour and a half. He had instructed Dailey and his brother to cut sawlogs prior to the time the injury had occurred, and the crew was on the property merely to finish loading the logs. He testified that many of the trees cut would produce sawlogs on the bottom but the tops would qualify for pulpwood, that using one tree for both was not an uncommon practice, and had been done on this particular job to meet his pulpwood quota. On this conflicting testimony the Commission found that Dailey was harvesting timber, part of which could be used as sawlogs and part of which could be used as pulpwood, and that at the time of his injury he was performing services for both employers concurrently.

The evidence as to the type of wood being cut at the time of the injury was in sharp conflict and permitted three different conclusions. Ridgeway argues that the evidence that they were cutting pulpwood at the time was the more credible. Baker argues that the credible evidence tends to establish that they were cutting sawlogs. Questions of credibility and the weight and sufficiency to be given

evidence are matters for the Commission to determine. On appeal the evidence is viewed in the light most favorable to the finding of the Commission and is given its strongest probative value in favor of its order. The issue is not whether we might have reached a different result or whether the evidence would support a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence and even where a preponderance of the evidence might indicate a contrary result we will affirm if reasonable minds could reach the Commission's conclusion. It is also well settled that agencies such as this Commission are better equipped by specialization, insight and experience to analyze and determine issues and to translate evidence into findings of fact. *Allen Canning Company* v. *McReynolds,* 5 Ark. App. 78, 632 S.W.2d 450 (1982).

The Commission found from conflicting evidence that at the time of the injury the timber being harvested by Dailey was usable for both purposes and, applying the rules set forth in *Dillaha Fruit Co. et al* v. *Latourrette,* 262 Ark. 434, 557 S.W.2d 397 (1977), concluded that the employment was concurrent and held the employers jointly liable for compensation to the claimant. We cannot say that reasonable minds could not reach this conclusion or that the application of the law to that conclusion was erroneous. *Dillaha Fruit Co. et al* v. *Latourrette, supra,* held that the relation of employer to employee may be simultaneously maintained between several employers and the same employee, and where that situation is found the employers are jointly liable for compensation to the injured employee. In *Dillaha* the court cited with approval from 1(A) Larson's Workmen's Compensation Law, § 48.40 as follows:

> . . . Courts are showing an increasing tendency, however, to dispose of close cases, not by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee, but by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both.

The appellant, Macel Baker, contends that the Commission erred in holding that he had controverted the claim in its entirety. We do not agree.

The right to determine the necessity of a claimant's securing the service of an attorney to preserve his benefits has been placed within the discretionary power of the Commission. Appellate courts should not set aside such a determination unless it is clearly wrong or constitutes a gross abuse of that discretion. We agree with the appellant that the mere fact payment of benefits is delayed does not amount to controversion per se. A determination of whether a claim has been controverted may be a question of fact and is not to be determined mechanically upon ascertaining whether the employee has filed his claim the employer promptly responds by accepting or controverting the claim. There are other factors which the Commission may consider in determining whether the services of the attorney were necessitated by the employer's action. *Aluminum Co. of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976); *Hamrick* v. *Colson Company,* 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981).

Here Baker was aware of the injury when it occurred. Dailey received no benefits from either employer for a period of thirteen weeks and then only after he had employed counsel and notice that his claim was set down for a hearing by the Commission had been given. While it does appear that Baker brought the disability payments to date and was making them at the time of the hearing, there is no evidence explaining the delay or tending to excuse it. We cannot say that the Commission's finding that the claim was a controverted one is not supported by substantial evidence or that it abused its discretion.

Affirmed.

Patty CARDOZO and Christine PAIGE
v. STATE of Arkansas

CA CR 82-158 646 S.W.2d 705

Court of Appeals of Arkansas
Opinion delivered February 23, 1983

Marc G. Kurzman and *William R. Wilson, Jr.,* for appellants.

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

LAWSON CLONINGER, Judge. In this case, after the trial court denied appellants' motion to suppress evidence obtained by an allegedly defective search warrant and their motion to suppress evidence obtained by a warrantless search behind appellants' house, appellants were adjudicated guilty of manufacturing a controlled substance, marijuana, in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981). Appellants were sentenced to four years in prison and placed on probation under suspended sentence.

For reversal, appellants contend, first, that the affidavit for the search warrant was fatally defective for lack of reference to the time of the affiant's observations, and they contend, secondly, that marijuana found behind appellants' house was improperly seized because it was found as a result of a warrantless search without consent. We find no merit to appellants' contentions and we affirm the judgment of the trial court.

Sheriff Ray Watkins and Deputy Sheriff Larry Whitney arrived at the property of appellants about noon on August 29, 1981 pursuant to a search warrant issued August 28, 1981. The affidavit upon which the search warrant was based was signed by Sheriff Watkins and described the location of the property in detail. The sheriff stated that he had received a report that there was marijuana growing on the property, and then related that he went to the area and found twenty or

so marijuana plants growing along with corn and other vegetables. The affiant made no reference as to when his observations were made.

Appellants' first point for reversal poses the narrow question of whether the affidavit for the search warrant adequately revealed the time of the sheriff's observations, so as to justify the issuing judge in concluding that probable cause existed at the time the warrant was issued. Apparently the question has not been addressed by an Arkansas court, but there are guidelines furnished in cases from other jurisdictions. Some courts have concluded, under certain factual situations, that the failure to state when the alleged facts occurred is fatally defective. *Pierson* v. *State,* 338 A.2d 571 (Del. 1975); *Thomas* v. *State,* 353 S.2d 54 (Ala. App. 1977).

The facts in an affidavit for a search warrant must be current. The issuing magistrate must be able to reasonably infer the existence of probable cause at the time of the issuance. *Andresen* v. *Maryland,* 427 U.S. 463 (1976). In *State* v. *Sager,* 404 A.2d 52 (N.J. Super. 1979), the court stated:

> The core question when staleness is raised in an attack upon a search warrant was simply stated in *State* v. *Blaurock,* 143 N.J. Super. 476, 363 A.2d 909, 910 (App. Div. 1976), as follows: '. . . . do all the circumstances exhibited . . . reasonably conduce to a belief that the law was being violated *at the time the warrant issued?*'

In determining whether a search warrant has been issued on probable cause, the results of the search are immaterial and may not be considered. *U.S.* v. *Nichols,* 89 F.Supp. 953 (E.D. Ark. 1950).

In the instant case, the trial judge believed it was reasonable to infer that the events related in the affidavit occurred on the same day the affidavit was dated, and there is justification for that belief. The affiant stated that he had reasonable grounds for believing marijuana was being grown at the described location on the date he signed the

affidavit, and then stated why: that he had personally observed the growing plants.

The growing of marijuana is an illegal activity of a continuing nature, and the magistrate could take note that August 28, the date the affidavit was made, was within the growing season for marijuana, as well as corn and other vegetables. In *State* v. *Loucheim,* 250 S.W.2d 630 (N.C. 1979), the court dealt with the issue of staleness and stated:

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: The character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. . . .

In *United States* v. *Dennis,* 625 F.2d 782 (8th Cir. 1980), the Court stated:

> If, because of delay in applying for a warrant, the information in the affidavit is stale, probable cause may be diminished. *Andresen* v. *Maryland, supra,* 427 U.S. at 478, N. 9, 96 S. Ct. at 2747. But the delay is not considered separately. The length of the delay is considered together with the nature of the unlawful activity. *United States* v. *Johnson,* 461 F.2d 285, 287 (10th Cir. 1972). And they are considered in the light of common sense. *Id.* Hence, in *United States* v. *Johnson,* a three-week delay did not undermine probable cause where the illegal distilling was an ongoing business, rather than a mere isolated violation. *Id.* In *Andresen* v. *Maryland,* a three month delay did not undermine probable cause because the warrants were for business records that were likely to be maintained for a long time. *Supra,* 427 U.S. at 478, N. 9, 96 S. Ct. at 2747.

In order to grant appellants' motion to suppress the evidence obtained by the search, it would have been necessary for the trial court to abandon the common sense rule laid down by the Arkansas Supreme Court in *Baxter* v. *State,* 262 Ark. 303, 556 S.W.2d 428 (1977), in which the court quoted with approval the following excerpt from *U.S.* v. *Ventresca,* 380 U.S. 102 (1965):

> . . . If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. . . .

Hence, we find that the trial judge's denial of the motion to suppress evidence was not an abuse of discretion.

Additionally, we find that appellants' second point is without merit. When we view the evidence in the light most favorable to the appellee, the state, the following events transpired at the time the search warrant was executed. Upon arrival at the site of the growing plants, located in a rural, heavily forested area, the officers encountered appellants and appellant Paige's ten-year-old daughter. Appellants informed the officers that two women had lived in a teepee near the garden area, but that the women had left and the F.B.I. was looking for them. The officers were told that appellants lived in a cabin down the hill, and when the officers asked if they could check to see if the two missing women were down there the appellants said they could. Appellant Paige's daughter disappeared, but she was on the porch of appellants' cabin when the officers and appellants arrived there. Upon reaching the cabin, appellants were advised of their rights which they indicated they understood. The officers were told that the missing women had been gone for six weeks, however, the garden had been recently tended. The officers were given permission by the appellants to look inside the house and to "look around." When the deputy sheriff went around the cabin, he observed cut marijuana plants on top of a ladder behind the cabin.

It is not an unreasonable search for an officer to move into a position where he has a legal right to be and look for things he may have reason to believe will be seen. *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). Deputy Whitney had a right to be where he was. Appellants had given the officer permission to look around, and there was uncontradicted testimony that appellants were not intoxicated or otherwise incapable of giving consent. See *White* v. *State,* 261 Ark. 23, 545 S.W.2d 641 (1977). In *Scroggins* v. *State,* 268 Ark. 261, 595 S.W.2d 219 (1980), the court stated:

> Knowledge of the right to refuse consent to search is not a requirement to prove the voluntariness of consent. *McGuire* v. *State,* 265 Ark. 621, 580 S.W.2d 198 (1979). Specifically, a *Miranda* warning is not required before a warrantless search is conducted, *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).
>
> We recognize that the state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given and there was no actual or implied duress or coercion, *Rodriquez* v. *State,* 262 Ark. 659, 559 S.W.2d 925 (1978). . . .

At the time Deputy Whitney walked to the rear of the cabin, the officers had reason to suspect that the two missing women may have been in the area, and that appellant Paige's daughter had gone to warn them. The only incriminating statement previously made by the appellants was that one of the appellants owned the property. The finding by the trial court that the officers were given consent to not only search the cabin, but to "look around" the house, and that there was no duress or coercion, is not clearly against the preponderance of the evidence.

Affirmed.

COOPER, GLAZE and CORBIN, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. While I do not disagree with the majority opinion as it relates to the evidence obtained through the warrantless search, I respectfully dissent from that portion of the opinion which affirms

the trial court's refusal to suppress the evidence obtained through the search warrant. The affidavit for the search warrant described the property in question and showed that the affiant, Sheriff Ray Watkins, had personally observed marijuana growing on the property. However, there was no information whatsoever contained in the affidavit as to when Sheriff Watkins observed the growing marijuana. I believe this is a fatal defect, and that the evidence seized should have been suppressed.

The majority disposes of this issue by finding that the municipal judge could have inferred that the events related in the affidavit occurred on the date the affidavit was signed. I disagree. Since the affiant had personally observed the growing marijuana plants, the majority opinion reasons that the magistrate had reasonable grounds for believing that marijuana was being grown at the described location on the date the affidavit was signed. The majority, I believe, has gotten the cart before the horse. The alleged illegal activity, according to the face of the affidavit, could have occurred weeks, months, or even years earlier. To use the conclusory statement by the affiant, i.e., that he believes there is marijuana on the premises on the day he signed the affidavit, as a justification for believing that he observed it on that day, is simply bootstrapping. Obviously an affiant is going to believe that contraband is located on the premises at the time he signs the affidavit, or at least, that the contraband will be present shortly thereafter. This is true in virtually every case. If that justifies the issuance of this search warrant, then from and after the date of this opinion, there will simply be no requirement that time be alleged in affidavits for search warrants.

In *Coyne* v. *Watson,* 282 F.Supp. 235 (S.D. Ohio 1967), *aff'd,* 392 F.2d 585 (6th Cir.), *cert. denied,* 393 U.S. 951 (1968), the district court stated:

> With respect to the deficiency in "time," it must be conceded that the affidavit must contain something affirmatively indicating that there is probable cause at or about the time the search warrant is applied for. If it be on personal knowledge, there should be some

> indication of the officer's personal knowledge now; or if it be based on hearsay, there should be some indication that the information was imparted to the affiant at or shortly before the time of the application and that the information indicated probable cause *now,* not five or six days or months ago. [citation omitted].

The case of *United States* v. *Neal,* 500 F.2d 305 (10th Cir. 1974), involved information provided to the police by an informer. The information was at least three months old, and the court found that the affidavit contained no information from which it could be inferred that the criminal activity continued, or that the contraband remained on the premises. The district court stated:

> Probable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed. *Sgro* v. *United States,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932); [footnote omitted] *Durham* v. *United States,* 403 F.2d 190 (9th Cir. 1967); *Rosencranz* v. *United States, supra; People* v. *Siemieniec,* 368 Mich. 405, 118 N.W.2d 430 (1962), 100 A.L.R.2d 522, Anno. 525; 3 Wright, Federal Practice and Procedure, par. 662 at 23, par. 670 at 91 (1969).

Although undated information may be closely interrelated with dated information so as to allow an inference that the events alleged took place in close proximity to the dates given, *United States* v. *Holliday,* 474 F.2d 320 (10th Cir. 1973), undated information with no specific clues as to time is inadequate to justify a finding of probable cause. *United States* v. *Salvucci,* 599 F.2d 1094 (1st Cir. 1979), rev'd and remanded on other grounds, 448 U.S. 83 (1980).

In *United States* v. *Boyd,* 422 F.2d 791 (6th Cir. 1970), the court dealt with an affidavit which alleged that there was being concealed certain contraband "now". In vacating the conviction, the court said:

> But when the date of that observation is not supplied to the Commissioner under oath, the door is opened to

> inference of a present offense based on stale information. Generally, the courts have refused to uphold warrants based — or possibly based — on stale information. [citations omitted]

While it is true that the cases cited above contain language which appears to allow inferences as to the time of the alleged criminal activity, it is clear that those inferences must be tied to other factual and dated allegations contained in the affidavit before they may be considered sufficient to constitute probable cause for the issuance of a search warrant. In the case at bar, the majority concludes that, because of the "common sense" rule laid down by the Arkansas Supreme Court in *Baxter* v. *State,* 262 Ark. 303, 556 S.W.2d 428 (1977), which quoted *United States* v. *Ventresca,* 380 U.S. 102 (1965), the affidavit in the instant case should be held sufficient. However, this exact issue was dealt with in *Rosencranz* v. *United States,* 356 F.2d 310 (1st Cir. 1965). The Court dealt with the question of whether *Ventresca* compelled or permitted the upholding of an affidavit which lacked any averment as to when the affiant received information from an anonymous informant, or as to the time when the affiant actually detected the alleged illegal activities. In *Rosencranz,* the district court dealt with *Ventresca,* and held, as does the majority in the case at bar, that the information received from the informant "must reasonably be construed as speaking as of the date of the affidavit, for the present tense is used." The Court of Appeals reversed, holding that the affidavit was insufficient because it did not contain sufficient allegations as to the time when the observations were made. The court, in so holding, stated:

> We conclude that a combination of undated, conclusory information from an anonymous source and an undated general allegation of personal observation by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate.

Further, the court stated:

> It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw

> inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed.

Several state court decisions have reached the same result. *See McCray* v. *State,* 50 Ala. Crim. App. 143, 277 So.2d 418 (1973); *People* v. *Padilla,* 182 Colo. 101, 511 P.2d 480 (1973); *Pierson* v. *State,* 338 A.2d 571 (Del. 1975); *Bachelor* v. *State,* 143 Ga. App. 442, 238 S.E.2d 579 (1977); *Latten* v. *State,* 127 Ga. App. 75, 192 S.E.2d 562 (1972); *State Ex Rel. Townsend* v. *District Court of Fourth Judicial District,* 168 Mont. 357, 543 P.2d 193 (1975); *Morris* v. *State,* 617 P.2d 252 (Okla. Crim. App. 1980); *State* v. *Winborne,* 273 S.C. 62, 254 S.E.2d 297 (1979). *See also* Annot., 100 A.L.R.2d 527 (1965). Although there have been more cases on this question since the A.L.R. annotation, it is worthwhile to note the beginning paragraph of the annotation where it is stated:

> While the courts agree that an affidavit must contain an express statement of the time of the occurrence of those facts relied upon as supporting the issuance of a search warrant, this rule is apparently so well recognized that few cases contain a positive statement to this effect.

The reason, at least to me, the rule is so obvious to most courts, is that probable cause dissipates with time. As stated in *State* v. *Winborne, supra,* if the affidavit fails to state the time of the occurrence of the facts alleged, then

> The conduct of the citizen throughout the entire period of his past life would furnish grounds for continuous and repeated searches of his premises, if, perchance, he had been guilty during that period of harboring on his premises contraband articles. . . .

Finally, I must point out that neither I, nor the majority, have found any Arkansas case which has ruled on the precise point presented in the case at bar. However, I find the decision of the Arkansas Supreme Court in *Vanderpool*

v. *State,* 276 Ark. 220, 633 S.W.2d 374 (1982) persuasive. In *Vanderpool,* the affiant did not make any statement in his affidavit as to whether he personally had observed the contraband or whether the information had been obtained from a third person. The Arkansas Supreme Court reversed and remanded, holding that the trial court should have suppressed the evidence because of the failure to state the source of the affiant's information. In so doing, the court stated:

> A magistrate must determine the reliability of the assertion in the affidavit before deciding the existence of probable cause. In order to weigh reliability the magistrate must know whether the assertion is from personal observation, perceived facts or hearsay. Thus, the basis of the assertion must be stated in the affidavit in those cases where the sole evidence is the affidavit. We reverse the Court of Appeals on this issue and remand the case for a new trial.
>
> If a magistrate determines that an affidavit is insufficient the defect can easily be cured, if the affiant has the required good cause, by putting the affiant under oath and allowing him to testify or else allowing him to execute a supplemental affidavit under oath.

In *Vanderpool,* the Arkansas Supreme Court held that the magistrate, and the reviewing court, may not infer the source of the information provided by the affiant. The Court further held that the source of the affiant's information must be specifically stated. How, then, can we allow the issuing magistrate to infer the *time* when the affiant gained the information in the affidavit from which a probable cause determination must be made?

I think the obligation of this Court is to make an independent determination based on the totality of all the circumstances and to resolve all doubts in favor of the rights of the individual. We should reverse the trial court on the refusal to suppress the evidence obtained by virtue of the warrant, since the ruling was clearly erroneous. *State* v.

Tucker, 268 Ark. 427, 597 S.W.2d 584 (1980); *Grant* v. *State,* 267 Ark. 50, 589 S.W.2d 11 (1979).

I respectfully dissent.

GLAZE and CORBIN, JJ., join in this dissent.

Jack E. HEARRELL *v.* Mitchell J. ROGERS

CA 82-223 646 S.W.2d 703

Court of Appeals of Arkansas
Opinion delivered February 23, 1983

Jonathan P. Shermer, Jr., for appellant.

Highsmith, Gregg, Hart & Farris, by: *Josephine L. Hart,* for appellee.

TOM GLAZE, Judge. This case presents a situation in which the appellee breached a real estate contract he had entered into with the appellant. In his sole point for reversal, appellant argues the trial court erred in its award of damages.

Appellant, a speculative house builder, sold one of his homes to appellee for $59,400. The parties executed a standard offer and acceptance contract that contained an earnest money provision. They agreed to $300 earnest money which would become liquidated damages under the following terms:

> If, after acceptance, Buyer fails to fulfill his obligations, the earnest money shall become liquidated damages, WHICH FACT SHALL NOT PRECLUDE SELLER OR AGENT FROM ASSERTING OTHER LEGAL RIGHTS WHICH THEY MAY HAVE BECAUSE OF SUCH BREACH.

The trial court found the appellee violated the terms of the parties' contract, and it awarded $300 in liquidated damages. Because his actual damages exceeded the stipulated $300, appellant contends that under the terms of the agreement he was not precluded from proving and receiving a greater amount. Appellant's contention is contrary to well established law on the subject.

An argument similar to appellant's was posed in *Blackwood* v. *Liebke,* 87 Ark. 545, 113 S.W. 210 (1908). In *Blackwood,* the Court rejected the suggestion that an agreement for liquidated damages could be disregarded when the damages are capable of ascertainment. It stated:

> But the question is not as to the status of the parties at the time when the contract terminated, but as to the status of the parties at the time they made the contract. It may be, as the contract works out, that it would be easy to ascertain the damages for the breach of it, or to prove that there were none. But if the status of the parties at the time of the contract was such that it would be difficult or impossible to have anticipated the damage for a breach of it, and there was a positive element of damage, then under the authorities there is no reason why that may not be anticipated and contracted for in advance.

Id. at 553, 113 S.W. at 212-13.

In the instant case, when the parties executed their contract, they no doubt had difficulty in anticipating what damages might result from any breach. We know for certain that since the contract was breached, the appellant and appellee have been unable to come close to agreeing on what damages resulted. For example, appellant argues that his actual damages totaled $1,906, which represents the interest on construction mortgage payments he incurred between the breach and the subsequent sale of the house. Appellee counters that appellant actually netted more than $1,300 after the breach because he eventually sold the house, without certain costly items required by appellee, for $500 more than their original contract price. Because of the parties' divergent views on the amount of damages appellant sustained by appellee's breach, the $300 liquidated damages to which the parties agreed does not appear unreasonable.

We also note another reason the $300 liquidated damages provision should be enforced. The Supreme Court in *McGregor* v. *Echols,* 153 Ark. 128, 239 S.W. 736 (1922), held that the proper measure of damages for breach by the purchaser in an executory contract for the sale of land is the difference between the contract price and the market value at the time of the breach, less the portion of the purchase price already paid. Here, the parties ignored the measure of damages adopted in *McGregor* and instead agreed to stipu-

late damages. Neither party offered any evidence at trial concerning the market value of the property at the time appellee breached the contract, nor were they so required because they did liquidate damages. We suspect any damages incurred by the appellant under the *McGregor* rule would have been minimal, because only five months transpired between the date the parties signed the contract, the date appellee breached it and the date appellant sold the property to a third party.

Under the facts of this case, any anticipated damages were indeed uncertain, and accordingly, the parties chose to liquidate those damages. By the terms of the parties' agreement, the appellant may have sought to enforce the agreement rather than sue for damages. However, because appellant brought an action to seek damages, we believe the trial court was correct in enforcing the liquidated damage provision contained in the parties' agreement.

We affirm.

Affirmed.

REVERE COPPER AND BRASS, INC. *v.*
Thearman E. TALLEY, Jr., Employee

CA 82-232 647 S.W.2d 477

Court of Appeals of Arkansas
Opinion delivered March 2, 1983

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellant.

Sam Boyce, for appellee.

LAWSON CLONINGER, Judge. The sole issue on this appeal is whether the Arkansas Workers' Compensation Commission was in error in holding that appellant, Revere Copper and Brass, Inc., a self-insured employer, had controverted the impairment rating of 50% for a compensable injury to the hand of appellee, Thearman E. Talley, Jr. The Commission, upon finding that appellant had controverted the claim, awarded attorney's fees to appellee's attorney to be paid by appellant.

We hold that there is substantial evidence to support the decision of the Commission and we affirm.

Appellee suffered a compensable injury to his left hand on November 13, 1980, and returned to work at light duty one week later. The treating physician, Dr. Ramon E. Lopez, an orthopedic surgeon, in his final report, stated that appellee had some increased sensitivity of the fingers and some residual swelling, but gave appellee a final release on January 19, 1981 without any award of permanent disability.

On March 27, 1981, appellee was examined by Dr. Rex M. Easter, also an orthopedic surgeon, at the request of appellee's attorney. Dr. Easter found appellee entitled to a 50% permanent partial impairment to his hand. Dr. Easter clarified his evaluation in a letter dated April 14, 1981, and on April 15, 1981 appellant's attorney wrote a letter on behalf of appellant disclaiming responsibility for Dr. Easter's charges and declining recognition of Dr. Easter's rating. On May 7, 1981 appellant's attorney wrote a letter to Dr. Lopez stating that appellant intended to defend against appellee's claim and requested that Dr. Lopez attend a hearing on the matter and testify regarding his evaluation of appellee. The letter also stated that "If you feel the need of having a more recent examination of Mr. Talley before the hearing, please have your office schedule an appoint-

ment . . . " Dr. Lopez again examined appellee, and on June 24, 1981 reported to appellant's attorney that he agreed with the rating given to appellee by Dr. Easter. Thereafter, appellant concurred with the award of 50% impairment, and on July 8, 1981 tendered the first payment to appellee.

Whether the benefits have been controverted entitling a claimant to an attorney's fee is a question of fact. In *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976), the court stated:

> A liberal construction favoring the claimant mandates a holding that the question whether a claim is controverted be one of fact to be determined from the circumstances of the particular case, only one of which is the status of the formal proceeding before the commission, and that, as in other such determinations, the commission's finding should not be reversed if there is substantial evidence to support it, or it is clear that there has been a gross abuse of discretion.

Making an employer liable for the attorney's fees of the employee served legitimate social purposes. It may discourage oppressive delay in recognition of liability, deter arbitrary or capricious denial of claims, and insure the ability of necessitous claimants to obtain adequate and competent legal representation. *Aluminum Company of America* v. *Henning, supra.* But the mere failure of an employer to pay compensation benefits does not amount to controversion, in and of itself, especially where the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Horseshoe Bend Builders* v. *Sosa,* 259 Ark. 267, 532 S.W.2d 182 (1976). In the *Sosa* case, however, a finding of controversion was reversed by the Arkansas Supreme Court because it found that the difficulty arose in part because the claimant was difficult to find and keep up with.

In *Hamrick* v. *The Colson Company,* 271 Ark. 740, 610 S.W.2d 281 (1981), this court found substantial evidence to support the Commission's finding that a claim had not been controverted. The court made note of the fact that the

claimant had seen three doctors, including one of her own choice, who had never diagnosed her specific problem, and, therefore, had not recommended the surgery which was later deemed necessary. Colson had relied on this medical advice, and no additional or contrary medical evidence was provided by the claimant until some two months later when Colson received a report from Dr. Allen recommending surgery. Two days later, Colson requested a second medical opinion before surgery, and six days after the claimant's examination by the second physician, Colson acknowledged the claim to be compensable. This court stated:

> Colson's actions were prompt in its attempt to obtain another medical opinion upon which it could base a decision to either controvert or not controvert the medical expenses and disability payments to be incurred due to Dr. Allen's opinion. Colson assumed responsibility for Hamrick's medical expenses and surgery six days after Dr. Rosensweig examined Hamrick, confirming the extent of her injury. Again, the time and manner in which Colson acted was such that the Commission could find it to be reasonable.

In the instant case, we hold that appellant was not prompt in its attempt to obtain another medical opinion. On the day following Dr. Easter's clarifying letter, appellant's attorney wrote the letter repudiating Dr. Easter's rating, but then, unlike the employer in *Hamrick,* appellant did not promptly seek an early independent medical opinion to confirm or contradict Dr. Easter's rating; appellee wrote Dr. Lopez, clearly stating that appellee intended to defend the claim. Dr. Lopez was not asked to re-examine and re-evaluate appellee, but was asked to prepare himself for the hearing.

There was substantial evidence presented to the Commission to support a finding that the claim was controverted, and the Commission did not abuse its discretion in the award of attorney's fees.

The finding that appellee was entitled to an attorney's fee is not inconsistent with the Commission's failure to

order the payment of Dr. Easter's charges for the evaluation of appellee. Appellee did not comply with the provisions of Rule 21, Rules of the Arkansas Workers' Compensation Commission (in effect on the pertinent date), relating to a change of physicians at the expense of the employer, and he was thus required to bear the expense of Dr. Easter's evaluation, which he voluntarily did. Appellee's failure to comply with Rule 21, however, had no bearing on Dr. Easter's qualifications to be a witness. *Markham* v. *K-Mart Corporation,* 4 Ark. App. 310, 630 S.W.2d 550 (1982).

The decision of the Commission is affirmed.

Terry NEELY *v.* STATE of Arkansas

CA CR 82-147 647 S.W.2d 473

Court of Appeals of Arkansas
Opinion delivered March 2, 1983

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

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

DONALD L. CORBIN, Judge. On May 8, 1978, appellant, Terry Neely, entered a plea of guilty to two counts of burglary, class B felonies, and two counts of theft of property, class C felonies. He received a sentence of twenty years on each burglary count with fifteen years of each twenty-year sentence suspended on good behavior. He received a sentence of five years on each of the theft of property counts. Each of the sentences was to run concurrently with credit for time served while awaiting trial dating from March 3, 1978.

The prosecuting attorney filed a petition to revoke these suspended sentences and a hearing was held on March 22, 1982. An order was entered by the trial court revoking the sentences on March 24 and appellant was ordered to be delivered to the Arkansas Department of Corrections to remain for the balance of the fifteen years previously suspended less the time between the date appellant was paroled and the date the revocation of sentences occurred.

For reversal, appellant contends the trial court erred in revoking his suspended sentence on the basis that the state had failed to produce any proof that appellant had any knowledge of the conditions of suspension or probation. He argues that since Ark. Stat. Ann. § 41-1203 (4) (Repl. 1977) requires a court to provide a defendant with a written statement explicitly setting forth the conditions under which he is being released, the admitted failure to do so in this instance mandates reversal. The state conceded that appellant was orally told at the revocation hearing that the suspended portions of his sentence were being suspended "during his good behavior."

Appellant further contends that *Ross* v. *State,* 268 Ark. 189, 594 S.W.2d 852 (1980) is controlling. There the Arkansas Supreme Court stated the following:

> Moreover, our holding in *Gerard, supra,* preceded the adoption by the General Assembly of a requirement of written conditions in connection with suspended sentences. In light of this current legislative expression, all 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.

The State contends that good behavior is an implied condition of every suspension and need not be expressed in writing since a person should be presumed to know that his suspended sentence is contingent upon his refraining from criminal conduct. We understand and are sympathetic with appellee's argument, but we have no choice but to agree with appellant and follow precedent. Any change in the interpretation or construction of Ark. Stat. Ann. § 41-1203 (4) (Repl. 1977) must come from legislative action or from the Arkansas Supreme Court.

We recognize the value of having written conditions to avoid misunderstandings by the probationers; however, we have 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 (in the instant case, burglary and theft of property offenses).

We reverse.

MAYFIELD, C.J., and CRACRAFT, J., concur. COOPER, J., joins in Judge CRACRAFT's concurrence.

GLAZE, J., dissents.

MELVIN MAYFIELD, Chief Judge, concurring. I believe any problem with the decision in this case results from an Act of the General Assembly and if a change is needed, it should be made by the General Assembly.

GEORGE K. CRACRAFT, Judge, concurring. In considering the merits of this appeal I have carefully and critically analyzed the decision in *Ross* v. *State,* 268 Ark. 189, 594 S.W.2d 852 (1980) in a vain attempt to find a distinction or other reason why it should not be controlling. I have been unable to do so. It holds exactly what the majority opinion says it does and we are firmly bound by it even though this suspended sentence was imposed before *Ross* was decided.

I have found it difficult to believe that the Supreme Court intended to extend the requirement of Ark. Stat. Ann. § 41-1203 (4) (Repl. 1977) as far as its opinion seems to go or, if it did, that the Legislature in its enactment actually had the intention ascribed to it in that opinion.

I had no difficulty in accepting such a rule applicable to restrictions on non-felonious conduct. It is certainly a reasonable requirement that a probated felon be informed of the type of non-criminal conduct which might result in revocation. It is reasonable to assume that he might not know that his failure to pay a fine or make restitution within a given time might result in imprisonment. It is a sensible assumption that he might not otherwise know that he must refrain from frequenting unlawful or designated places or consorting with designated persons who might adversely influence his future conduct. Some of the restrictions on non-criminal conduct which a court may impose as a condition of his suspension are set out in the Act and cover over three-quarters of a page. Basic fairness dictates that these restrictions, intended to assist him in leading a law-abiding life, be given in writing (1) to assure that he fully understands the condition of his probation and (2) as a means of refreshing his memory from time to time. Without such a memorandum and explanation of it he might easily forget or misinterpret one or more of his many restrictions and be dealt with unfairly.

My concern is that we are here compelled by *Ross* to reverse the revocation of a suspended sentence imposed on a person convicted for several felonies simply because he was not informed in writing what everyone already knows — that he must not commit another one. Nor am I able to relate such a rule to any notions of due process, fair play and deterrences as was further reasoned by *Ross*. He would certainly not have been permitted to interpose as a defense to his initial convictions that he had never been informed in writing that he would go to jail if he committed burglary and theft. It is as incongruous to me that he be permitted to interpose that defense in a revocation hearing.

This case, in which the suspension was imposed before *Ross* was published, is not unique in that respect. There must be many other such suspended or probated sentences still in effect. The required retroactive application of *Ross* to these cases has, and will for some time to come, cause this legislation, intended to prevent injustice to an accused, to result in an unnecessary and unjust burden on the public and the orderly administration of justice. It would be my sincere hope that the legislature would take the needed action to correct this.

I reluctantly concur in the result, and am authorized to state that COOPER, J., joins in this concurrence.

TOM GLAZE, Judge, dissenting. No member on this Court agrees that the rule announced in *Ross* v. *State,* 268 Ark. 189, 594 S.W.2d 852 (1980), is correct. The reason for my disgruntlement with the rule in *Ross* is eloquently stated in the concurring opinion of my colleague, Judge Cracraft. Although this Court is in no position to overrule *Ross* v. *State,* it certainly could refuse to follow the case, thereby inviting the Supreme Court to review the rule it set out in *Ross*. The approach taken by the majority court in following the *Ross* rule gives us no assurance that the rule will be reviewed any time soon. I believe that this Court should express its honest opinion that the rule in *Ross* is wrong and then permit the Supreme Court to reverse *Ross* or restate its affirmance of the rule.

I would affirm.

Frank MORRIS, d/b/a FRANK MORRIS ESCORT SERVICE *v.* William F. EVERETT, Director of Labor

E 82-273 647 S.W.2d 476

Court of Appeals of Arkansas
Opinion delivered March 2, 1983

Burk Dabney, for appellant.

Alinda Andrews, for appellee.

TOM GLAZE, Judge. This appeal arose from a determination by the Employment Security Division, Arkansas Department of Labor, that appellant Frank Morris is an "employer" within the meaning of the Arkansas Employ-

ment Security Law, and therefore liable to pay unemployment insurance taxes. The Board of Review affirmed the Agency's determination.

Appellant owns a heavy equipment highway escort service. He employs individuals to drive escort vehicles for trucks hauling oversized loads from Little Rock to their various destinations. Appellant is paid a per mile rate for providing the escort vehicles; he, in turn, pays the drivers a per mile rate for their services.

Appellant contends that the drivers who work for him are independent contractors, not employees. Accordingly, he argues that he is exempt from paying into the State unemployment insurance fund. In support of his argument, appellant relies upon *Crossett Lumber Co.* v. *McCain,* 205 Ark. 631, 170 S.W.2d 64 (1943), but the *McCain* decision was premised on the construction of Ark. Stat. Ann. § 81-1103 (i) (5) (a) (b) (c) (Repl. 1976) *before* it was amended by Act 35 of 1971. When *McCain* was decided, § 81-1103 (i) (5) (a) (b) (c) provided that independent contractors, as defined under the common law, were employers and not employees under our State Employment Act; it also required compliance with only one of its three provisions, (a), (b) or (c), to permit exemption under the Act. Before Act 35, these three provisions were joined by the disjunctive term "or," connoting that any one of the provisions could be shown for entitlement to an exemption. However, § 81-1103 (i) (5) (a) (b) (c) (with Act 35 of 1971 changes italicized) now provides:

> (5) Service performed by an individual for wages shall be deemed to be employment subject to this Act *irrespective of whether the common-law relationship of master and servant exists,* unless and until it is shown to the satisfaction of the commissioner that —
> (a) 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*
> (b) 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*
(c) 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 supplied).

By its passage of Act 35, the 1971 General Assembly obviously intended to make it more difficult to claim an exemption under our Employment Security Act.[1] As one can quickly discern from reading the statute above, Act 35 joined the (a) (b) (c) provisions with the conjunction "and," thereby requiring a person to show all three before obtaining an exemption under the Act.

In the instant case, appellant attempts to show that his drivers are independent contractors by pointing out facts sufficient to show that the drivers are independent contractors at common law. While appellant's argument would have been valid under the *McCain* decision and prior to 1971, we cannot ignore the plain wording of § 81-1103 (i) (5) (a) (b) (c), as amended by Act 35 of 1971. Subpart (c) clearly provides that in order to qualify for the exemption, appellant must show "to the satisfaction of the commissioner" that his drivers are "customarily engaged in an independently established trade, occupation, profession or business *of the same nature as that involved in the service performed.*" Of the three drivers who submitted affidavits in support of appellant's contentions, one is a truck driver, one a waitress, and one a gasoline station attendant; none was customarily and independently engaged in a business of the same nature as appellant's escort service, which is what the statute clearly mandates.

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[1]The General Assembly actually has gone full circle on this exact issue. Originally, this statutory provision required all three provisions (a), (b) an (c) to exist before a person could be exempt. The Supeme Court held to this effect in the case of *McKinley, Commissioner of Labor* v. *R. L. Payne & Son Lumber Co.,* 200 Ark. 1114, 143 S.W.2d 38 (1940). Subsequently, the General Assembly amended the statute, requiring only one of the three provisions for exemption entitlement. *See also, Crossett Lumber Co.* v. *McCain,* 205 Ark. 631, 170 S.W.2d 64 (1943), for a discussion of the prior legislative history pertaining to this statutory provision.

We find that substantial evidence was presented for the Board to find that appellant is liable for payment into the unemployment fund. We affirm.

Affirmed.

Sidney C. FITZPATRICK *v.* STATE of Arkansas

CA CR 82-126 647 S.W.2d 480

Court of Appeals of Arkansas
Opinion delivered March 9, 1983
[Rehearing denied April 6, 1983.]

Macom, Moorhead, Green & Henry, by: *David G. Henry,* for appellant.

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

MELVIN MAYFIELD, Chief Judge. This is an appeal of an order revoking probation.

On June 2, 1981, appellant pled guilty to a charge of burglary. He was placed on probation for five years subject to several conditions. One condition was that he would obey all federal and state laws, local ordinances, and court orders, and immediately report all arrests to his probation officer.

On April 7, 1982, appellant was arrested and charged with aggravated robbery and theft of property for the armed robbery of a liquor store clerk. Based on those charges, the state filed a petition to revoke his probation.

After a hearing, the trial court revoked the probation and sentenced appellant to a term of twelve years imprisonment on the 1981 conviction. Appellant's first contention is that the trial court erred in allowing the state to introduce testimony concerning a statement made by an alleged accomplice.

A deputy sheriff testified over appellant's objection about a written statement given by Travis Burse, one of the alleged accomplices in the 1982 liquor store robbery. Burse did not appear as a witness at the hearing and consequently did not testify in person. Appellant contends that this testimony was a violation of the hearsay rules and of his constitutional right to confront the witnesses against him.

Arkansas Uniform Evidence Rule 1101 (b) (3) provides that the rules do not apply to proceedings for granting or revoking probation. Ark. Stat. Ann. § 28-1001 *et seq.* (Repl. 1979). Relevant evidence which is not admissible at a criminal trial may be admissible at a revocation hearing. *Lockett* v. *State,* 271 Ark. 860, 611 S.W.2d 500 (1981). There is no doubt that the statement of Burse concerning appellant's actions on April 7, 1982, and the details of the commission of the crime alleged on that date constitutes relevant evidence. As to the contention that evidence of the contents of Burse's statement violated appellant's right to confrontation, there are two answers.

First, the issue is raised here for the first time. The only objection in the trial court was that the statement is hearsay and "not admissible in evidence against Mr. Fitzpatrick." The judge's response was that the "rules of evidence just simply do not apply in probation hearings." We do not think this was sufficient to raise the confrontation issue below and, therefore, it need not be considered here. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

In the second place, we do not find anything crucial or devastating disclosed by the references to Burse's statement. The substance of the statement is disclosed by other evidence, particularly the testimony of the appellant himself. Thus, we fail to see how appellant was prejudiced in this regard. *See Dutton* v. *Evans,* 400 U.S. 74 (1970). We do note, however, that he is correct in stating that the trial court made no specific finding of any cause for not allowing confrontation as is required under Ark. Stat. Ann. § 41-1209 (3) (a) (Repl. 1947). Although we find no error in this case, we think it should be pointed out that the statements about confrontation in *Lockett, supra,* may well relate only to the situation there involved.

Appellant also contends that the trial court erred in allowing the probation officer to testify as to appellant's statement to him because the probation officer had not warned appellant of his rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

Ray Williams, appellant's probation officer, testified that the sheriff called him to report that appellant was in custody on the charge of robbing a liquor store clerk. Williams testified that although appellant was supposed to report his arrest, appellant had not called him. So Williams telephoned appellant at the jail and took a routine statement from him for a probation report. Over appellant's objection, the probation officer testified about the statement appellant gave him over the telephone.

Appellant states that there was no testimony that the probation officer advised appellant of his rights against self-incrimination prior to this custodial interrogation, and that appellant's statement was therefore inadmissible under *Miranda* v. *Arizona, supra.* However, Investigator Davidson of the Arkansas State Police testified that he had advised the appellant as to his Miranda rights about a week before Williams talked to him. Appellant argues that this seven-day delay does not satisfy the *Miranda* rule and relieve the probation officer from the requirement of so advising appellant again before taking his statement.

The Arkansas Supreme Court recognized in *Upton* v. *State,* 257 Ark. 424, 516 S.W.2d 904 (1974), that there has been no previous attempt to set up a fixed limit on the interval of time which must elapse before a new warning is necessary. *Upton* involved the review of a judgment of conviction, here we review a probation revocation proceeding, where fundamental fairness, with an opportunity to be heard, is all that is required. *Lockett* v. *State, supra.* Although there does not appear to be an Arkansas case directly on point, we note that it has been uniformly held in other jurisdictions that a probationer's statement obtained by probation officers without first advising the probationer of his Miranda rights is admissible in revocation proceedings. Annot., 77 A.L.R.3d 669, 674 (1966); *accord, Childers* v. *Commonwealth,* 593 S.W.2d 80 (Ky. Ct. of App. 1979).

In the instant case, it is uncontroverted that appellant had previously been advised of his rights by the investigator, and it appears from the record that appellant is not a complete stranger to criminal proceedings. We hold that the trial court did not err in allowing the probation officer to testify about the telephone conversation with appellant.

Appellant's final contention is that the trial court's finding that appellant had violated the terms of his probation is not supported by a preponderance of the evidence.

Testimony at the hearing reveals that on April 7, 1982, appellant, accompanied by Travis Burse and Leonard Keys, drove his car from DeWitt to Gillett, Arkansas. According to appellant, Burse and Keys had discussed robbing a bank, but said they'd leave it alone when appellant told them he wanted no part of robbing a bank. He admitted that when the three got to Gillett it was mentioned that they could not rob the bank when it was noticed that it was directly across the street from City Hall, and appellant says he again told them that he wanted no part of robbing it.

Appellant testified that after arrival at Gillett, he stopped the car and went into a parts store located next door to a liquor store. He said it was only after he came out of the store and picked up Burse and Keys down the street at a

motel parking lot that he learned they had a gun and had used it to rob the liquor store. Appellant testified that he told them that he wanted no part of that, but was told by Burse to "Shut up, and drive," and since Burse had a gun in his hand, appellant did what Burse told him.

He then drove to Casscoe, where they stopped at a grocery store and where Burse and Keys went inside and bought a six-pack of beer while he waited outside in the car. He admitted he could have left then, but said he didn't think about it. After Burse and Keys got back into the car, the appellant drove on towards Stuttgart before being stopped at a roadblock by police officers. There was testimony that approximately $371.00 was taken during the armed robbery and that the officers found approximately $354.00 and a .38 caliber pistol in appellant's vehicle.

While the evidence as to appellant's accomplice liability could be stronger, we find it to be sufficient to justify the revocation of his probation. In a similar revocation case, *Redman* v. *State,* 265 Ark. 774, 784, 580 S.W.2d 945 (1979), the supreme court stated:

> Under present law, there is no distinction between the criminal responsibility of an accomplice and the person who actually commits the offense. . . . Presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant facts in determining the connection of an accomplice with the crime.

Each of the relevant factors discussed in *Redman* appear to be present in the instant case. Although appellant's testimony as to his involvement is to the contrary, the trial court was not required to believe him since he was the witness most interested in the outcome of the revocation proceeding. *Core* v. *State,* 265 Ark. 409, 578 S.W.2d 581 (1979).

It is settled that in revocation cases the appellate court will not overturn a decision of the trial court granting a

petition to revoke unless it is clearly against a preponderance of the evidence. *Peppers* v. *State,* 3 Ark. App. 166, 623 S.W.2d 544 (1981). We find that the trial court's decision in this case was not clearly against the preponderance of the evidence.

Affirmed.

Carl WOODSON and Marilyn WOODSON *v.*
Karen KILCREASE and Mike KILCREASE

CA 82-277 648 S.W.2d 72

Court of Appeals of Arkansas
Opinion delivered March 9, 1983
[Rehearing denied March 30, 1983.]

[redacted]

Jones & Petty, by: *John Harris Jones,* for appellants.

Paul B. Pendleton, for appellees.

GEORGE K. CRACRAFT, Judge. Carl Woodson and Marilyn Woodson, the paternal grandparents of Caroline (Woodson) Kilcrease, appeal from an order of the Chancery Court of Jefferson County refusing to enforce right of visitation it granted them after the date of Caroline's adoption by her widowed mother's second husband. The question is this: When the widowed mother of an infant child remarries and later joins a second husband in obtaining a probate court decree by which he adopts the child, are the paternal grandparents still entitled to obtain visitation privileges by a chancery court proceeding? This identical question was answered in the negative in *Wilson* v. *Wallace,* 274 Ark. 48, 622 S.W.2d 164 (1981). The appellants contend that *Wilson* is not controlling here because in *Wilson* the visitation rights were obtained by a consent order entered *prior* to the adoption whereas in this case the visitation was awarded in a consent decree entered *after* the adoption. We find no substance in that distinction and conclude that the chancellor was correct.

A clear understanding of our determination in this case requires that the facts be viewed in light of the development of our law in this area.

In *Quarles* v. *French,* 272 Ark. 51, 611 S.W.2d 757 (1981), the court pointed out that at common law a grandparent could not maintain an action for privilege of visitation with a grandchild except in a custody proceeding. In 1975 Ark. Stat. Ann. § 57-135 (Supp. 1981) was enacted and permits the maintenance of a separate suit in the chancery courts for visitation by grandparents whose own child is deceased. In

1977 the Arkansas Legislature enacted the Revised Uniform Adoption Act, Ark. Stat. Ann. § 56-201 et seq. (Supp. 1981). Section 56-215 (a) (1) provided for the first time in this State that the effect of an adoption decree, except with respect to a spouse of the petitioner and relatives of that spouse is "to terminate all relationships between the adopted individual and his relatives, including his natural parents, *so that the adopted individual thereafter is a stranger to his former relatives for all purposes.*"

The potential conflict between the policies of these two enactments came to the attention of our court in *Poe* v. *Case,* 263 Ark. 488, 565 S.W.2d 612 (1978). In *Poe* the paternal grandparents did not seek visitation privileges in the chancery court under Ark. Stat. Ann. § 57-135 (Supp. 1981) but obtained those rights in the probate court at the same time an order of adoption of their grandchild was granted. The Supreme Court determined that the Adoption Act made no provision for the allowance of such rights in adoption proceedings and that the portion of the decree of adoption allowing them was void and unenforcible. The court rejected the argument of the grandparents that an overriding public policy of this state favoring visitation rights of grandparents was expressed in Ark. Stat. Ann. § 57-135 which granted them that right. The court stated:

> Those statutes address themselves to courts having jurisdiction in custody proceedings and are clearly inapplicable by their own terms to adoption proceedings. Since this is the case, they certainly do not indicate a reversal of the *strong public policy,* expressed in the adoption statutes, to strengthen the relationship between the adopted child and its adoptive family and to terminate the previous family relationship . . . . Besides, the new adoption statute is the *most recent declaration of public policy with reference to adoptions.* (Emphasis supplied)

It is clear from the concluding paragraph in *Poe* that the court was declaring that when the public policy favoring maintenance of grandparental ties collided with the strong-

er public policy to strengthen the relationships within adoptive families, the former must give way to the latter.

On November 5, 1980, however, the former Court of Appeals handed down its decision in *Hensley* v. *Wist,* 270 Ark. 1004, 607 S.W.2d 80 (Ark. App. 1980). In *Hensley* the parents of the child involved had been divorced in 1976. Her mother remarried after the natural father had been killed in an accident. The paternal grandparents petitioned the chancery court for visitation rights pursuant to Ark. Stat. Ann. § 57-135 (Supp. 1981) but no action was taken on it. In February 1980 the probate court entered an order of adoption for the second husband of the natural mother, but denied the grandparents' petition for a ruling on their chancery court petition for visitation rights. The Court of Appeals ruled that the chancellor erred in summarily denying the petition for visitation and reversed and remanded the cause for a hearing on that motion. In its opinion the Court of Appeals determined that the concluding paragraph in *Poe* as to the effect of adoption on the relationship with natural parents' family was not necessary to its decision and was therefore not controlling. It concluded that the two public policies were of equal weight and that a chancellor was required "to balance those two public policies, that of allowing visitation and that of making the adoptive family strong, and determine the best interest of the children." This decision of the Court of Appeals was not reviewed by the Supreme Court at that time.

On October 12, 1981 the Supreme Court rendered its opinion in *Wilson* v. *Wallace, supra,* in which it expressly overruled *Hensley* and reaffirmed its language in *Poe,* stating that the legislature had declared that the public policies favoring the solidarity of the adoptive family outweighed those favoring grandparents and others who were related to the child through its deceased parent.

The critical events in the appeal now before us occurred in the interim between *Hensley* and *Wilson.* The appellee, Karen W. Kilcrease, was divorced from Phillip Woodson in 1973 and subsequently married Mike Kilcrease. Phillip Woodson shared his court-ordered visitation rights with his

parents until his death in 1979. After his death the natural mother voluntarily continued to permit visitation with the grandparents. In August 1980 the child Caroline was adopted by Mike Kilcrease by an order of the probate court. The adoptive parents continued to recognize those voluntary visitation rights until the summer of 1981 when a dispute arose and they were terminated.

On September 9, 1981 the controversy was resolved and a consent order was entered in the chancery court which incorporated an agreement of the parties, permitting specific visitation by the grandparents. That order was entered by the court on written consent of all parties and in the belief that he could do so under the decision in *Hensley.*

Shortly after the decision in *Wilson* was handed down the adoptive parents ceased to comply with the consent order and the grandparents sought enforcement of it in the chancery court in contempt proceedings. The chancellor refused to enforce the order for the following reasons:

> The fact that a lower court decision was reversed by the highest appellate court does not permit this court to do what the current law says clearly it may not do. The court will not enforce the order entered September 9, 1981.

This action of the chancellor is fully warranted by the following language from *Wilson* v. *Wallace, supra*:

> It was unquestionably within the province of the legislature to decide that *the reasons favoring the solidarity of the adoptive family outweigh those favoring grandparents and other blood kin* who are related to the child through the deceased parent. The final decision as to the state's policy lay with the legislature, not with the courts. We have already recognized the force of the 1977 statute in two earlier cases. *Poe* v. *Case,* 263 Ark. 488, 565 S.W.2d 612 (1978); *Quarles* v. *French,* 272 Ark. 51, 611 S.W.2d 757 (1981). We adhere to our position and accordingly overrule the decision of the Court of Appeals in *Hensley,* which in effect applied

> our former law as if the 1977 statute did not exist. (Emphasis supplied)

It follows that as the legislature has already determined where the best interest of the child lies in such situations there is nothing for the chancellor to weigh and balance in determining it. The visitation order in question ought not have been entered and the same public policy mandates that it not be enforced.

We agree with the chancellor that even though the visitation order was entered after the decree of adoption, he was fully warranted in refusing to enforce it in view of the strong public policy favoring the solidarity of adoptive families.

The appellants further argue that the policy of the law is to favor settlements such as this supplemental consent decree. This argument again overlooks the declaration of a stronger public policy in favor of adoptive families. It is to be noted that in *Wilson* the visitation order was also entered by consent. It is also to be noted that in *Poe* the grandparents relied upon the fact that the adoptive parents had *agreed* to those visitation rights as a basis for the natural father's consent to the adoption. The court in *Poe* disposed of that argument in the following language:

> An agreement to provide for such visitation rights in the absence of statute is against public policy and void and unenforceable. *Whetmore* v. *Pratello,* 197 Or. 396, 252 P.2d 1083 (1953); *Stickles* v. *Reichardt,* 203 Wis. 579, 234 N.W. 728 (1931).

If any doubt as to the import of that statement arises from its context, a simple perusal of the two cases cited as authority for it makes it crystal clear that any agreements or other actions which seek to undermine the public policy favoring the adoptive family are void and unenforceable.

The appellants also argue that the visitation order was entered "in accord with the public policy at the time of entry." The public policy involved here was declared by the

legislature in its enactment of the Revised Uniform Adoption Act in 1977. The fact that it had been misinterpreted in *Hensley* does not override the interpretation of it previously made in *Poe* and subsequently affirmed in *Wilson*.

We find no error.

CLONINGER, CORBIN and GLAZE, JJ., concur.

DONALD L. CORBIN, Judge, concurring. This is an area of the law that clearly needs to be addressed by legislative action. Social scientists are writing more each day about the good to be gleaned by children having interaction with their grandparents. If anything, there is a biological and moral right of the grandparents to have a relationship with their grandchildren and vice versa. All parties can and should benefit by allowing some interaction between the grandparents and the adoptive child. Case authority forecloses any consideration by the chancellor in these instances. We do recognize that visitation may not be beneficial in every instance.

CLONINGER and GLAZE, JJ., join in this concurrence.

Patricia GILBERT *v.* William F. EVERETT, Director of Labor, and BEAIRD-POULAN

E 82-286 647 S.W.2d 486

Court of Appeals of Arkansas
Opinion delivered March 9, 1983

Moody & Nye, by: *Debby Thetford Nye,* for appellant.

Alinda Andrews, for appellees.

GEORGE K. CRACRAFT, Judge. Patricia Gilbert appeals from a decision of the Board of Review affirming the Appeal Tribunal's denial of unemployment benefits on a finding that she had voluntarily left her last employment without good cause connected with the work as provided in Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981). We agree with the Board of Review.

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

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

The Board of Review found that the appellant was employed by Beaird-Poulan until she submitted her written resignation on May 21, 1982. A short time prior to her resignation she had decided to marry Gerald Gilbert who was a supervisory employee of Beaird-Poulan. She admitted that both she and her husband were aware of a company policy which did not permit husbands and wives to work in the same facility and had agreed that because he made the larger salary she should be the one to terminate her employment. She discussed her approaching marriage with her superiors who indicated that if she married she must resign. She did resign in writing. The appellant contends that the findings of fact of the Board are not supported by the evidence and its conclusion that she did not have good cause for leaving her employment was erroneous. We do not agree.

The appellant admitted in her testimony that she was aware of the company policy and when asked how she knew of it she answered " . . . [I]t's nothing I've ever seen in writing, but it's just a known fact at the company that husbands and wives cannot work together." There was evidence from a representative of the employer that all employees were informed of this policy at the time they were hired. She admitted that it was possible that she was told about it at the time. She was asked:

> Q. And you and your husband decided that since his was the better paying job that it would make sense for you to quit and he to stay on?
>
> A. Yes sir.
>
> . . . .
>
> A. Well yes, we . . . discussed . . .Gerald, Gerald and I had dicussed several times about who would leave.
>
> Q. Now who is Gerald?
>
> A. Gerald is my husband.

The Board of Review found from the evidence that the appellant was aware of the company policy and voluntarily terminated her job because of it. The evidence supports these findings. No matter how worthy her purpose might be held to be, her resignation was based on purely personal considerations and did not result from working conditions, other good cause connected with the work or a personal emergency as those terms have been construed under this Act.

In *Hunter* v. *Daniels,* 2 Ark. App. 94, 616 S.W.2d 763 (1981) we reached this same result in a somewhat similar situation. There the employer had a policy against its employees seeking political office. The employee, desiring to run for county judge, voluntarily made his choice to give up his job and seek the office. We held that his resignation did not result from working conditions or other good cause

connected with the work even though the factors motivating it were worthy.

Other courts have applied this same rule to resignations resulting from company policies regarding the marriage of employees. *Elliott Co.* v. *Unemployment Comp. Bd. of Review,* 180 Pa. Super. 542, 119 A.2d 650 (1956); *Czarnecki* v. *Unemployment Comp. Bd. of Review,* 185 Pa. Super. 46, 137 A.2d 844 (1958); *Huiet* v. *Atlanta Gas Light Co.,* 70 Ga. 233, 28 S.E.2d 83 (1943).

In *Czarnecki* it was said: "When she married she thereby terminated her employment and voluntarily elected to place herself in an unemployed status for a reason which the law does not recognize as necessitous and compelling."

We affirm.

GLAZE, J., concurs.

COOPER, J., dissents.

Ronald Dean ROE *v.* STATE of Arkansas

CA CR 82-170 647 S.W.2d 483

Court of Appeals of Arkansas
Opinion delivered March 9, 1983

Donald R. Huffman, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Ronald Dean Roe appeals from his conviction of attempted aggravated robbery for which he was sentenced to ten years in the Department of Correction. The sole issue is whether the trial court erred in not directing a verdict of acquittal. He contends that the testimony of his accomplice, Steven Sparks, was not sufficiently corroborated to sustain the conviction. We do not agree.

Glenna Stanley and Robert Fletcher were employees of "One-Stop Mart" on the night of January 23, 1982. They described the premises as a typical convenience store with customer parking in the front. The parking area and the area around the gas island were well lighted. The north side of the store had no windows or lights but there was a back door located on that side. The parking area on the north side was for deliveries but it was separated from the customer parking area by a curbing. Entrance or exit from the north side was by a side street.

Glenna Stanley testified that Sparks entered the store and while threatening her with a knife demanded money. She called Fletcher for assistance and the robber fled. Both employees followed him out of the store, saw him go around the north side of the building, and saw him enter a vehicle which had been backed into the parking area with its front end facing the side street. There was another person in the driver's seat of the car and the motor was running. The automobile sped away down the side street. The employees signaled a passing police car and the vehicle in which the robber had fled was stopped within a block of the store and two men apprehended. Sparks and Roe were brought back to the store where both employees immediately identified Sparks. Neither had seen Roe.

The arresting officers testified that they observed Sparks running from the store with a knife in his hand and had also seen the signals from the employees. They immediately turned on their blue lights and pursued the vehicle. Although the fleeing vehicle appeared to be trying to elude them, it was unable to do so because of the traffic. They identified Roe as the driver and Sparks as the passenger.

Sparks admitted his participation in the crime and testified for the State. He had known Roe most of his life and at the time the crime was committed both of them were living in Elm Springs. On the night of the attempted robbery Sparks and Roe had been riding in Roe's car and listening to music and drinking beer for most of the afternoon. A short time before the robbery they returned to Elm Springs because they had no money for gas or beer. According to Sparks they had then decided that they would find a place to rob. They drove to Siloam Springs and after "casing" the One-Stop Mart both decided, "All right. That's it." According to Sparks, Roe wanted to steal some gas while Sparks was committing the robbery. They did not do so because both feared that the employees might be able to identify the car. He testified that Roe then decided to pull around on the north side of the store where it was dark and shadowy and the car could not be identified. They backed the car into the darkened parking lot where Roe would wait with the motor running while the robbery was committed. He testified that they pulled on to the side street but got behind an "old pickup" that slowed them down and they were unable to pass it because of the traffic. He testified that Roe made several attempts to do so but could not pass.

Roe did not testify in his own defense, but in a pre-trial statement which was read into evidence he admitted that he was driving the car and parked it where he did because Sparks told him to. He stated that he thought Sparks was merely going to buy a package of cigarettes and that he had no knowledge of his true intentions.

Appellant contends that the evidence tending to corroborate the testimony of the accomplice was purely circumstantial and of insufficient force to warrant its consideration. He contends that the evidence independent of that of his accomplice does no more than place the appellant at the scene of the crime, a fact which does not constitute sufficient corroboration. *Green* v. *State,* 265 Ark. 179, 577 S.W.2d 586 (1979).

The case under review is clearly distinguishable from *Green*. In *Green* four men robbed a store. The only evidence

of Green's participation in the crime was given by his accomplices. No other witness saw or observed him or his actions at the time the crime was committed. The only independent evidence placing him at the scene of the crime was Green's own statement that he was at that location with the robbers but was unaware of their intention to commit the crime.

Here the state does not rely solely on his admission of being present at the scene of the crime. There was direct evidence of his being there and of his actions both before and after the crime was attempted. There was evidence that he had parked his car in a dark and shadowy place designed primarily for delivery trucks rather than in the well lighted place provided for customers. The car had been backed into the parking place with its front end facing the side street and engine running. It was located some distance from the customer entrance to the building. These are circumstances, apart from his mere presence at the scene, from which a jury might infer that he was indeed connected to the crime.

The appellant, relying on *Harshaw* v. *State,* 275 Ark. 481, 631 S.W.2d 300 (1982), argues that although circumstantial evidence may be substantial, where such evidence alone is relied upon it must be of such force as to exclude every other reasonable hypothesis but guilt. This reliance is misplaced. That well established rule is applied where circumstantial evidence alone is relied upon to establish *guilt* of a crime. It has no application to circumstantial evidence relied upon in *corroboration* of an accomplice's testimony. Where the State relies on testimony of an accomplice to support a conviction, that testimony must be corroborated by other evidence which tends to connect the accused with the commission of the offense and it is not sufficient to show that the offense was committed and the circumstances of the offense. Ark. Stat. Ann. § 43-2116 (Repl. 1977). It is not necessary that the evidence be sufficient to sustain the conviction but the evidence must, independent from that of the accomplice, tend to some degree to connect the defendant with the commission of the crime. Where circumstantial evidence is utilized all facets of the evidence may be considered to constitute a chain sufficient to present

the question for the resolution by the fact finder as to the adequacy of the corroboration. This court reviews the sufficiency of that evidence by the test of whether the verdict is supported by substantial evidence which means whether the fact finder could have reached the verdict without resorting to speculation and conjecture. *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202 (1976); *King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973); *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982). In such cases the court merely determines whether the circumstantial evidence tends to some degree to connect the defendant with the commission of the crime and does not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Rhodes* v. *State, supra; Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981).

We cannot say that the trial court erred in submitting this issue to the jury.

Affirmed.

Peter K. WESTLUND et al *v.* Arthur MELSON, Jr. and Faye MELSON, Husband and Wife

CA 82-258 647 S.W.2d 488

Court of Appeals of Arkansas
Opinion delivered March 9, 1983
[Rehearing denied April 6, 1983.*]

*GLAZE, J., would grant rehearing.

Burrow & Sawyer, by: *Stephen P. Sawyer,* for appellants.

Elrod & Lee, by: *John R. Elrod,* for appellees.

LAWSON CLONINGER, Judge. An action was filed in the trial court by the appellees, Arthur Melson, Jr. and Faye Melson, against the appellants, Peter K. Westlund and Jeannie E. Westlund, husband and wife, asking for judgment on a promissory note executed by appellants, and for the foreclosure of two mortgages executed to secure the note. The suit was instituted on the basis that appellants failed to make payments in accordance with the provisions of the note.

The trial court awarded judgment and foreclosure, finding that there was no mistake as to when the monthly payments were due, and finding that there was no waiver by appellees by reason of accepting late payments. On this appeal, appellants urge that the findings of the trial court, and the court's failure to find lack of good faith and inequitable conduct on the part of appellees, are contrary to

the preponderance of the evidence. We find no error and we affirm.

The promissory note was executed by appellants as part of the consideration for a house and apartment complex in Siloam Springs, and was dated May 10, 1979. Gerald and Claudia Westlund are the parents of Peter K. Westlund. The note provided that the first payment on the indebtedness was due on June 15, 1979, and that subsequent payments were due on the fifteenth day of each month thereafter until paid. The note further provided as follows:

> In the event the Makers shall fail to make any installment payment of principal or interest when due or within 60 days thereafter, then the holders hereof, at their option, may declare the entire unpaid balance of principal and interest owed immediately due and payable . . .

Mr. Melson testified that he told Peter Westlund that the first payment on the note could be paid on July 1, 1979, instead of June 15 as called for by the terms of the note, because the transaction was not closed until May 31, but that subsequent payments would have to be paid on the fifteenth of each month. The first payment was made on July 12, 1979.

The evidence indicates that every monthly payment for a period of eighteen months was late. The payments were made eighteen days to fifty-two days past the due date, and appellees accepted the late payments. There is evidence that Mr. Melson told Peter Westlund that the payments were going to have to be paid when due or he would have no alternative but to foreclose.

Appellants urge that an offer and acceptance, signed only by Mr. Melson and Peter Westlund, was executed on May 10, 1979, which provided that the monthly payments were to be payable beginning thirty days after the closing date. The closing date was not until May 31, and by the terms of the offer and acceptance the first payment would not have become due until July 1, 1979. Subsequent payments would have been due on the first of succeeding months, and those

payments would be subject to the sixty-day grace period provided for in the promissory note. The offer and acceptance was signed by Peter Westlund individually and as sales agent for his employer, a real estate firm.

Mr. Melson testified that the offer and acceptance was executed at the request of Peter Westlund, and that it was done only to fulfill a formal requirement for the files of Peter Westlund's employer.

Appellants contend that, because of mistake, there could be no acceleration of the indebtedness. They argue that the mistake was that it was appellants' understanding that the first payment was due thirty days after the closing date, or July 1, 1979. However, the note specifically provides that the first payment was due and payable on June 15, 1979. It is correct that the offer and acceptance was dated two days after the purported date of the promissory note, but the evidence was that the note was not signed by the parties until May 30, 1979, some eighteen days after the execution of the offer and acceptance. There was no evidence that appellees were ever mistaken as to the time for payment, and so if there was a mistake it was a unilateral one. The courts will not reform or rescind a contract involving a unilateral mistake, except where there is fraud. See *Foshee* v. *Murphy,* 267 Ark. 1047, 593 S.W.2d 486 (Ark. App. 1980).

Appellants' argument that appellees waived the right to accelerate because appellees consistently accepted late payments does not have merit. Although all the payments were late, none was delinquent beyond the sixty-day grace period until the payment due on December 15, 1980 became seventy-two days past due. Appellees filed their complaint in foreclosure on February 25, 1981. Further, acceptance of a late payment precludes acceleration because of the lateness of that payment, but is not a waiver of the right to accelerate when default occurs in a subsequent installment. *Rawhide Farms* v. *Darby,* 267 Ark. 776, 589 S.W.2d 210 (Ark. App. 1979).

Appellants contend that when the first chance to accelerate the debt and foreclose the mortgage arose, the

appellees immediately declared the unpaid balance due. Appellants rely upon the following observation made by the court in *Seay* v. *Davis,* 246 Ark. 201, 438 S.W.2d 479 (1969):

> On the record as a whole we cannot say that the chancellor was wrong in concluding from the Davises' testimony that the sellers were motivated by a desire to turn the down payment into a quick profit rather than by a good faith conviction that the purchasers could not perform their contract.

The original opinion in *Seay* v. *Davis* ruled that the case fell within the intent of Ark. Stat. Ann. § 85-1-208 (1961 Add.), which provided:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or "when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised. . . .

In a supplemental opinion, *Seay* v. *Davis,* 246 Ark. 627, 438 S.W.2d 479 (1969), the court again affirmed the decision of the chancellor, but based its holding on the rule that a court of equity will protect a debtor against an inequitable acceleration of the maturity of the debt. The court left open for a future decision the question of the applicability of § 85-1-208 to a mortgage contract where there is a clear material breach. In the case of *Bowen* v. *Danna,* 276 Ark. 528, 637 S.W.2d 560 (1982), the Arkansas Supreme Court held that the good faith requirement for acceleration set out in § 85-1-208 was inapplicable where the right to accelerate is conditioned upon the occurrence of an event such as default on monthly payments.

In *Seay,* the mortgage had been executed by E. T. Davis and his son, T. G. Davis. The son was to make the monthly payments, and the mortgagee assured the father that the

father would be notified of any delinquency in payments by the son (and inferentially, an opportunity to pay the arrearages) before filing a foreclosure suit. The mortgagee failed to give the notice to E. T. Davis. The court held that it would be inequitable to allow the mortgagee to repudiate his own promise.

In the case before the court, there is no evidence of inequitable conduct. Two competent business people, one a banker, the other a realtor, handled all the negotiations leading up to the sale, and they consummated an arms length contract. The chancellor found that there was a breach by the appellants of their repayment obligation and that appellees were entitled to exercise the acceleration clause. The findings of the chancellor are not clearly against the preponderance of the evidence, and we must affirm. Arkansas Rules of Civil Procedure, Rule 52 (a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981).

Affirmed.

Charles Robert McKEE *v.* STATE of Arkansas

CA CR 82-154 647 S.W.2d 490

Court of Appeals of Arkansas
Opinion delivered March 9, 1983

Harold King, for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. The Pulaski County Prosecuting Attorney charged appellant, Charles Robert McKee, with violating the terms of his suspended sentence. Appellant was arrested and confined to jail on March 7, 1982. He was released on April 26, 1982, on a writ of habeas corpus. On June 23, 1982, the Court ruled that he had violated the terms of his suspended sentence and on July 12, 1982, he was sentenced to a term of five years in the Arkansas Department of Correction. We reverse and dismiss.

Appellant contends that the trial court erred by failing to hold a revocation hearing within sixty days. The basis for appellant's argument is his reliance upon Ark. Stat. Ann. § 41-1209 (2) (Repl. 1977) which requires that a suspended sentence or probation should not be revoked except after a hearing within a reasonable time, not to exceed 60 days, after the defendant's arrest. In the instant case, more than 87 days elapsed from the time of his confinement in jail until the revocation hearing.

In his motion for habeas corpus, appellant alleged that he had been denied due process of law and equal protection by the State's failure to provide him with a speedy hearing on the revocation petition. In *Haskins* v. *State,* 264 Ark. 454, 572 S.W.2d 411 (1978), the Supreme Court stated:

> We think it clear that the 60-day limitation was not intended by the legislature to be jurisdictional. The statute refers to "a reasonable period of time, not to exceed 60 days." We cannot believe that the lawmakers meant to define a jurisdictional limitation in terms of reasonableness. If, for example, a period of only 30 days is found to be reasonable in a particular case, does that mean that the court absolutely loses jurisdiction at the

> end of that time? Surely not. In our opinion the 60-day limitation represents the period beyond which the hearing cannot be delayed if the defendant objects.

The Court went on to hold that Haskins, by his failure to object, waived his right to insist that his revocation hearing be held within 60 days.

This was not the case here. The State was put on notice by appellant's motion for habeas corpus that he was seeking a speedy hearing on the revocation petition. He never backed away from this position at any time. The State should have conducted the hearing no later than May 6, 1982.

We reversed and dismiss the State's petition for revocation.

Hayes STEPHENS and Jimmie G. STEPHENS,
His Wife *v.* WEST PONTIAC-GMC, INC., Lee WEST,
Individually, and Woodrow WELLS, Individually

CA 82-297 647 S.W.2d 492

Court of Appeals of Arkansas
Opinion delivered March 9, 1983

Charles S. Gibson, for appellants.

Holloway & Bridewell, by: *Bill R. Holloway,* for appellees.

TOM GLAZE, Judge. This contract case involves appellees' purchase of appellant's vehicle dealership which included three franchises, Pontiac, GMC trucks and AMC/Jeep.[1] Because only the Pontiac and GMC franchises were delivered, appellees filed suit for breach of contract, seeking damages for appellants' failure to convey the Jeep franchise. Appellants denied any breach and affirmatively asserted that

[1]The Arkansas Franchise Practices Act (and specifically Ark. Stat. Ann. § 70-812 [Repl. 1979]) is not an issue in this case.

appellees refused the Jeep dealership when it was offered and that appellees otherwise waived or were estopped from alleging any breach. At trial, appellees were favored with a jury verdict in the amount of $40,740.00. On appeal, appellants argue the trial court erroneously (1) overruled their motions for summary judgment and directed verdict, (2) admitted prejudicial hearsay testimony, and (3) instructed the jury.

In testing the trial court's ruling on the sufficiency of the evidence, we view the evidence in the light most favorable to the appellees. *Southern Pipe Coating, Inc.* v. *Spear & Wood Mfg. Co.*, 235 Ark. 1021, 363 S.W.2d 912 (1963). In doing so, we find the trial court was correct in denying appellants' motions.

Appellants contracted to sell their business, including the three franchises, for $130,000. The parties, in their written agreement, acknowledged that the respective manufacturers must approve the transfer of each franchise. Accordingly, the parties provided for rescission of the contract in the event the manufacturers did not approve. The date for closing the sale was set "at such time as the transfer of dealership has been approved by the manufacturers." Contrary to their agreement, the parties actually consummated the sale on November 1, 1980, which was *before* the manufacturers formally approved the transfers of the three dealerships. Appellees testified that they closed the sale because General Motors had informally approved the transfer of its dealerships which GMAC agreed to finance. They believed the Jeep dealership would also follow once the General Motors franchise was approved. Appellees subsequently obtained the Pontiac and GMC truck dealerships, but never received the Jeep franchise. Three and one-half months after the sale closed, appellees learned that GMAC would no longer finance or floor-plan Jeep vehicles. Learning this, appellees later declined the Jeep franchise after its transfer was finally approved and offered to them.

Appellants claim that they were entitled to a summary judgment or instructed verdict because appellees were offered the Jeep franchise, but refused it because of reasons

extraneous to appellants' conduct or the parties' agreement, *viz.*, that GMAC no longer provided financing for Jeep. We cannot agree. Appellees' testimony showed that appellants refused to terminate their relationship with Jeep because of a dispute over bonus money. Until appellants released their franchise with Jeep, appellees claimed they were unable to obtain the franchise in their own names. On November 1, 1980, the parties knew that the franchises were not formally approved, and the transfers would have to occur later. When, or if, either the appellants or appellees breached their contract necessarily became a fact question for the jury to decide. The rule is that a party to a contract who, with knowledge of a breach by the other party, continues to accept benefits under the contract and suffers the other party to continue in performance thereof, waives the right to insist on the breach. *Southern Pipe Coating, Inc.* v. *Spear & Wood Mfg. Co., supra.* Whether appellants refused to do those things required, within a reasonable time, for appellees to acquire the Jeep dealership was certainly in issue; so, too, was the issue regarding whether appellees waived any breach which may have been committed by appellants. These factual issues alone were sufficient reasons for the trial court to refuse appellants' requests for summary judgment and directed verdict.

We also find no merit in appellants' argument that the trial court erred in admitting certain hearsay testimony. Appellees' bookkeeper was allowed to testify that a Jeep representative said, in essence, that appellees need not submit an application for the Jeep dealership until appellants terminated their franchise. Even if the bookkeeper's statement were inadmissible hearsay, no prejudice arose from its introduction. The appellants admitted that, as dealers, they knew they had to release Jeep before the dealership could be transferred. The bookkeeper's testimony was merely cumulative to other testimony on this same issue and consequently was not prejudicial. *Nelson* v. *Busby,* 246 Ark. 247, 437 S.W.2d 799 (1969).

We finally consider appellants' argument that the trial court erred in giving jury instructions numbers 6, 7 and 8. Instructions 7 and 8 dealt with awarding damages if the jury

found in appellees' favor. After interposing objections at trial, appellants failed to proffer any instructions in their stead and failure to do so precludes their argument on appeal. *Roy* v. *Akins,* 276 Ark. 586, 637 S.W.2d 598 (1982); and *Baxter* v. *Grobmyer Bros. Construction Co.,* 275 Ark. 400, 631 S.W.2d 265 (1982). A different situation exists when considering instruction 6 because it was a binding instruction, and as such other rules become applicable. For example, the rule is well established that a general objection is sufficient against a binding instruction that is inherently erroneous. *Compton* v. *Talley,* 227 Ark. 491, 299 S.W.2d 653 (1957). The Supreme Court's adherence to the rule has continued and, in fact, it has been incorporated into the Court's Rules of Civil Procedure. *Swink & Co.* v. *McEntee & McGinley, Inc.,* 266 Ark. 279, 584 S.W.2d 393 (1979); Rule 51, Arkansas Rules of Civil Procedure.

Here appellants made a proper objection to instruction number 6 and we agree that the instruction was erroneous. The instruction directed the jury to find for appellees if it found: (1) appellees paid for but did not receive the Jeep dealership upon payment of the money, and (2) appellees sustained damages caused by appellants' failure to deliver the Jeep dealership on November 1, 1980, the time they were required to do so by the [parties'] contract.

In the first place, instruction 6 sets forth no principle of law, but instead singles out certain evidence the jury was required to consider in determining whether appellants breached the parties' contract. As noted by the Supreme Court in *Baxter* v. *Grobmyer Bros. Construction Co.,* 275 Ark. 400, 631 S.W.2d 265 (1982), courts have taken a skeptical view of such instructions and their use has been subject to disapproval because they single out and emphasize certain evidence in the minds of the jurors. *See also Thiel* v. *Dove,* 229 Ark. 601, 317 S.W.2d 121 (1958). Secondly, the evidence, as set out in instruction 6, was clearly wrong. Neither the appellants nor the appellees required or expected the Jeep dealership to be delivered when the sale was closed on November 1, 1980. In fact, the parties knew that none of the three franchises would be delivered until after the November 1 date. Nonetheless, instruction 6 erroneously correlates

appellees' damages to appellants' failure to deliver the Jeep dealership on November 1, 1980. This error was further enhanced by instructions 7 and 8 which instructed the jury to award damages to appellees based, in part, on the fact that appellants failed to deliver the Jeep dealership on November 1, 1980.

Appellees argue that any error contained in instruction 6 was cured by a concurrent instruction given at appellants' request. This argument ignores the rule that when a binding instruction is inherently erroneous, it cannot be cured by a correct instruction. Because instruction number 6 was a binding instruction and inherently erroneous, we must reverse and remand this cause for a new trial. *Clark* v. *Duncan,* 214 Ark. 83, 214 S.W.2d 493 (1948).

Reversed and remanded.

Dickson COLEMAN *v.* Marie COLEMAN

CA 82-267 648 S.W.2d 75

Court of Appeals of Arkansas
Opinion delivered March 16, 1983

Hoofman & Bingham, P.A., by: *John Biscoe Bingham*, for appellant.

Ruby E. Hurley and *Stephen E. Whitwell*, for appellee.

LAWSON CLONINGER, Judge. Appellee, Marie Coleman, was granted a decree of separate maintenance against appellant, Dickson Coleman, on February 9, 1982, and the only issue on this appeal is the correctness of the trial court's order awarding to appellee as her sole and separate property a $10,000 certificate of deposit.

The order is an improper final award of property. We reverse the decision and remand the case to the trial court.

On January 6, 1981, the appellant purchased the certificate in question with his funds and placed appellee's name on it. When appellant and appellee separated on May 10, 1981, appellant took the certificate with him, and it was in his possession at the time of the hearing in the trial court. The appellee initially endorsed the interest checks on the certificate which came in her name and delivered them to appellant, but appellee has retained the interest checks since the parties separated.

The decree of the trial court provides as follows:

> 8. That the plaintiff is entitled to retain as her sole and separate property the $10,000 certificate of deposit which currently exists in her name and shall be allowed to expend the interest and principal from said certificate of deposit as she so desires and further that the physical possession of said certificate should be placed with the plaintiff.

An action for separate maintenance is not an action which is based upon statutory authority, but there is inherent power in a court of equity to grant a decree of separate maintenance. *Womack* v. *Womack,* 247 Ark. 1130, 449 S.W.2d 399 (1970). Ark. Stat. Ann. § 34-1214 (Supp. 1981) provides for a division of property at the time a divorce decree is entered, but the Arkansas Supreme Court has held that a chancellor has no authority to dispose of property rights in an award of separate maintenance. *Mooney* v. *Mooney,* 265 Ark. 253, 578 S.W.2d 195 (1979); *Spencer* v. *Spencer,* 275 Ark. 75, 627 S.W.2d 550 (1982). In a concurring opinion in *Spencer* v. *Spencer,* Mr. Justice Dudley observed that "Property cannot be divided in a separate maintenance proceeding although possession may be awarded."

In *Mooney* v. *Mooney, supra,* the court upheld the chancellor's finding that the husband was not entitled to a divorce, and held that the property of the parties could not be divided unless a divorce was granted.

Mooney v. *Mooney, supra,* involved, among other things, a dispute regarding the source of the money used to purchase a certificate of deposit in the name of the wife only. The Arkansas Supreme Court upheld the chancellor's finding that the husband was not entitled to a divorce, and ruled that "The property, of course, cannot be divided unless a divorce is granted."

In this case, Mr. Coleman contends that there was no completed gift of the certificate. Mrs. Coleman insists that there was a completed gift, and that the certificate is her sole and separate property. The award by the chancellor was a final disposition of the property rights of the parties, and is unauthorized under a separate maintenance award. It is

proper, however, for the trial court to award possession of the certificate and to award the income from the certificate for the support of appellee.

The case is reversed and remanded with directions to enter an order of possession of the certificate, an order of distribution of the income therefrom if the trial court deems it necessary for the maintenance of appellee, and an order to safely preserve the certificate until a divorce decree is granted.

Reversed and remanded.

[redacted]

[redacted]