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Dennis Ray MATTHEWS *v.* STATE of Arkansas

CR 81-96 627 S.W. 2d 20

Supreme Court of Arkansas
Opinion delivered January 25, 1982

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

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

RICHARD B. ADKISSON, Chief Justice. After a trial by jury appellant, Dennis Ray Matthews, was convicted of rape and sentenced to 50 years in prison and to a fine of $15,000. On appeal appellant argues that the trial court erred in allowing identification testimony of appellant by the victim regarding (1) a previous photo lineup, (2) a previous physical lineup, and (3) an in-court identification. These arguments are without merit. We affirm.

On November 30, 1980, at approximately 5:00 a.m. appellant entered a Seven Eleven Food Store on West 65th Street, Little Rock. The victim was working alone as the store clerk. During the next 15 to 20 minutes appellant carried on a conversation with the victim and purchased two pieces of bubble gum. After the purchase appellant began questioning the victim about the burritos in the sandwich stand. Appellant then asked the victim about a sandwich that was not labeled so the victim walked to the sandwich

counter to look at it; on her way back to the register appellant grabbed her from behind and put a steak knife to her throat. He then took her to a secluded embankment behind the Seven Eleven Food Store and raped her. During the rape the victim noticed the knife was on the ground. She picked it up and threw it. After the rape, appellant ordered her to find the knife. She located the knife but tried to kick it away. And in doing so she stumbled and fell down a hill, breaking her knee. She hobbled to a nearby apartment complex where a group of teenagers found her.

Appellant alleges that the photographic lineup was suggestive and prejudicial and, therefore, that evidence of the victim's identification of him in the lineup should not have been admitted. Appellant claims prejudice because he was the only one wearing a jacket, because the side views of him were cut off, because his picture was slightly out of focus, and because the other suspects did not resemble appellant.

We cannot agree that the photo lineup was prejudicial. It consisted of six snapshots, all in color and all the same size. All the suspects were young white males of about the same age with hair color ranging from medium to dark brown. Side views of two other suspects besides the appellant were partially cut off. All of the suspects' pictures appear to be slightly out of focus. However, each of the suspects' features, including appellant's, are clearly distinguishable. The fact that appellant was wearing a jacket while the others were in shirts does not in itself make the photo lineup suggestive. In short, we see nothing suggestive or prejudicial about this photo lineup.

Appellant argues that the physical lineup conducted after the photo lineup was also so suggestive and prejudicial that the victim's identification of appellant at the lineup should not have been admitted into evidence. Appellant alleges prejudice because the other suspects did not resemble appellant, because appellant was the only suspect in both the physical and photo lineups, and because a defense attorney who was present at the lineup was not allowed to speak with appellant.

An examination of a photograph of the physical lineup reveals that all six suspects were young white males of about the same age, dressed alike, and had similarly colored hair of approximately the same length. Also, contrary to appellant's argument that appellant was by far the tallest, there does not appear to be a significant difference in the heights of the six suspects. In any event appellant's tallness was to his advantage because the victim apparently thought her assailant was somewhat shorter than appellant.

The fact that a defense attorney was at the lineup but was not allowed to speak with appellant or position him in the lineup is an insufficient reason to hold the lineup suggestive and prejudicial. The purpose of an attorney's presence at a lineup is to ensure the fairness of the procedure. At the time of the lineup the defense attorney did not object to the fairness of this lineup. And appellant has failed to show that he was in any way prejudiced by the fact the attorney was not allowed to speak with him or position him.

The fact that the appellant was the only participant in both lineups does not make the last lineup conducted suggestive or prejudicial. Appellant was identified in the first and second lineups both of which were properly conducted. There was no prejudice.

Appellant argues that because the two lineups were suggestive and prejudicial, the victim's in-court identification of appellant should have been suppressed. Since we have found both lineups to be without error, we cannot agree with this contention. Reliability is the linchpin in determining the admissibility of identification testimony for confrontations. *Manson* v. *Brathwaite,* 432 U.S. 98 (1977); *McCraw* v. *State,* 262 Ark. 707, 561 S.W. 2d 71 (1978).

The evidence in this case points to the reliability of appellant's identification. The victim testified that appellant remained in the store, which was well lighted, for 15 to 20 minutes before the rape, and did not attempt at any time to cover his face. During this time appellant carried on a conversation with her, and purchased bubble gum. It is clear from these facts that she had ample opportunity to observe

him. Furthermore, she testified that she had been trained to carefully observe people in the store.

The victim was at all times certain that appellant was her assailant. She testified that she recognized him immediately in the photographic lineup, and that she recognized him "right on the spot" at the physical lineup. At trial she stated that there was no doubt in her mind that appellant was her assailant. In viewing the totality of the circumstances, it is clear that the victim's identification of appellant was reliable.

Affirmed.

Jim HOOPER *v.* Carl ZAJAC, d/b/a BLUE HILL GARAGE et al

81-182 627 S.W. 2d 2

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*Guy Jones, Jr.,* for appellant.

*E. H. Herrod,* for appellees.

GEORGE ROSE SMITH, Justice. Hooper, a resident of Faulkner county, filed this suit in the Faulkner circuit court, asserting one cause of action against Zajac and a different cause of action against Edwards and Chapman. All three defendants moved to quash the summons on the ground that they reside in Pulaski county and must be sued there. Hooper filed a reply alleging that his cause of action is asserted not in contract but in tort and particularly under Ark. Stat. Ann. § 27-611 (Repl. 1979), which is a venue statute. The trial judge, without hearing testimony, sustained the motion and dismissed the action, finding that the defendants reside in Pulaski county, where the alleged acts occurred. The Court of Appeals certified the case to us under Rule 29 (1) (o) and (4). We affirm as to Zajac, but reverse as to Edwards and Chapman.

The complaint alleges that at Hooper's request Zajac, who operated a wrecking service, hooked his wrecker to Hooper's car to transport it to Conway, but instead Zajac took the car to his place of business, where it remained for ten days. When Hooper "recovered his vehicle, the two front wheels had been removed, battery, and there had been other damage to said automobile while in possession of . . . Zajac. Plaintiff claims damages to his vehicle in the aggregate amount of $200.00 for property damage." There are other vague assertions of loss, but the only prayer for relief against Zajac is for the $200 already specified. The question is whether such an action can be brought in the county where the owner of the damaged property resides.

Our 1939 Venue Act provided that actions for personal injury or death must be brought in the county "where the accident occurred" or in the county where the injured person resided. Ark. Stat. Ann. § 27-610. The act was defective in that a person injured in a highway accident might have to sue for his personal injuries in one county but for his property damage in another county, where the defendant resided. By Act 182 of 1947 the legislature remedied that defect by providing that an action for damages to personal property by wrongful or negligent act may be brought in the county where the accident occurred which caused the damage or in the county of the plaintiff's residence. By Act 830 of 1977 the law was amended to provide also that an action for the conversion of personal property may be brought in the county of the residence of the person who owned the property when the cause of action arose. § 27-611.

Hooper's complaint against Zajac does allege that Zajac removed two wheels and the battery from the vehicle, but the complaint is not for the conversion of those parts, which are not separately valued. Instead, the cause of action is for damages to the vehicle in the aggregate amount of $200 *for property damage*. Thus no cause of action for conversion is stated against Zajac. What the complaint does state is a cause of action for Zajac's breach of contract, which may have been negligent or tortious conduct. Even so, we have consistently held that the amendment to the Venue Act, permitting an action for damages to personal property by wrongful or

negligent act, refers only to damage caused by an accident involving force or violence. *Sarratt* v. *Crouch Equipment Co.*, 245 Ark. 775, 434 S.W. 2d 286 (1968); *Evans Laboratories* v. *Roberts*, 243 Ark. 987, 423 S.W. 2d 271 (1968); *International Harvester Co.* v. *Brown*, 241 Ark. 452, 408 S.W. 2d 504 (1966). There being no assertion of an accident in this case, the trial court correctly sustained Zajac's motion to quash service.

As to Edwards and Chapman, the complaint alleges that they have in their possession household goods, furniture and other property belonging to Hooper, that they have failed and refused to allow Hooper to pick up his property, and that they have retained it and refused to deliver it, without just cause. Those allegations describe a conversion as we have frequently defined that term. *Quality Motors* v. *Hays*, 216 Ark. 264, 225 S.W. 2d 326 (1949); *Meyers* v. *Meyers*, 214 Ark. 273, 216 S.W. 2d 54 (1948); *Hooten* v. *State for Use of Cross County*, 119 Ark. 334, 178 S.W. 310, LRA 1916C, 544 (1915). The venue as to Edwards and Chapman is therefore in Faulkner county under § 27-611.

Affirmed as to Zajac, reversed as to Chapman and Edwards.

Sterling WILLIAMS *v.* STATE of Arkansas

CR 81-86 627 S.W. 2d 4

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*John L. Kearney,* for appellant.

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

FRANK HOLT, Justice. A jury found appellant guilty on two counts of aggravated robbery and theft and assessed penalties totaling 40 years imprisonment. Appellant's only contention for reversal is that the court erred in refusing to dismiss the charges against him since he was not brought to trial within three full terms of court in violation of his right to a speedy trial. Ark. Stat. Ann., Vol. 4A, Rules of Criminal Procedure, Rule 28.1 (b) (Repl. 1977) (Amended effective July 1, 1980 [Supp. 1981]).

There are two terms of court per year in Jefferson County — one beginning the first Monday in March and the other the first Monday in October and the term when appellant was arrested and charged is not counted. *Kemp* v. *State,* 270 Ark. 835, 606 S.W. 2d 573 (1980). The burden is upon the state to prove good cause for any delay in the trial or that it was legally justified. *State* v. *Lewis,* 268 Ark. 359, 596 S.W. 2d 697 (1980). Here, the appellant was arrested and charged on May 17, 1979; on June 5, an attorney was appointed to represent him; on July 16, he was released upon his own recognizance; on August 27, 1980, the court set his trial for November 28, 1980; on October 17, 1980, appellant's counsel filed a motion to be permitted to withdraw, stating that appellant had failed to cooperate with him in his efforts to represent him; on December 1, 1980, the court granted the attorney's motion to withdraw, apparently incarcerated the appellant, and gave him until January 5, 1981, to secure counsel. On that date appellant, not having secured counsel, was given until February 2, 1981, to do so. Not having an attorney by this date, the court

appointed present counsel. The trial was rescheduled for and held on May 20, 1981. A few days before trial, appellant's present court appointed counsel sought dismissal of the charges asserting the trial date exceeded three full terms. He insisted that, although the appellant had been absent from the state, his absence violated no court order and that he had always been available for trial purposes. The appellant testified that he had returned to the state a short time before his scheduled trial date in November, 1980. The state responded that appellant had been absent from the state from October, 1979, until December, 1980; his whereabouts were unknown to the prosecuting attorney and to his own attorney; he had failed to respond to the requests of his then attorney; on December 1, 1980, this attorney was permitted to withdraw upon his own motion since he had been unable to contact the defendant; and the court jailed the appellant because he had fled the state. Appellee argues that a period of 15 or 16 months should be excludable from the three term trial requirement, or at least the period from October 17, 1980, to February 2, 1981.

It is undisputed that three terms of court, not counting the term in which appellant was arrested and charged, elapsed and therefore charges against appellant should be dismissed unless there is good cause shown for an excludable period of time. Appellant's trial was conducted 79 days following the expiration of three full terms of court. We are of the view that the period of time from October 17, 1980, when his attorney asked for permission to withdraw because of appellant's failure to cooperate in the preparation of his defense, until February 2, 1981, when present counsel was appointed, should be excluded from the three term requirement and chargeable to the appellant. It is true that counsel's motion to withdraw was not granted until December 1, 1980; however, it is quite evident that the appellant's scheduled trial on November 28 could not have been held in view of the conflict between appellant and his appointed counsel, resulting in the necessity of appointing new defense counsel. *Divanovich* v. *State,* 273 Ark. 117, 617 S.W. 2d 345 (1981). Here, as there, the postponement of the scheduled trial was for good cause which brings it within Rule 28.3 (h).

Since the 108 days chargeable to the appellant greatly exceeds the 79 day delay, we cannot say the trial court erred in denying appellant's motion to dismiss the charges against him for lack of a speedy trial.

Affirmed.

ADKISSON, C.J., and HICKMAN and PURTLE, JJ., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority has decided that 108 days is an excludable period for good cause under the speedy trial provisions of the Rules of Criminal Procedure, Article VIII, Rule 28.

More specifically, they have held that the excludable period began when court-appointed counsel moved to withdraw as counsel 42 days before trial, alleging he was unable to prepare for trial because the accused had not contacted him, and ended 66 days after the trial date when a second attorney was appointed.

This decision marks the end of any pretense that this Court may have posed regarding enforcement of the speedy trial provisions of the Rules of Criminal Procedure.

At a time when most of the jurisdictions in this nation are requiring that trials be held in 90 days to six months from the time of arrest, this Court is unable to require a trial be held in 18 months, finding "good cause" for delay on the very flimsiest of reasons.

This Court should realize that laws requiring a speedy trial are practically and ultimately for the benefit of the public — the accused seldom really wants one.

Sanctions for failure to hold a speedy trial are deemed necessary for its enforcement; that is the concept behind Article VIII. If sanctions are not enforced, the rule will be meaningless.

I am hereby authorized to state that HICKMAN and PURTLE, JJ., join in this dissent.

Maurice Theotis JONES *v.* STATE of Arkansas

CR 81-103 627 S.W. 2d 6

Supreme Court of Arkansas
Opinion delivered January 25, 1982

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

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

FRANK HOLT, Justice. Upon a jury trial, appellant, as a habitual offender, received a life sentence for aggravated robbery, 15 years for theft of property, and a life sentence for kidnapping. Appellant first argues that the court erred in granting the state's motion to amend the aggravated robbery information during the trial and, therefore, he was entitled to a directed verdict in the absence of the amended information. We recite the pertinent facts.

The uncontroverted testimony of the victim was that she had visited her husband in a local hospital, and as she approached her car on the hospital parking lot in the late evening hours, appellant grabbed her, told her he had a gun, placed it against her head, and forced her into her car. She described the weapon as "an army gun. It had a long barrel . . . " While he was driving, he threatened to "blow her head off" several times, demanded her money, and threw her purse in the back seat. The purse contained her husband's wallet and a small sum of her money. At one point he placed his hand on her crotch or vaginal area, saying "If you don't let me lick you, I will kill you." He struck her several times. In defending herself, a button was torn from the shirt worn by the appellant. About thirty minutes after her abduction, she jumped from the car as it was moving slowly. She was picked up by a passing motorist, the police were alerted, and she was taken to a hospital. Shortly thereafter, the police apprehended appellant, who was driving the victim's car. A BB pistol was found in the front seat. Three credit cards belonging to the victim's husband were found in the appellant's pocket. Other identification cards belonging to the victim's husband were found in appellant's right shoe. A torn shirt with a button missing was found in the back seat — the button being found in the front seat.

The information originally charged the appellant with aggravated robbery by violating Ark. Stat. Ann. § 41-2102 (Supp. 1981), alleging that the appellant unlawfully and feloniously employed physical force upon the victim "with the purpose of committing a theft, and did have in his

possession a pistol, a deadly weapon . . . . " After the state rested its case, it was allowed to amend the information to include the additional words of the statute that the appellant "represents by word or conduct that he is so armed."

The appellant argues that the state, by specifically alleging in the original information that a deadly weapon was used, is bound by that allegation and, therefore, he is entitled to a directed verdict since the weapon, a BB pistol, is not a deadly weapon. Neither could the asserted deficiency be corrected by permitting the state to amend the information to conform to the proof that appellant represented he was armed with a deadly weapon. In *Workman* v. *State,* 267 Ark. 103, 589 S.W. 2d 21 (1979), we said:

> It is well settled that the information may be amended during the trial as long as the nature or degree of the crime charged is not changed.

This is authorized by Ark. Stat. Ann. § 43-1024 (Repl. 1977). The state is entitled, under this statute, to amend an information to conform to the proof when the amendment does not change the nature or degree of the alleged offense. *Prokos* v. *State,* 266 Ark. 50, 282 S.W. 2d 36 (1939); *Dolphus* v. *State,* 256 Ark. 248, 506 S.W. 2d 538 (1974); and *Whitley* v. *State,* 140 Ark. 425, 215 S.W. 703 (1919).

Here, the appellant argues, however, that the nature of the crime alleged was changed by the amendment. We have said that an amendment which describes a deadly weapon as being a pistol instead of a knife does not change the nature of a crime nor its degree. *Ridgeway* v. *State,* 251 Ark. 157, 472 S.W. 2d 108 (1971). Further, the original information here sufficiently complied with Ark. Stat. Ann. § 43-1006 (Repl. 1977), which requires that the language of an indictment or information must be certain as to the title of the prosecution, the name of the court in which the indictment or information is presented, and the names of the parties, subject to a bill of particulars. See *Browning* v. *State,* 274 Ark. 13, 621 S.W. 2d 688 (1981). Here, the appellant did not ask for a bill of particulars, plead surprise nor seek a continuance when the court allowed the amendment of the information. The

appellant has demonstrated no prejudice. We hold that the trial court did not err in refusing to grant appellant's motion for a directed verdict on the original allegation of aggravated robbery and then permitting the state to amend the information to conform to the proof.

The appellant next contends the court erred in permitting the state to amend the information with respect to the kidnapping charge. The information, in the words of the statute, charged the appellant with violating Ark. Stat. Ann. § 41-1702 (1) (d) (Repl. 1977) by unlawfully restraining the victim "so as to interfere substantially with her liberty for the purpose of engaging in sexual intercourse or deviate sexual activity . . . . " The information was amended at the close of the state's case, over appellant's objection, to include in the words of the statute, the additional allegation that the appellant proposed to engage in "sexual contact" with the victim. Appellant reiterates his previous argument that this amendment changed the nature of the alleged crime and is, therefore, prohibited by § 43-1024. That statute, however, as indicated, permits the amendment of an information when the nature or degree of an alleged crime is not changed by the amendment. Here, the amendment changed only the manner in which the alleged offense was committed and did not change the nature of the offense charged and was, therefore, proper. *Prokos* v. *State, supra; Workman* v. *State, supra; Ridgeway* v. *State, supra;* and § 43-1006. Here, appellant did not seek a bill of particulars, plead surprise nor seek a continuance. Appellant has failed to demonstrate that he has suffered any prejudice by the court allowing the amendment.

Pursuant to the requirements of Ark. Stat. Ann. § 43-2725 (Repl. 1977), Rule 36.24 of the Rules of Criminal Procedure, and Rule 11 (f) of the Rules of the Supreme Court, we have reviewed the record and all objections and find no errors prejudicial to the appellant.

Affirmed.

STATE of Arkansas *v.* James T. BRANAM

CR 81-93 627 S.W. 2d 8

Supreme Court of Arkansas
Opinion delivered January 25, 1982

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

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

DARRELL HICKMAN, Justice. This is an appeal by the State questioning the trial court's suppression of a statement made by James T. Branam. While the facts are somewhat complex, the question is not. It is simply a matter of whether Branam had waived his right to have counsel when he talked to the police. The trial court ruled that the State had not met its burden of proof in this regard and we cannot say the court was clearly wrong. The decision is affirmed.

Branam was charged with the capital murder of Phillip Hammett on December 30, 1980. He was arraigned in municipal court the next day and Sandra Berry, an attorney for the Public Defender's office, was appointed to represent him. She told him to make no statements. Hours later Branam was charged with several counts of aggravated robbery and capital murder in connection with the death of Johnny Otwell at the Motel 6 in Little Rock. Shortly after this last charge was made, Detective Jones with the Little Rock Police Department spoke to Branam about the Otwell case. Branam declined to make a statement and the detective made a note which read:

> James Branam, declined to make any statement on advice of his attorney, Public Defender. He was charged with one count of capital felony murder, two counts of aggravated robbery and one count of rape.

On January 2, 1981, Larry Dill, a deputy sheriff with the Pulaski County Sheriff's office, questioned Branam about a third possible charge of aggravated robbery at the Protho Junction Day's Inn Motel. Dill testified that during that questioning Branam wanted to talk about the Otwell case and that he called Detective Jones to tell him Branam was talking about the Otwell case. It is undisputed that Branam did not initiate the conversation with Dill and did not ask to talk with Jones about the Otwell case. Jones and Dill talked to Branam together and Branam made a statement in connection with the Otwell case. That statement is the subject of this appeal. Detective Jones conceded that he

knew Branam had a lawyer and had declined earlier to talk to him. For that reason Jones added to Branam's statement: "I am making this statement against the advice of the public defender."

The trial court ruled that the case of *Edwards* v. *Arizona,* 451 U.S. 477, 101 S. Ct. 1880 (1981) controlled and the statement had to be suppressed. In *Edwards* the Court recognized that an accused can waive his right to counsel, even after he has counsel, but held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

That is precisely the case before us. Branam had counsel, Detective Jones knew it, and, in fact, Branam had declined to make a statement in this case on that very ground. Deputy Sheriff Dill initiated the later contact with Branam, and brought Detective Jones into the case again. There is no evidence at all that Branam initiated this contact with Dill or Jones.

On appeal we examine such a ruling to see if the State proved by a preponderance of the evidence that a statement was voluntarily given. In this case the specific question is whether Branam made a valid waiver. We make an independent determination of this issue considering the totality of the circumstances, and affirm the trial court unless we can say he was clearly wrong. *Coble* v. *State,* 274 Ark. 134, 624 S.W. 2d 421 (1981). The State argues that numerous fine distinctions exist between this case and *Edwards,* but none would be a basis for holding the trial judge clearly wrong.

Affirmed.

Robert Montague ADAMS, Jr., and John W. ADAMS, Jr., Successor Trustees of R. M. Adams Trust *v.* Louise Ann McNamara BRUDER et al

81-176 627 S.W. 2d 12

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*J. Sky Tapp,* for appellants.

*Martin, Vater & Karr,* by: *Robert W. Vater,* for appellees.

JOHN I. PURTLE, Justice. Appellees brought suit in the Chancery Court of Franklin County, Arkansas, to set aside appellants' mineral tax deed and certain leases for oil and gas which had been executed by appellants. The issues were joined and the trial court granted appellees' motion for a summary judgment. On appeal the appellants argue the court erred because there were genuine issues of material facts to be decided by the court. We hold the chancellor was correct in granting the summary judgment.

In 1905 appellees' predecessor in title sold the land in question but reserved all the mineral rights. The taxes on the separate mineral rights were delinquent for the 1944 assessment. Appellants' predecessor in title acquired the mineral rights by paying the delinquent taxes. A deed was executed to appellants in 1948. The deed was duly recorded and appellants or their predecessors have paid the taxes up until the commencement of this suit in November of 1979.

The 1944 Franklin County listing of tax assessments for

mineral rights were kept in the property tax book. The mineral rights in question were described at Pt. SE SE S8, T9, R26. The tax, penalty and costs amounted to $3.85 but the transfer was recited in the tax sale deed as being in the amount of $4.20. The mineral assessments were not subjoined to the land taxes. Instead, the mineral rights were listed at random in another section of the tax record book. They were listed neither in alphabetical order nor by section, township and range. There were several other discrepancies in the listings, notices and collection of the taxes relating to these mineral rights.

Appellees never paid any taxes on the mineral rights in question. They simply did nothing until 1977 when they executed a gas and oil lease to Texas Oil and Gas Corporation. However, appellants as trustees had executed an oil and gas lease in 1949 which was assigned to Arkansas Western Gas Company. The lease was renewed and the property was pooled and unitized. Drilling for natural gas was commenced and completed in 1965. This well was not physically located upon the property described in the lease in question but was in section 5 which was a part of the unit into which this property had been pooled. A second producing well was completed within the unit but not upon the land in dispute.

Through the process of interrogatories the facts were developed in this case. There is no question but that the mineral rights were improperly listed and that the original tax sale was void. It would serve no useful purpose for us to list all of the imperfections in the process of handling the taxes on the mineral rights for the year 1944. So far as the facts are concerned they are undisputed in relation to the void tax deed. The appellants' argument is that the appellees should not be allowed to sit by and do nothing for 35 years and then come in and take over the property after oil and gas has been discovered. Although appellants allege there were genuine issues of material fact to be determined by the court, their argument is based upon the court's interpretation of the law. The appellants feel that the appellees slept on their rights and they should have been allowed to argue the defenses of limitations and laches in order to defeat the

appellees' rights to the property in question. We think the court was able to take these arguments under consideration with the facts presented to it at the time of the summary judgment.

The issue presented here has been previously considered by this court, and we think the case of *Sorkin* v. *Myers,* 216 Ark. 908, 227 S.W. 2d 958 (1950), is controlling. The facts are almost identical in *Sorkin* and the present case. In *Sorkin* the land commissioner had issued a tax deed for mineral rights. The mineral lease was not subjoined to the surface property. The assessor kept an alphabetical list of the owners of several interests in a separate book called "Leases and Royalties." In *Sorkin* we held that the mineral rights as they relate to forfeitures shall in all things be handled in the same manner as provided for real property. See also *Stienbarger* v. *Keever,* 219 Ark. 411, 242 S.W. 2d 713 (1951); *Smiley* v. *Thomas,* 220 Ark. 116, 246 S.W. 2d 419 (1952). We have held in cases too numerous to need citation that a defective tax forfeiture deed is void. *Sorkin* firmly held that mineral interests were severable only because the legislature had made it so. Also, it held that the mineral rights were so closely related to the realty that ownership identification and accuracy made it imperative that the mineral rights be subjoined to the land assessment. The *Sorkin* decision wound up with the following language:

> . . . our decision rests upon the proposition that the procedure legislatively intended was not followed. Instead, there was a course of well-intentioned administrative conduct that deprived the property owners of the process provided for assessing and selling. This means that the power to sell was lacking.

We do not mean to imply that mineral interests could never be ripened into a good title if the original deed was defective. We held in the case of *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W. 2d 390 (1929), that the only way the statute of limitations would run against the owner of the mineral rights is for the owner of the surface rights or some other person to take actual possession of the minerals by opening mines and operating same. In the case of *Laney* v. *Monsanto*

*Chemical Co.*, 233 Ark. 645, 348 S.W. 2d 826 (1961), we held that the drilling on one tract of land within a lease did not amount to constructive possession of mineral rights in other tracts within the lease. In *Laney* it was contended that continuing production of oil from a 40-acre tract had the effect of vesting constructive possession of the mineral rights throughout the 240 acres covered by the lease. The opinion is summed up with a sentence which states:

> We are unable to agree with the basic premise in appellants' argument, that a lessee's production of oil from one tract within a lease amounts to constructive possession of all the oil throughout the leasehold. . . .

In the early case of *Woolfolk* v. *Buckner*, 67 Ark. 411, 55 S.W. 168 (1900), we dealt with a claim concerning a tax title and adverse possession, stating:

> . . . There is only one way in which the owner can be dispossessed or disseised by an illegal tax sale, and that is by actual adverse possession. . . . If the original owner of the legal title was in constructive possession because he had the legal title, how could the claimant under the void tax title have the constructive possession at the same time? To so hold would be to give to possession under a void tax title more legal effect than to possession under a valid legal title . . .

In the case of *Eades* v. *Joslin*, 219 Ark. 688, 244 S.W. 2d 623 (1951), we dealt with the matter of adverse possession. The defense interposed was the equitable defense of laches. There we stated:

> . . . plaintiff's title was of record; the Eades were depending on adverse possession; until their possession had ripened into title they had no title to lease or sell. We find no facts sufficient to make laches applicable as a defense in this case.

Had the appellants been given an opportunity to present additional evidence in support of their contentions the result would have been the same. Based upon precedent

the tax sale was obviously void. Also, based upon precedent, the appellants had not taken actual possession of the mineral rights by exercising physical control in some manner which would bring notice to the appellees and the public in general.

Affirmed.

Joe RIGHTMIRE *v.* STATE of Arkansas

CR 81-102 627 S.W. 2d 10

Supreme Court of Arkansas
Opinion delivered January 25, 1982
[Rehearing denied March 8, 1982.]

*Shaw & Shaw,* by: *Orvin Foster,* for appellant.

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

JOHN I. PURTLE, Justice. The trial court denied appellant's Rule 37 Petition wherein he sought to prove ineffective assistance of counsel. The court held (1) that the defendant was represented by an attorney at all important and vital stages of the proceedings; (2) that the attorney was competent and adequately represented the defendant; and, (3) that the defendant knowingly and voluntarily entered a plea of guilty.

On appeal appellant argues: (1) the trial court erred in finding appellant's counsel was not ineffective; and, (2) the trial court erred in finding appellant's entry of a guilty plea was voluntary. We disagree with appellant on both arguments for the reasons discussed below.

The appellant entered his guilty plea on June 28, 1979. His Rule 37 Petition was filed on August 15, 1980. In the interim, one of appellant's codefendants received a jury trial and was found guilty of manslaughter. Appellant alleges he should be treated in the same manner. At the Rule 37 hearing appellant testified that he was incarcerated at Cummins on July 2, 1979, and remained there through the date of the

hearing, February 28, 1981. His testimony was that he had approximately six meetings with his former attorney prior to the time the trial was scheduled. He alleged that on the second day of the trial his attorney took him into a sideroom and stated:

> What kind of damn fool are you trying to make of me in that courtroom? I have sat up until 2:00 a.m. this morning and I don't have the first word for your defense prepared. If you don't plead guilty and take this reduced sentence, you will get a life sentence.

He alleges that at that time he agreed to accept the proposal to plead guilty with the understanding that he would have to serve only a couple of years in the Department of Correction.

After being incarcerated he determined that his eligibility for parole would be December 6, 1983. According to his calculations, he would have to spend four years and eight months in the Department of Correction. He had been sentenced to 25 years with seven years suspended, leaving 18 years to be served. It is the contention of the appellant that if he had known he would not become eligible for parole for four years and eight months, he would not have accepted the plea agreement. He states that neither his attorney nor anyone else advised him about the length of time he would have to serve before becoming eligible for parole. He also made the argument that his attorney told him he would only have to serve a couple of years on the 18-year term. He acknowledged having been in the Department of Correction before but denied knowing anything about how the parole system worked. He stated that he served about 20% of the time on his prior sentence.

The attorney who represented the appellant at the original trial testified that he was present at the time the plea was entered and that it was free and voluntary. The attorney denied he had ever told the appellant the length of time he would have to serve. He stated that not even the trial judge could determine that time. The attorney testified that the appellant had admitted to him the facts and circumstances surrounding the offense with which he was charged and,

further, that he knew of no defense to the charge. It was the attorney's understanding that the appellant would come up with some type of defense but he never did. The attorney stated he had a conversation with the appellant in which he told him he would not be eligible for parole as a first offender due to his prior record. In other words, he informed the appellant he would have more time to serve than he had before.

The record reveals the appellant went before the judge and admitted his guilt and stated he understood the full consequences of his entry of a guilty plea. He stated he was satisfied with his attorney and that the attorney had worked competently and diligently in representing him in the matter. He further acknowledged that he knew the court was not bound by any recommendation made by the prosecuting attorney and that the court was completely free to fix or assess punishment at the court's discretion subject only to the limits set by law. During the sentencing process, appellant did not make inquiry as to the length of time he would actually have to serve.

It appears the appellant was satisfied with his sentence until he determined he was going to have to serve a longer period than he anticipated when he entered the guilty plea. There is no requirement that his attorney or the court or anyone else tell him how long he will have to serve on any given sentence. In fact, it would be sheer speculation for an attorney or the court to tell an accused that upon being sentenced to a time certain he would only have to serve a certain percentage of that time. This is a matter that is solely within the control of the Department of Correction and the courts have nothing to do with the parole system in the ordinary course of events. In fact, appellant did not file his petition until after he learned that a codefendant had been convicted of manslaughter by a jury. The original charge against the appellant had been first degree murder but his plea of guilty was to second degree murder.

In determining whether a petitioner had effective assistance of counsel it is his duty to demonstrate prejudice and an unfair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.

2d 184 (1981). There is a presumption that counsel is competent. *Hoover* v. *State,* 270 Ark. 978, 606 S.W. 2d 749 (1980). It was the duty of the appellant to prove the allegation of ineffective assistance of counsel. That is a rather heavy burden in view of the presumption of effective assistance of counsel. *Williams* v. *State,* 273 Ark. 371, 621 S.W. 2d 686 (1981); *Hoover* v. *State,* supra; *Cason* v. *State,* 271 Ark. 803, 610 S.W. 2d 891 (1981); and *Blackmon* v. *State,* supra.

In viewing all of the testimony and evidence presented in this case we are of the opinion that the appellant has not met the burden required of him to prove ineffective assistance of counsel. We cannot say that any action on the part of his trial counsel was prejudicial or that he failed to receive fair treatment by the court.

Affirmed.

Roy KEITH, Collector of Pulaski County, Arkansas, et al *v.* BARROW-HICKS EXTENSIONS OF WATER IMPROVEMENT DISTRICT NO. 85 of Pulaski County, Arkansas, et al

81-178 626 S.W. 2d 951

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*Wilbur C. Bentley,* Pros. Atty., by: *Hugh L. Brown* and *Steven L. Curry,* Deputy Pros. Attys., for appellants.

*Townsend & Townsend, Ltd.,* by: *Willis Townsend,* for appellees.

ROBERT H. DUDLEY, Justice. Appellees, sixteen improvement districts comprised of drainage districts, municipal improvement districts and suburban improvement districts, sought a declaratory judgment, a mandatory injunction and damages against appellants, the collector and treasurer of Pulaski County, for withholding ten percent of the combined assessment and penalty or fee on delinquent property located within the various districts. One of the prayers for relief asked for a judgment of $6,649.81, the amount allegedly wrongfully withheld from May 1, 1975 until the date of filing the complaint, April 26, 1978, along with any additional amounts withheld during the pendency of the suit. An accounting was not requested.

At trial the only fact put in evidence was that the appellant collector had withheld ten percent of the combined delinquent assessments, penalties or fees. That fact was material to the declaratory judgment and injunction.

The appellee districts attempted to prove the amounts withheld in order to prove their damages. The appellants objected to a recapitulation or summary of damages which had been prepared by appellees' attorney. The court did not rule on the objection. The summary was neither proffered nor ordered in evidence and therefore we have no way to

examine it on this de novo appeal. The chancellor later ruled that an injunction should issue against the collector mandating that he collect the assessments, penalties or fees from the delinquent taxpayer and not from the districts and appellee districts were given a judgment for court costs. However, the last paragraph of the order provides that the "court retains jurisdiction for such further orders as may be required pertaining to an accounting . . . " for damages.

Is this a final and appealable order? In *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W. 2d 605 (1967), we stated that for an order to be appealable

> . . . it must in form or effect: terminate the action; operate to divest some right so as to put it beyond the power of the court to place the parties in their former condition after the expiration of the term; dismiss the parties from the court; discharge them from the action; or conclude their rights to the matter in controversy.

and that

> An appeal will not lie from an interlocutory order relating only to some question of law or matter of practice in the course of the proceeding, leaving something remaining to be done by the court entering the order or by some court having jurisdiction to entertain the same and proceed further therewith.

Commencing with *Arkansas State Highway Com'n.* v. *Kesner,* 239 Ark. 270, 388 S.W. 2d 905 (1965), we have consistently held that an order which establishes a plaintiff's right to recover, but leaves for future determination the exact amount of damages, is not final. Equity has jurisdiction to order an accounting and restitution for an illegal exaction, *Munson* v. *Abbott et al,* 269 Ark. 441, 602 S.W. 2d 649 (1980), and a court of equity can fashion the relief justified by the proof. *Whitten Developments, Inc.* v. *Agee,* 256 Ark. 968, 511 S.W. 2d 466 (1974). Thus, unless we hold that the chancellor abused his discretion in retaining jurisdiction for a possible subsequent accounting, the order of the trial court is not yet appealable. On de novo review we conclude that the

chancellor erred in "retaining jurisdiction for such further orders as may be required pertaining to an accounting . . ." Appellee districts filed this case in 1978 and pleaded entitlement to damages dating back to 1975. Appellant officials asked that the case be tried and also moved that it be dismissed for failure to timely prosecute the action. It was not tried until 1981. The appellee districts neither asked for an accounting nor did they prove any need for one as the collector's records are a matter of public record. Unfortunately, appellees failed to prove their damages or make a record. However, in equity, in the absence of surprise, the cause of action and the relief granted are determined by the allegations of fact in the pleadings. *Henslee* v. *Kennedy,* 262 Ark. 198, 555 S.W. 2d 937 (1977). While the chancellor could have allowed a recess to obtain the proof, or could have allowed a non-suit, he erred in retaining jurisdiction for a later action "pertaining to an accounting." Fairness dictates that the case be ended and the appellants be allowed to appeal rather than face an additional delay and suffer the additional expense of some unspecified type of hearing at some unknown date when the future hearing was neither pleaded nor required by proof and the proposed future hearing was solely occasioned by the appellees' failure to prove their damages. The decision was final and the appellants have a right to appeal.

The principal issue in this case is whether Ark. Stat. Ann. § 20-1132 (Supp. 1981) authorizes appellant collector to collect ten percent of the combined tax and penalty from the redeeming taxpayer or from the taxing authority districts. As can be seen, the statute is ambiguous:

> One receipt issued for lands redeemed in counties of more than 150,000 population — County collector's fee. — Any person, firm or corporation having an interest in any property which has been certified by the County Collector's office prior to the enactment of this law, for delinquent assessment(s) in any improvement district and which property has not been sold for such delinquent assessment(s) prior to the enactment of this law, may pay the assessment(s) or redeem said property within the time and in the manner now provided by

> law, except that one (1) receipt or certificate of redemption shall be issued to such person, firm or corporation embracing all of the property in the improvement district on which assessments are then paid or redemption then made by said person, firm or corporation, regardless of the number of calls describing the property or the number of years of delinquency, and for which receipt or certificate of redemption the said Collector shall be entitled to a fee equal to ten (10) per cent of the combined tax and penalty collected. And on all delinquent improvement district property certified by the County Collector's office subsequent to the enactment of this law, the Collector's cost for redemption shall be a fee equal to ten (10) per cent of the combined tax and penalty collected on each call, or twenty-five [cents] (25¢) per call, whichever is greater.

The appellants contend that the statute is vague and that a tax cannot be imposed except by clear and express words. See, *Heath* v. *El Dorado Golf and Country Club,* 258 Ark. 664, 528 S.W. 2d 394 (1975), citing *Wiseman* v. *Arkansas Utilities Co.,* 191 Ark. 854, 88 S.W. 2d 81 (1935). That argument does not decide the issue because the statute is not the exaction of a tax but instead deals with a redemption fee. It is a method of statutory reimbursement to the collector for the additional expense which the landowner caused by failing to pay his assessment on time. A common sense interpretation of the statute dictates that the collection of the delinquency fee be had from the delinquent landowner and not from the district. It is clearly inequitable to require the other property owners in the districts who have paid their assessments on time to bear the costs of collecting from the delinquent owner, which is the result if the districts pay ten percent of the combined assessment and penalty or fee to the collector.

The chancellor correctly applied a sensible approach to statutory construction. "We have long held that statutory construction requires a common sense approach." *Henderson* v. *Russell,* 267 Ark. 140, 589 S.W. 2d 565 (1979). We affirm the injunction prohibiting the collector from with-

holding ten percent of the combined assessment, penalty and fee from the various districts.

Appellants argue that because the case was three years old it should have been dismissed under Rule 10 of the Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Repl. 1979). It is within the discretion of the trial judge to dismiss cases for lack of prosecution. We find no abuse of discretion in the failure to dismiss this case. Even had the chancellor dismissed the case it would have been without prejudice.

Affirmed as modified.

Dennis P. GLICK *v.* STATE of Arkansas

CR 81-79 627 S.W. 2d 14

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*Holmes, Holmes & Trafford,* for appellant.

*Steve Clark,* Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. During the night of July 11, 1980, the home of Alvin Gibson at Reydell was burglarized and food, clothing and a shotgun were stolen. The following night two men entered the home of Willie Moore where Moore and several companions were gambling and using the shotgun taken from Gibson robbed them of about two hundred dollars. The two dwellings are about three miles apart.

Appellant was convicted of burglary, aggravated robbery, and two counts of theft of property. Found to have committed at least four prior felonies, appellant was given cumulative sentences of 120 years to run consecutively. He seeks a reversal on one assignment of error — the trial court erred in not directing a verdict because of prejudicial statements by some of the state's witnesses. We find no error.

The argument is that testimony by the state was prejudicial to appellant: A. L. Lockhart testified to his observations at the scene of the burglary; David Rosegrant of the Arkansas State Police testified that discarded prison clothing was found near the Gibson dwelling and that members of the Department of Correction were at the scene; one of the robbery victims, John Hardin, testified that he had been in the penitentiary, knew the appellant and

recognized him as one of the robbers. Appellant contends that the jury could have inferred that he had been convicted of a felony without his having taken the stand and prejudice resulted.

In the first place, the motion and the argument are incompatible, as a motion for a directed verdict is a challenge to the *sufficiency* of the evidence and not to the nature or character of the evidence. *Harris* v. *State,* 262 Ark. 680, 561 S.W. 2d 69 (1978); *Parker* v. *State,* 252 Ark. 1242, 482 S.W. 2d 822 (1972). Here, there was more than sufficient evidence to submit the issue of guilt or innocence to the jury. Appellant was connected to the robbery by direct evidence in that five of the victims identified him as the man who carried the shotgun during the robbery and he was linked to the burglary by strong circumstantial evidence: two men were shown to have entered the Gibson home on the night preceding the robbery and the shotgun used in the robbery was positively identified as the one stolen from Gibson. Furthermore, no objections were offered to any of the testimony appellant now complains of and he cannot raise issues on appeal where there was no proper objection below. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W. 2d 345 (1980); and *Wicks* v. *State,* 270 Ark. 782, 606 S.W. 2d 366 (1980).

Conceding the testimony had some prejudicial aspects, it should be said that the state has a right to meet its burden of proof from the relevant facts of the case, even though some coincidental detriment to the defendant may result. If one of the victims of the robbery knew the accused in the penitentiary and recognized him because of that association, the state cannot be deprived of probative evidence connecting the defendant to the crime simply because there are dual aspects to such evidence. Appellant cites *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954), but that decision is not in point — it deals with the question of when evidence of a prior offense, not part of the offense being tried, can be introduced. We are not dealing with prior offenses but simply with admissible evidence from which a jury might infer the accused had been, or was, in the penitentiary. While the state cannot make direct proof of that fact (and, indeed, should refrain from even drawing needless attention to it),

because of the heavy burden of proof placed on the state under the law, it cannot be denied the opportunity of meeting that burden simply because some of the evidence has a coincidental implication not favorable to the accused. See *Young* v. *State,* 269 Ark. 12, 598 S.W. 2d 74 (1980); and *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971).

We find no error and therefore we affirm the judgment.

Rodney Lee ROWE *v.* STATE of Arkansas

CR 80-99 627 S.W. 2d 16

Supreme Court of Arkansas
Opinion delivered January 25, 1982

PER CURIAM. Petitioner Rodney Lee Rowe was convicted in the Circuit Court of Pulaski County of attempted capital murder, Ark. Stat. Ann. § 41-701, 1501 (Repl. 1977),

and aggravated robbery, Ark. Stat. Ann. § 41-2102 (Repl. 1977). We affirmed. *Rowe* v. *State,* 271 Ark. 20, 607 S.W. 2d 657 (1980). Petitioner received a sentence of ten years imprisonment for aggravated robbery and thirty years imprisonment for attempted capital murder. The trial court ordered the sentences served consecutively. Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. He specifically asks that a hearing be held in circuit court to determine whether a line-up identification procedure in the case was conducted in violation of petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article II § 10 of the Arkansas Constitution. He also asks that this Court modify his sentence or direct the circuit court to correct the sentence on the grounds that it is illegal to enter a judgment of conviction on attempted capital felony murder and aggravated robbery when the aggravated robbery was the underlying specified felony to the charge of attempted capital murder.

The issue of the line-up identification was considered on appeal and decided adversely to petitioner. The matter cannot be raised in a petition for postconviction relief. Rule 37 was not intended as a means of again presenting questions which were settled on direct appeal. *Neal* v. *State,* 270 Ark. 442, 605 S.W. 2d 421 (1980).

The question of legality of the sentences imposed on petitioner was also considered on direct appeal, but on a different ground than those presented in this petition. On appeal, petitioner alleged that the acceptance of the jury verdict violated the constitutional prohibition against double jeopardy and Ark. Stat. Ann. § 41-105 (1) (e) (Repl. 1977) which provides that a defendant may not be convicted of more than one offense if his conduct constitutes an offense defined as a continuing course of conduct and is uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses. This Court rejected that argument because it was found that two distinct impulses instigated the aggravated robbery and the attempted murder. Furthermore, it was noted that no objec-

tion had been made at trial to the charges or the sentences, thus precluding the argument from being considered for the first time on appeal.

Petitioner now submits that the failure to object at trial should not preclude relief under Rule 37 because the trial court did not have the authority under Rule 37.1 (b) to impose the sentences since they are in excess of the maximum sentences allowed by law. Petitioner cites as support for his contention this Court's decisions in *Singleton* v. *State,* 274 Ark. 126, 623 S.W. 2d 180 (1981); *Simpson* v. *State,* 274 Ark. 188, 623 S.W. 2d 200 (1981); and *Swaite* v. *State,* 272 Ark. 128, 612 S.W. 2d 307 (1981). In these cases, we held that when a criminal offense by definition includes a specified lesser offense, a conviction cannot be had for both offenses under Ark. Stat. Ann. § 41-105 (1) (a) (Repl. 1977). The statute provides:

> (1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in subsection (2);
>
> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> (c) it differs from the offense charged only in the respect that a less serious risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

On direct appeal, petitioner did not directly cite this statute and confined his arguments to the question of double jeopardy. Accordingly, this Court ruled on the issue as presented by petitioner under Ark. Stat. Ann. § 41-105 (1) (e) (Repl. 1977). He now argues that in light of our recent holdings in *Swaite, Singleton* and *Simpson,* this Court should examine the legality of the sentences under Rule 37.1 and conclude that the sentences were imposed in violation of the laws of this state and were in excess of the maximum authorized by law. We agree with petitioner's contention and set aside the conviction and sentence for the lesser included offense of aggravated robbery. The conviction and sentence for attempted capital felony murder are not disturbed. In proving the elements of attempted capital murder, it was necessary to prove the elements of aggravated robbery. Therefore, Ark. Stat. Ann. § 41-105 (1) (a) (Repl. 1977) prohibits petitioner's conviction for both offenses.

Petition granted in part and denied in part.

Everett E. SHELTON *v.* STATE of Arkansas

CR 81-53 627 S.W. 2d 18

Supreme Court of Arkansas
Opinion delivered January 25, 1982

*Lessenberry & Carpenter,* by: *Thomas M. Carpenter,* for appellant.

*Steve Clark,* Atty. Gen., for appellee.

PER CURIAM. This is a petition pursuant to Rule 37.2, Arkansas Rules of Criminal Procedure (Repl. 1977). Petitioner contends he was effectively denied assistance of counsel at his original trial. The case was affirmed in the original action in an unpublished opinion by the Court of Appeals on April 29, 1981 (CA CR 81-35).

Briefly, the history of the case reveals petitioner was charged with theft of property in excess of $2500 in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). He engaged the services of three different attorneys but for one reason or another all three were disqualified or resigned. On February 29, 1980, the public defender was appointed to defend the petitioner and the case was set for trial on April 10, 1980. At a hearing on April 1, 1980, the petitioner persuaded the court to allow him to serve as his own defense counsel at the trial. Although the court attempted to persuade the petitioner that it would not be wise for him to do so, it nevertheless granted petitioner the right to proceed as his own attorney. The court then informed the public defender to continue to serve in an advisory capacity and to be available for the trial. The petitioner requested an out-of-state attorney be present to testify on his behalf but for some unknown reason the out-of-state attorney was either not contacted or did not appear. However, the parties stipulated into the record what the testimony of this witness would have been had he been present. The petitioner had also requested the presence of two other witnesses and another attorney. No subpoena was issued for the local attorney, and the two other witnesses did not appear.

The trial was held on April 10, 1980; petitioner was convicted of theft of property and sentenced to a term of 20 years in the Arkansas Department of Correction with five years suspended. During the course of the trial petitioner encountered much difficulty in cross-examining witnesses. The court became annoyed by the frequent conferences between the petitioner and the public defender. The court ordered the public defender to sit down and keep quiet until the defendant requested him to do something on his behalf. On another occasion the court called a brief recess and instructed the petitioner to get with his attorney during the recess and prepare to finish the trial. Later, the court told the petitioner he was apparently unable to couch his questions in proper form but the public defender would be able to do so and thus enable the court to make a proper ruling. Petitioner was informed by the court he could still object if he disagreed with the actions of the public defender. The petitioner agreed with this proposal and allowed the public defender to do the questioning from that point on with some minor exceptions when the petitioner injected himself into the proceedings. For all practical purposes the public defender conducted the balance of the trial until the state rested.

After the state rested the public defender made several motions which were denied by the court. The court was then informed that the petitioner did not wish to take the stand. This statement was verified by the court asking the petitioner if the statement was correct and by the petitioner agreeing that he did not wish to take the stand. In fact, at this time petitioner stated that whatever the public defender said was all right with him. The court then stated:

> You're the attorney, now, and this is a judgment that you can make. Mr. Rosenzweig is just trying to get you through the technical areas of getting evidence into the court and keeping evidence out of court. But this is an area in which you can have just as much judgment as Mr. Rosenzweig. He can advise you but is this your decision in this case?
>
> MR. SHELTON: Yes, sir.

such capacity . . . " would not apply to appellant, as he was not acting or assuming to act as a real estate broker. To so isolate this sentence would be to misinterpret the statute. The second section which gives the appellant grounds for argument reads ". . . where the licensee in performing or attempting to perform any of the acts mentioned herein . . . ." Again, if you read only that portion of the sentence, it would give the impression that appellant was correct in his interpretation of the statute that the Commission could only take action against a licensed broker or salesman. However, in an over-all reading of the statute it is fairly clear that the "acts mentioned herein" means the acts listed following this portion of the statute, the applicable ones being (a), (b), (h) and (j). Therefore, in reading the statute in its totality it states that the Commission shall have the power, under circumstances stated therein, to discipline a real estate broker or salesman or " . . . any person who shall assume to act in either such capacity . . . ." The last quoted portion is an attempt to give the Commission authority over persons who assume to act as brokers or salesmen. We do not question appellant's statement that in order for one to be acting as a broker or salesman he must be acting (a) for another and (b) for compensation or expectation of compensation. However, the Commission admits that appellant was not acting as a salesman or broker at the time he sold the lots in question. The Commission's order is based primarily upon a claim of his making substantial misrepresentation or false promises concerning the building of the road in the subdivision and the reliance of the purchasers that appellant's actions were sanctioned by the Real Estate Commission. These are grounds which may give rise to revocation or suspension and need not be made while the person is in fact acting as a broker or salesman.

One of the purposes set forth in the act is to "safeguard the interests of the public." We have held that statutes enacted for the benefit of the public should be liberally construed to effectuate the purpose of the act. *Laman* v. *McCord,* 245 Ark. 401, 432 S.W. 2d 753 (1968). Both parties seem to place part of their argument in the case of *Rothgeb* v. *Safeco Insurance Co. of America,* 259 Ark. 530, 534 S.W. 2d 759 (1976). The *Rothgeb* case never came through the Real

Estate Commission and thus there was no issue as to the suspension of a broker's license. The action was brought by an individual against a real estate partnership alleging the partnership violated sections of Ark. Stat. Ann. § 71-1307 and asking for damages under a surety bond. Safeco Insurance Company was joined as a defendant because they wrote the surety bond for the Real Estate Commission at that time, and the defendants had gone into bankruptcy. In *Rothgeb* we stated:

> We must agree with appellee's position that since Wimpy was selling land owned by him and Steele, he could not be considered an agent or broker, which requires a license, within the meaning of § 71-1302. If Wimpy was acting solely as the owner, he would not come within the provisions of § 71-1302. . . .

We do not think *Rothgeb* is controlling in the present situation, as there was neither an investigation nor a finding by the Commission of improper conduct. In the present case the Commission did not suspend appellant's license for selling the land but for promises made outside the sale which the Commission determined violated the above-mentioned provisions of the statutes and Rule 40. The appellant also relies on *Bell, Commissioner* v. *Investment Training Institute,* 271 Ark. 663, 609 S.W. 2d 919 (1981). In *Bell* the complaint was against a person who was running a school wherein applicants for licenses as security broker-dealers were tutored. The action of the commissioner in that case was an attempt to prevent the carrying on of the business of tutoring applicants for licenses. Again, the action was brought in the court seeking an injunction preventing appellees from performing certain acts. That is not the case in the present action.

In the present case it is obvious that appellant could have performed these very same transactions had he possessed no license at all. However, since the transactions dealt with real estate and most of the sales were initiated in his real estate office where his broker's license was prominently displayed, we think the purchasers were entitled to rely upon appellant to act in the manner in which a broker or salesman

should act. Almost every purchaser of a lot in this subdivision indicated they relied upon the fact that appellant was a real estate broker. There is, of course, substantial evidence to support the finding of the Commission that appellant misrepresented matters and made false promises. In reviewing matters which were brought up through the Administrative Procedure Act we give much weight and credence to the action of the Board or Commission because of their knowledge of the subject matter before them. The standard of review in this court is whether there is substantial evidence to support the action of the Real Estate Commission in suspending appellant's broker's license for a period of six months. *Ark. Real Estate Commission* v. *Harrison,* 266 Ark. 339, 585 S.W. 2d 34 (1979). Therefore, the circuit court decision affirming the order of the Real Estate Commission is hereby affirmed.

Affirmed.

HAYS, J., not participating.

Bobby TUCKER *v.* William Reed JOHNSON

81-121 628 S.W. 2d 281

Supreme Court of Arkansas
Opinion delivered February 1, 1982
[Rehearing denied March 8, 1982.*]

*ADKISSON, C.J., would grant the petition; HOLT, J., not participating.

*Spencer, Spencer & Shepherd, P.A.,* for appellant.

*Donald Frazier,* for appellee.

JOHN P. GILL, Special Justice. This is an appeal from Union Circuit Court from an order denying a motion to set aside a default judgment due to defective summons. We reverse because the summons does not conform to Rule 4 (b), ARCP.

Appellee Johnson filed a complaint against appellant-defendant Tucker alleging negligence in the repair of an airplane resulting in a crash thereof. On March 12, 1980 a summons was issued by the Circuit Clerk for the Union Circuit Court. The summons and complaint were served upon appellant the following day, and on March 22, 1980 the appellant mailed a letter to the appellee-plaintiff's lawyer acknowledging the crash and in effect denying liability therefor. No pleading was filed by defendant-appellant in the Circuit Court and on June 25, 1980 appellee obtained a default judgment against appellant. Within 90 days, as required by Rule 60 (b), ARCP, appellee filed a timely motion to set aside the default judgment, and after hearing thereon, the motion was denied; this appeal followed.

The summons in question reads as follows:

IN THE CIRCUIT COURT OF
UNION COUNTY, ARKANSAS

No. CIV 80-90 Second Division

William Reed Johnson PLAINTIFF

v. SUMMONS

Bobby Tucker DEFENDANT

THE STATE OF ARKANSAS, To the Sheriff of Union County, Arkansas, Greetings:

YOU ARE COMMANDED TO SUMMONS Bobby Tucker, 100 W. Sharp Street, El Dorado, Arkansas.

to answer in twenty days after the service of this summons upon him a complaint filed against him in the CIRCUIT COURT OF UNION COUNTY, ARKANSAS, Second Division thereof, and warn him that upon his failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said Court is in session after twenty days after the date of the issuance hereof.

Witness my hand and seal of said Court, this 12th day of March, 1980.

Lorene Flenniken, Clerk
By Irene Lipsey, D.C. (sig.)

Nine months before the summons was issued, this Court adopted Rule 4 (b), ARCP which sets forth mandatory criteria for a valid summons as follows:

(b) Form: The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the Court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any; otherwise the address of the plaintiff; and the time within which these rules require the defendant to appear, file a

> pleading, and defend and shall notify him that in case of his failure to do so, judgment by default will be entered against him for the relief demanded in the complaint.

The summons in the case at bar is defective because: (1) it is not directed to the defendant, (2) it does not direct the defendant to file a pleading and defend, (3) it does not notify the defendant that in the event of his failure to file a pleading that a judgment by default will be entered against him and (4) that such default judgment will be for the relief demanded.

One purpose of Rule 4 (b) is to bring the archaic language of the summons suggested by Ark. Stat. Ann. § 27-306 (Repl. 1979), and used by trial courts in this state for over a century, into modern more readily understandable terms. It is recognized that the summons cannot, as admonished in appellee's brief, provide a short course in legal pleading practice, but it can and must be sufficient to advise a non-lawyer what is expected of him. The first reading of the summons by a defendant is the only step in the legal process which is not expected to be performed with the advice and assistance of licensed attorneys, therefore this Court in adopting Rule 4 (b) sought to achieve a summons format which would advise defendants that their person or property was in jeopardy by virtue of the complaint.

With these criteria in mind, the above omissions are fatal to the summons in the case at bar. First, the sheriff and not the defendant was directed by the Clerk to take action. Second, the summons warned the defendant to "answer". Third and fourth, the consequences of the failure of the defendant to answer are more reasonably calculated to be understood by laymen using Rule 4 (b) language, than by using the legal term "taken for confessed" appearing in the summons.

The summons does not substantially comply with the requirements of Rule 4 (b). This is not a matter of form over substance, rather it is the absence of sufficient substance to give the defendant notice and the Court jurisdiction.

Service of valid process is necessary to give a court jurisdiction over a defendant. *Halliman* v. *Stiles,* 250 Ark. 249, 464 S.W. 2d 573 (1972). Under our rules, the summons is a process used to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard. *Southern Kansas Stage Lines Co.* v. *Holt,* 192 Ark. 165, 90 S.W. 2d 473 (1936).

Since the summons format has not been heretofore prescribed for compliance with Rule 4 (b), such notice to be valid must be reasonably calculated to make the defendant aware of his duty to take action or risk entry of a default judgment. *Estes* v. *Masner,* 244 Ark. 797, 427 S.W. 2d 161 (1968); see also *Pender* v. *McKee,* 266 Ark. 18, 582 S.W. 2d 929 (1979). Judgments by default rendered without valid service of notice are judgments rendered without jurisdiction and are therefore void. *Edmonson* v. *Farris,* 263 Ark. 505, 565 S.W. 2d 617 (1978); *Halliman* v. *Stiles, supra;* Ark. Stat. Ann. § 29-107 (Repl. 1979).

In the case at bar, however, the actions and method of serving process were valid, but the notice itself was defective. In these circumstances we therefore hold that a default judgment based upon valid service of a defective summons is voidable. Being voidable, there was a need for showing a meritorious defense. *White* v. *Ray,* 267 Ark. 83, 589 S.W. 2d 28 (1979); *Edmonson* v. *Farris, supra.* We have not heretofore defined the term "meritorious defense"; it is evidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. In other words, it is not necessary to prove a defense, but merely present sufficient defense evidence to justify a determination of the issue by a trier of fact.

In applying the foregoing to the case at bar, it appears that the defendant-appellant showed a meritorious defense. The complaint alleged appellant's negligent repair of an

airplane landing gear resulting in a crash thereof. At the hearing to set aside the default judgment, the appellant presented evidence that before returning the airplane to appellee, appellant had test flown the airplane and that the landing gear was operating properly. This presented a fact issue for determination by the trier of fact — it presented a meritorious defense.

Appellee argues that the defendant-appellant having received the summons, did nothing but write the plaintiff's attorney; this is tantamount to arguing that the defendant had actual notice of the pending action and waived the defect in the summons. Such contention is not sound. Where a defect in the summons is so substantial as to render the process void, there can be no waiver of the defect. *Storey* v. *Brewer,* 232 Ark. 552, 339 S.W. 2d 112 (1960). [2] Nor does actual knowledge of a proceeding validate defective process. *DeSoto, Inc.* v. *Crow,* 257 Ark. 882, 520 S.W. 2d 307 (1975); *McIntosh* v. *Ponder,* 222 Ark. 701, 262 S.W. 2d 277 (1953). A default judgment is valid by virtue of valid process, and not by the fact that a defendant otherwise learns that a lawsuit is pending.

For a summons to be valid process, it must at the very least be such that will give the person notice that an action is pending against him; advise him of the action which he must take to defend himself; and apprise him of the consequences of his failure to take that action. Rule 4 (b) was adopted for that purpose. A summons which does not follow that rule lacks substance, and a defendant receiving such summons lacks notice. Since the Union Circuit Clerk issued defective summons, the default judgment entered was voidable; the appellant had a meritorious defense, and the order denying appellant's motion to set aside the default judgment is reversed and the cause remanded.

The issuance of summons is a matter of court administration and should not constitute an unknown procedural trap for the plaintiff. Accordingly, we are today issuing a per

[2]We recognize the dicta in *Storey* v. *Brewer* is applicable law to the facts in the case at bar.

curiam opinion setting forth the summons form prescribed by this Court to comply with Rule 4 (b).

HOLT, J., not participating.

Magnolia FELTS & James Vernon FELTS, Guardian of the Person & the Estate of Harry Ellis FELTS *v.* J. C. FORD.

81-268 627 S.W. 2d 25

Supreme Court of Arkansas
Opinion delivered February 1, 1982

*John B. Mays* and *Brent W. Martin,* for petitioners.

*Burrow & Harlan,* for respondent.

PER CURIAM. Petition for review is denied.

DARRELL HICKMAN, Justice, concurring. I agree that the petition in this case should not be granted because the petitioner did not comply with Rule 29, Rules of the Supreme Court. In a per curiam issued March 2, 1981, regarding Amendment to the Rules of the Supreme Court and Court of Appeals, we amended Rule 29 (6) to provide that no petition for a review of a Court of Appeals decision would be granted on the grounds that the case involved an issue of significant public interest or legal principle of major importance unless the party petitioning files with the Court of Appeals, before the case is submitted, a motion asking that the case be certified to us. Since that was not done in this case, we have to deny the petition. But I file this concurrence to strongly emphasize that I disagree with the decision reached by the Court of Appeals in this case. The

Court of Appeals in a careful and considered opinion held in substance that a lease signed by the husband does not have to be joined in by the wife although the property is held as an estate by the entirety. To me the decision is wrong.

A decision by the Court of Appeals in Arkansas is recognized as binding on lower courts and unless we have ruled on that question, such a decision obviously carries weight. But it is not the final word in such a matter and until this Court rules on it, a decision by the Court of Appeals should not be considered by the bench and bar as the final word in the matter. *Posados* v. *Warner, Barnes & Company,* 279 U.S. 340 (1929).

I feel compelled to point our my position for posterity.

ADKISSON, C.J., and PURTLE, J., join.

Robert M. RUSSELL *v.* Tom F. DIGBY, Sixth District Circuit Judge, Third Division, Pulaski County, and WORTHEN BANK & TRUST CO., N.A.

81-228 627 S.W. 2d 25

Supreme Court of Arkansas
Opinion delivered February 1, 1982

*Henry & Duckett,* by: *David P. Henry,* for appellant.

*Thomas P. Thrash,* for appellee.

PER CURIAM. Motion to Dismiss is granted.

JOHN I. PURTLE, Justice, dissenting. I feel the majority has inflicted an unnecessary and serious injury upon this particular petitioner and upon untold numbers who will

stand in his place in the future. The petition to dismiss the appeal should not be allowed under the circumstances presented by the respondents. By refusing to consider this case on its merits the majority is, in effect, telling the respondents that it was all right to use an obviously outdated law to deprive a citizen of his rights as guaranteed by the constitution and as pronounced by the local courts.

The respondents never filed a pleading in this court. They paid the judgment after the petitioner filed his brief in this court. This indicates that they intended merely to delay paying a just claim. I would hear the case on its merits; and, further, it is my tentative feeling after a careful review of the record that an opinion should issue declaring Ark. Stat. Ann. § 30-301 (Repl. 1979) to be null and void. I would further award all costs of the action, appeal and brief to the petitioner.

ADKISSON, C.J., and HICKMAN, J., join in this dissent.

Donald E. COLYER *v.* STATE of Arkansas

627 S.W. 2d 22

Supreme Court of Arkansas
Opinion delivered February 1, 1982

*F. James Jefferson,* for appellant.

*Steve Clark,* Atty. Gen., for appellee.

PER CURIAM. Appellant Donald E. Colyer, by his attorney F. James Jefferson, has filed a motion for a rule on the clerk. The motion implies that a notice of appeal was not given and indicates that the record may not have been timely filed. The motion for a rule on the clerk is denied as no good reason is given for the dilatory actions.

If an affidavit had been attached to the motion, and if it had admitted a late notice of appeal and a late tendering of the record, and if it had stated that the attorney was careless in the computation of time, or made an error, or gave any good cause, the motion could be granted. In a per curiam opinion regarding belated appeals rendered February 5, 1979, 265 Ark. 964, we discussed the problem of an untimely tender of a record *caused by the attorney*. We decided that we have no alternative but to grant the motion for relief in such a case. However, we pointed out that a copy of the opinion would be forwarded to the Committee on Professional Conduct as is our practice.

Accordingly, we deny without prejudice the motion for a rule on the clerk.

Darrell Wayne HILL *v.* STATE of Arkansas

CR 81-18 628 S.W. 2d 285

Supreme Court of Arkansas
Opinion delivered February 8, 1982
[Rehearing denied March 15, 1982.]

[redacted]

[redacted]

*Bob Keeter* and *William H. McKimm,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. On July 11, 1980, following a jury trial, appellant, Darrell Wayne Hill, was convicted and sentenced for capital felony murder (death), kidnapping (50 years), and aggravated robbery (50 years) in connection with offenses against Donald Lee Teague; and

for attempted capital murder (life), kidnapping (50 years), and aggravated robbery (50 years) in connection with offenses against E. L. Ward. The 50-year sentences were set to run consecutively to the life sentence.

We affirm the conviction and sentence for capital felony murder but set aside the lesser included offenses of kidnapping and aggravated robbery in connection with offenses against Donald Lee Teague. Ark. Stat. Ann. § 41-105 (1) (a) and (2) (a) (Repl. 1977) prohibit the entry of a judgment of conviction on capital felony murder or attempted capital felony murder and the underlying specified felony or felonies. *Swaite* v. *State,* 272 Ark. 128, 612 S.W. 2d 307 (1981); *Singleton* v. *State,* 274 Ark. 126, 623 S.W. 2d 180 (1981). Generally, this Court will not consider errors raised for the first time on appeal; however, as we stated in *Singleton, supra,* in death cases we will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and this Court would unquestionably require the trial court to grant relief under Rule 37.

We affirm the convictions and sentences for attempted capital felony murder, kidnapping, and aggravated robbery in connection with offenses against E. L. Ward. The objection that kidnapping and aggravated robbery are offenses included in the offense of attempted capital felony murder was not raised in the lower court. This Court will not consider this issue when raised for the first time on appeal except in death cases. *Rowe* v. *State,* 271 Ark. 20, 607 S.W. 2d 657 (1980). Also *see Rowe* v. *State,* 275 Ark. 37, 627 S.W. 2d 16 (1982).

I

On February 7, 1980, at approximately 2:00 p.m. appellant drove into E. L. Ward's Service Station in Pencil Bluff, Montgomery County, in a maroon Thunderbird. Ward checked his radiator and filled his car with gas. At this time Donald Teague, a Game and Fish Commission Officer, drove up, also wanting gas, so Ward went inside the garage to clear the pumps. Appellant, who was waiting inside the garage, pulled a gun on Ward and demanded his money. He

then ordered Ward to put the money from the cash register into a money bag along with his wallet. At this time Teague entered the garage, and appellant pointed the gun at Teague, told him to put his billfold in the money bag, and told both men that they were going for a ride. Teague was instructed to drive the car and Ward to bring the money bag. While riding, appellant took the money from Ward's wallet and put it in his pocket. Teague was forced to drive to a gravel road off of Highway 88. Appellant then had Teague stop the car, marched the men into some weeds, and forced them to lie down with their hands behind them. Appellant shot Teague several times, killing him. Ward begged him to quit shooting, but appellant then shot at Ward four times, wounding him. Ward dropped into the weeds and did not move or speak until appellant had driven away. He then hollered at Teague, who did not respond, so he crawled back to the road. A pulpwood driver found him there later that afternoon. Ward gave the police a description of his assailant and the car he was driving before he was rushed to a hospital in Hot Springs.

That afternoon at 4:05 p.m. law enforcement offices in the surrounding area began receiving NCIC (National Crime Information Center) radio dispatches regarding these crimes. The Hot Springs Police Department broadcast the description of a white male, 45 to 50 years old, medium build, 160 lbs., rough skinned face, black hair, last seen wearing a gray suit with a blue shirt; vehicle and license described as late model Ford Thunderbird, maroon in color, with dark blue or black lettering on a white license plate. The occupant was described as being armed and extremely dangerous.

At 6:25 p.m. Hot Springs Police Officer Buck observed a vehicle matching this description with a white Oklahoma license plate with dark letters going westbound on Grand in Hot Springs; he radioed in that he was following the car. He stopped the vehicle at about the same time Officer Ward arrived to back him up. Officer Buck used a public address system to advise appellant to step out of the car and keep his hands in plain sight. Officer Buck conducted a frisk search of appellant for weapons. Meanwhile, Officer Ward searched

the immediate area of the car where appellant had been sitting, finding a brown paper sack containing a loaded Charter Arms .38 Special and a large quantity of coins under the front seat, driver's side. Appellant was then placed in Officer Buck's vehicle and transported to the police station at approximately 6:45 p.m. Neither of these officers testified regarding a description of the appellant before he was searched: neither while appellant was inside the car, nor after he was directed to stand behind it.

The evidence as set out above and the positive results of the ballistics tests on the gun found in appellant's car lead us to conclude that appellant's convictions were supported by overwhelming evidence of guilt.

II

Appellant argues that the stop and search of his vehicle by the police was unreasonable and that the pistol seized from under the driver's seat should have been suppressed as the fruit of an illegal search. We disagree. The search of the car was reasonable under the circumstances.[1] Rule 3.1, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977) provides:

> Rule 3.1 Stopping and Detention of Person: Time Limit.
>
> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he *reasonably suspects* is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require

[1]Officer Ward testified at the hearing on the motion to suppress that, as soon as appellant got out of the car, both he and Officer Buck immediately recognized him as fitting the description of the suspect as broadcast over the police radio. The search, therefore, was justified as being incident to an arrest and permissible under *New York* v. *Belton*, 450 U.S. 1028, 101 S. Ct. 2860 (1981).

> the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense. (Emphasis added)

Did the officer reasonably suspect the appellant had committed a felony? Rule 2.1 defines reasonable suspicion as:

> [A] suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The courts have used various terms to describe how much cause or suspicion is necessary or reasonable in order to stop a person or vehicle. The common thread which runs through the decisions makes it clear that the justification for the investigative stops depend upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *U.S.* v. *Cortez,* 449 U.S. 411 (1981); *Michigan* v. *Summers,* 450 U.S. 905, 101 S. Ct. 2587 (1981); *Terry* v. *Ohio,* 392 U.S. 1 (1967).

Here the police had reasonable suspicion to make an investigatory stop of appellant's late model maroon Ford Thunderbird exhibiting an Oklahoma license plate with a white background and dark letters. The car matched the description of the police broadcast. It was not likely that another vehicle of that description was in the Montgomery-Garland County area at that time. Also, the crimes had just recently been committed in the small community of Pencil Bluff in neighboring Montgomery County.

Since the investigatory stop was justified, the police were then allowed to make a limited search for weapons to protect themselves from attack by a suspect they had every

# ERRATA

*275 ARKANSAS REPORTS at page 80*

Detach at perforation, moisten the back, and paste over the fifth line of the first full paragraph on page 80 of *Hill v. State:*

the investigative stops depends upon whether, under the

reason to believe was armed and very dangerous. *Adams* v. *Williams,* 407 U.S. 143 (1972). Rule 3.4, Ark. Rules Crim. Proc. specifically authorizes a search for weapons in a situation such as existed here:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person *and the immediate surroundings* for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others. (Emphasis added)

This rule is consistent with the rule set forth in *Terry* v. *Ohio, supra,* which emphasizes that the purpose of the protective search is wholly for the safety of the police officer:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

In *Terry* the Court dealt specifically with a limited protective search of a pedestrian. However, the principles enunciated in that case are wholly consistent with the concept that an automobile's passenger compartment may be the subject of a limited search, in circumstances such as those presented here, for the protection of officers who otherwise might be endangered.[2] *See e.g. United States* v. *Thomas,* 314 A. 2d 464 (D.C. App. 1974).

[2]In instances where a person is arrested in an automobile, *New York* v. *Belton, supra,* standardized the concept of what is the immediate surrounding area for the purpose of a protective search to include the entire passenger compartment of the automobile in which the person

The search here was completely reasonable when considered under the totality of the existing circumstances. The officers would have taken an unnecessary risk if they had attempted to talk with the appellant before searching him and the accessible areas of his car; removing appellant from his car was a prerequisite to the safety of the officers in making such a search. Although appellant was standing behind the car with his hands on the trunk at the time of the search, the mere fact of appellant's removal from the car did not remove the possible danger to the officers and thereby obviate the necessity for the search. It was certainly reasonable to believe that a suspect believed to have kidnapped, robbed, and executed a Game and Fish Officer, and, simultaneously, attempted to do the same thing to another person was capable of breaking for a weapon inside his car, and probably would have been highly motivated to do so. Here, the limited search of the car was both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry* v. *Ohio, supra.*

III

Appellant argues that the trial court erred in not granting his motion for a change of venue. Ark. Stat. Ann. § 43-1501 (Repl. 1977) provides:

> Any criminal cause pending in any circuit court may be removed . . . whenever it shall appear . . . that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein.

To prove prejudice in this case appellant introduced four issues of the local newspaper which had carried stories about the crime. Appellant did not allege or prove any television or radio coverage of the crime. At the special hearing on the change of venue appellant also introduced

arrested was located. Since the purpose of the protective search is for the safety of the police officer, the rationale of *Belton* must be equally applicable to searches of automobiles after investigatory stops even though, as in *Belton,* the suspect is no longer inside the automobile.

testimony from six witnesses who testified that they did not think defendant could receive a fair trial in Montgomery County. Three witnesses for the State testified that he could. The trial judge specifically found that none of the defense witnessed showed that they were cognizant of prejudice existing throughout the whole county, but merely portions of the county. In *Bailey* v. *State,* 204 Ark. 376, 163 S.W. 2d 141 (1942) we stated that the statute which provides methods of proving prejudice, Ark. Stat. Ann. § 43-1502 (Repl. 1977), contemplates that the witnesses should have fairly accurate information concerning the state of mind of the inhabitants of the entire county.

A motion for a change of venue is directed to the sound discretion of the trial court and is not subject to reversal except for an abuse of that discretion. *Rush* v. *State,* 238 Ark. 149, 379 S.W. 2d 29 (1964). Under the facts of this case we cannot say that the trial court abused his discretion.

IV

Appellant argues that the trial court erred in not excusing certain jurors for cause. We recently held in *Conley* v. *State,* 270 Ark. 886, 607 S.W. 2d 328 (1980) that in order to preserve this point for appeal appellant must have exhausted his peremptory challenges and must state for the record that there is someone actually sitting on the jury that he would have stricken if he had had another peremptory challenge. Also, it must appear from the record that the trial judge should have excused the juror for cause.

Here, the record reflects that appellant did exhaust his peremptory challenges, and that appellant objected to juror Reed who sat on the jury. However, the trial court was correct in not striking juror Reed for cause. Reed stated on *voir dire* that she was related to one of the victims in a complicated way, but the record is silent on how close the relationship actually was. Defense counsel's reason for asking the court to strike her for cause was that she had stated that "Anybody that is brought in is under suspicion either if they are innocent or guilty; they are just as much guilty as they are innocent when you pick them up or they wouldn't

be picked up in the first place." After this statement, however, the court advised her as to the presumption of innocence. She then stated that she understood the law to be innocent until proven guilty, and said she could follow this law. This juror was sufficiently rehabilitated by the trial court so that we cannot say it was error to not strike her for cause.

Appellant also argues it was error to allow the State to peremptorily challenge two jurors who expressed opposition to the death penalty. These jurors were not excused for cause by the court but were peremptorily stricken by the State. Under such circumstances no explanation is necessary as to why a potential juror is being excused.

V

Appellant argues that the trial court erred in refusing (1) to grant his motion to make the victim, Mr. Ward, talk with defense attorneys, and (2) in refusing to allow defense attorneys to *voir dire* the sheriff concerning a conversation between the sheriff and a deputy in which the sheriff allegedly stated that "They will probably have me on trial in the morning concerning Mr. Ward."

The trial court refused to order Mr. Ward to discuss the case with defense counsel, but suggested that the prosecuting attorney furnish to defense counsel the substance of Mr. Ward's testimony whereupon the prosecuting attorney delivered to defense counsel a statement Mr. Ward had given to the state police. At trial, Mr. Ward testified that no one had told him not to speak with defense counsel. He explained that he had talked to defense counsel over the phone, but that he wasn't going to tell anyone anything over the phone, and that he wasn't going to talk to defense counsel unless the prosecuting attorney was present.

We cannot say the trial court abused its discretion in declining defense counsel's request to compel Mr. Ward to discuss the case with him or in refusing defense counsel's request to *"voir dire"* the sheriff regarding his conversation with the deputy. Appellant made no showing as to what

information was sought by these motions or that a favorable ruling by the court would materially aid in the preparation of the defense. Nor did appellant show that he was in any way prejudiced by the court's actions in denying the motions.

VI

Appellant argues that reversible error was committed when a state witness referred to appellant's prison records during the guilt-innocence phase of the trial. The state's witness, a psychiatrist with Arkansas State Hospital, testified that his psychiatric diagnosis of appellant was based on personal interviews and various psychological examinations that had been administered to appellant. He was then asked if there were any other tools he used in forming his opinion. He answered, "I did have the results of previous examinations conducted at the Vinita State Hospital. I also had access to his prison records." Defense counsel moved for a mistrial. The trial court then admonished the jury that they must not consider the witness's statement.

This cautionary instruction to the jury made harmless any prejudice that may have occurred and this is especially true in view of the overwhelming evidence of guilt. Declaring a mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury. *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979). The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and the decision of the trial court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *Brown* v. *State,* 259 Ark. 464, 534 S.W. 2d 207 (1976). *Dean* v. *State,* 272 Ark. 448, 615 S.W. 2d 354 (1981).

VII

Appellant argues that the photographs of the bullet wound in Teague's head should not have been admitted. We disagree. The picture was not shocking or grotesque and was not likely to unfairly prejudice or inflame the jury. The

question of admissibility of photographs lies largely in the sound discretion of the trial court. *Tanner* v. *State,* 259 Ark. 243, 532 S.W. 2d 169 (1976).

VIII

Appellant argues that the trial court erred in limiting the testimony of Reverend Nixon, a defense witness in the penalty phase of the trial. Reverend Nixon attempted to testify to appellant's charitable acts which appellant had related to him in a two-hour conference before trial. The trial court sustained the State's objection to Reverend Nixon's testimony that appellant wanted to donate a kidney. The court stated at a bench conference that appellant could testify if he so desired. Counsel for appellant was then encouraged to continue examining the witness, but declined to do so.

Ark. Stat. Ann. § 41-1301 (4) permits the introduction of evidence as to any mitigating circumstances in a capital murder case regardless of its admissibility under the rules of evidence. However, this statute was not designed to create a vehicle for intentional circumvention of the rules of evidence. The rules of evidence should be followed when possible. In this case the witness was available to testify and there was no reason for the admission of this hearsay testimony.

Appellant also argues that Reverend Nixon should have been allowed to testify as to the religious and ethical considerations applicable to the death penalty. Religious and philosophical approaches to the death penalty are not relevant as mitigating evidence. *Franklin* v. *State,* 245 Ga. 141, 263 S.E. 2d 666 (1980).

IX

Appellant argues that it was error to allow the State to prove, during the penalty phase, three prior convictions that did not involve threat or violence.

For purposes of sentence enhancement as a habitual

offender, the State proved that appellant had been convicted of five prior felonies pursuant to Ark. Stat. Ann. § 41-1001 (Repl. 1977):

> (2) A defendant who is convicted of a felony and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows: . . .

Of these five prior convictions the State used two robbery convictions to prove aggravating circumstances under Ark. Stat. Ann. § 41-1301 (Repl. 1977). This statute provides that if a defendant is found guilty of capital murder, the jury may hear evidence as to aggravating circumstances. Prior offenses for purposes of aggravating circumstances are specifically limited by Ark. Stat. Ann. § 41-1303 (Repl. 1977) to offenses involving threat or violence:

> Aggravating circumstances. — Aggravating circumstances shall be limited to the following:
>
> . . . .
>
> (3) the person previously committed another felony an element of which was the use or threat or violence to another person or creating a substantial risk of death or serious physical injury to another person; . . .

Appellant argues that the jury may have improperly considered the convictions introduced for enhancement purposes, some of which did not involve threat or violence, when they were considering aggravating circumstances. Apparently, appellant's position is that there should be two separate hearings on sentencing when capital and non-capital offenses are being tried together. This argument has no merit. Our statutes merely provide for a bifurcated procedure under which sentencing is separate from the determination of guilt or innocence. *See State* v. *Greenawalt,* 128 Ariz. 150, 624 P. 2d 828 (1981). Furthermore, the court clearly instructed the jury that they were to consider only the two robbery convictions as aggravating circum-

stances. They were also instructed that the other convictions were to be considered only for enhancement purposes on the charges of robbery, kidnapping, and attempted murder.

Appellant further argues that the court erred in allowing the State to submit the conviction for "unauthorized use of a motor vehicle after former conviction of a felony" for purposes of sentence enhancement under Ark. Stat. Ann. § 41-1001. Appellant argues that this conviction should not have been admitted since there was no proof that appellant was represented by an attorney when he was convicted of the "former felony." There is no merit to this argument. The record reflects that appellant was represented by an attorney when he was convicted of "unauthorized use of a motor vehicle after former conviction of a felony." This is the crime that the State used for enhancement purposes. The statute only requires proof of a prior conviction, not the underlying elements of the conviction.

Appellant also argues that the jury may have improperly considered the six findings of guilt that they had just entered as felonies for purposes of enhancement and aggravation during the penalty phase of the trial. We find no merit to this argument. We can assume that the jury understood the court's instructions and understood the verdict forms which refer to conviction for *previous* felonies.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979) and find no error. *cf. Singleton* v. *State, supra.*

Affirmed in part; reversed in part.

HICKMAN, J., concurs. See *Singleton* v. *State,* 274 Ark. 126, 623 S.W. 2d 180 (1981).

HOLT and DUDLEY, JJ., concur.

PURTLE, J., concurs in part; dissents in part.

ROBERT H. DUDLEY, Justice, concurring. I concur in the result and agree with the reasoning expressed on all but one

issue — the search. On that issue the majority opinion sanctions the search of the passenger compartment and the resulting seizure of evidence on the basis of a search incident to an arrest. That part of the holding disregards the Fourth Amendment because an investigatory stop does not require probable cause. In a footnote the majority opinion states that the search also can be justified as a search incident to arrest. That latter reason is the only basis on which this case can be sustained.

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio,* 392 U.S. 1 (1968) quoted in *Michigan* v. *Summers,* 450 U.S. 905, 101 S. Ct. 2587 (1981). Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *Delaware* v. *Prouse,* 440 U.S. 648 (1979). In this case there are two seizures, seizure of the person and seizure of the evidence. The Supreme Court of the United States has treated the two in differing ways. Seizure of the person involves a higher governmental interest than does seizure of evidence. The former allows an official intrusion for the intense governmental interest of protecting the safety of the arresting officer while the latter allows a lesser intrusion based only upon the governmental interest in preventing the concealment or destruction of evidence. The Court has traditionally limited the reach of any Fourth Amendment exception to that which is necessary to accommodate the identified needs of society. *Arkansas* v. *Sanders,* 442 U.S. 753 (1979).

The difference between the two seizures is illustrated by stating the general rule for each. An arrest, or seizure of a person, without a warrant is valid only when the arresting officer has reasonable grounds to believe that the arrested person has committed a felony, *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409 (1970); *United States* v. *Di Re,* 332 U.S. 581 (1948): *Johnson* v. *United States,* 333 U.S. 10 (1948), while a seizure of evidence without a warrant is, per se, unreasonable. *Katz* v. *United States,* 389 U.S. 347 (1967).

The Supreme Court of the United States has recognized

four exceptions, which are material to this case, where warrantless seizures of the person can be based on less than probable cause and still comply with the reasonableness standard of the Fourth Amendment.

First, in *Terry* v. *Ohio,* supra, a limited stop and frisk was approved. Second, in *Adams* v. *Williams,* 407 U.S. 143 (1972) a stop was approved to investigate an informant's tip that the person stopped was armed and carrying narcotics. Third, in *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), the Court held that border patrol officers may make investigatory stops of vehicles near the country's borders if there are articulable facts that reasonably warrant a suspicion that the vehicle contains illegal aliens. Fourth, in *United States* v. *Cortez,* 449 U.S. 411 (1981), the Court held that police could make an investigatory stop where there is an objective manifestation that the person is, or is about to be, engaged in criminal activity. Again, the investigatory stop does not have to be based on probable cause, it can be based upon the lesser standard of reasonable suspicion. Not one of these cases discussing a warrantless arrest upon only a reasonable suspicion intimates that an accompanying search and seizure of evidence can go beyond protection of the police officer's safety.

A seizure of evidence without a warrant is, per se, unreasonable. The Supreme Court of the United States has set forth only one narrowly drawn exception where a seizure of evidence can be based on less than probable cause. It is the protective search doctrine set out in *Terry* v. *Ohio,* supra, and *Adams* v. *Williams,* supra. It authorizes a search of the clothing and that area which is immediately reachable by the arrested person. The basis of this exception is that the arresting officer has every right to assure himself that the person does not have within reach a weapon, although the weapon may be evidence. The rationale of this exception is applicable to an investigatory stop, an arrest, a frisk, or any other seizure. It was applicable to the case before us and the frisk of the appellant was obviously valid. If a gun had been discovered during the frisk, it would have been admissible evidence. However, the appellant had been behind his car, had already been frisked and was about to be placed in the

arresting officer's car when a second officer conducted a search of the interior of appellant's car. The search of the interior of the car was not necessary for the officer's protection. It was necessary only to prevent the concealment or destruction of evidence. See A. R. Crim. P. 3.4, Vol. 4A (Repl. 1977).

All cases approving a warrantless search to prevent the concealment of evidence are synthesized with probable cause. Until probable cause is shown the warrantless search is narrowly limited to the governmental interest or protecting the police officer. After the probable cause standard is met the Court has not so narrowly defined the governmental interest and, as a result, the sanctioned area of the search is not as narrow. The Court has stated that a warrantless search of an automobile can be valid where the police have probable cause to believe the vehicle contains evidence of a crime. The governmental interest causing the Court to authorize this exception is the mobility of an automobile and the concealment of evidence. *Carroll* v. *United States,* 267 U.S. 132 (1925); *Arkansas* v. *Sanders,* supra; *Colorado* v. *Bannister,* 449 U.S. 1 (1980).

There is also the "automobile exception" where the scope of a search incident to a lawful custodial arrest, as opposed to investigatory stop, extends over the entire passenger compartment of the automobile in which the person arrested was riding. *New York* v. *Belton,* 450 U.S. 1028, 101 S. Ct. 2860 (1981). Generally, however, the scope of a search incident to a lawful arrest is governed by the principles set forth in *Chimel* v. *California,* 395 U.S. 752 (1969). These exceptions, based on probable cause, sanction a limited search to prevent the concealment or the destruction of evidence. While this area of search is limited, it is broader than the very narrow area of protective search based only upon reasonable suspicion. The reason is that the higher standard of probable cause allows the sanctioning of a greater governmental interest without violating the reasonableness clause of the Fourth Amendment.

The exceptions announced in *Carroll, Arkansas, Colorado, New York* and *Chimel* have two governmental interest bases; first, the need to protect the officer and,

second, the need to prevent the concealment or destruction of evidence. The first basis can be authorized by reasonable suspicion, while the second is authorized only when there is probable cause either for the arrest or for believing the vehicle contained evidence of a crime. Yet, the majority opinion sanctions a search to prevent the concealment of evidence, not on arrest and probable cause, but on an investigatory stop and reasonable suspicion. That result is based upon the fallacious assumption that a valid exception to the Fourth Amendment for the seizure of a person on less than probable cause creates a second exception of equal standing for the seizure of evidence. Such a double exception swallows the general rule that Fourth Amendment seizures of evidence are reasonable only if based on probable cause.

In the case before us the police had probable cause to arrest appellant, as opposed to stop to investigate, and that is the only basis upon which the search of the passenger compartment of the automobile can be sustained. I would affirm on that basis. See *New York* v. *Belton,* supra.

I am authorized to state that Mr. Justice HOLT joins in this opinion.

JOHN I. PURTLE, Justice, concurring in part, dissenting in part. I concur in that part of the majority opinion which affirms the sentence of capital felony murder wherein the penalty was set at death by electrocution. Also, I agree that it is plain error for the court to have sentenced the appellant to the lesser included offense of kidnapping and aggravated robbery in connection with the death of Donald Lee Teague.

I dissent from that part of the majority opinion which fails to apply the plain error rule to the lesser included charges in the case involving E. L. Ward. For the Ward episode the court sentenced the appellant for attempted capital murder, kidnapping and aggravated robbery. Although it is a mystery how he is going to serve any of these sentences if he is put to death, I nevertheless would like to see the record kept straight. By failing to recognize plain error at this time we are simply prolonging this case because we know with absolute certainty that the case is going to come

back to us under a Rule 37 Petition and in all likelihood another full appeal. If we follow our present opinions, we will at that time set aside these sentences just as we finally did in the case of *Rowe* v. *State,* 275 Ark. 37, 627 S.W. 2d 16 (1982). We had also corrected the matters in *Swaite* v. *State,* 272 Ark. 128, 612 S.W. 2d 307 (1981); *Singleton* v. *State,* 274 Ark. 126, 623 S.W. 2d 180 (1981); and *Earl* v. *State,* 272 Ark. 5, 612 S.W. 2d 98 (1981).

Because of the foregoing reasons I would correct the sentence imposed in this case by deleting the convictions of aggravated robbery and kidnapping with regard to the offenses against E. L. Ward as we did with the same charges relating to the offenses against Donald Lee Teague.

Bertha BURDEN *v.* Reuben HAYDEN, Superintendent of Lavaca School District et al

81-171 627 S.W. 2d 555

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Cearley, Gitchell, Mitchell & Bryant, P.A.*, for appellant.

*Daily, West, Core, Coffman & Canfield*, by: *Ben Core*, for appellees.

GEORGE ROSE SMITH, Justice. The appellant, a school teacher, had been employed annually by the Lavaca School District for four years before the school board voted not to renew her contract at the end of the 1977-1978 school year. After a public hearing held at Mrs. Burden's request the board voted to allow its non-renewal decision to stand. At that time the statutes did not provide, as they do now, for an appeal to the circuit court. Ark. Stat. Ann. § 80-1264.9 (b) (Repl. 1980). Hence in December 1978 Mrs. Burden filed this suit against the district, its superintendent, and its board members, seeking a declaratory judgment holding that the non-renewal of her contract was unlawful. She also asks for reinstatement, back pay, and damages. This appeal is from a judgment sustaining a demurrer to the complaint and dismissing the action. Our jurisdiction is based on Rule 29 (1) (c).

At the outset we point out that this case is not controlled by *Fullerton* v. *Southside Sch. Dist.*, 272 Ark. 288, 613 S.W. 2d 827 (1981); *Maxwell* v. *Southside Sch. Dist.*, 273 Ark. 89, 618 S.W. 2d 148 (1981); and more recent cases. Under the statutes and district policies considered in those cases a non-probationary teacher was entitled to a statement of the reasons for a proposed non-renewal and to a hearing *before* the board reached its decision not to renew. §§ 80-1264.3 and -1264.8. Those statutes and policies, however, had not yet been adopted when Mrs. Burden's contract expired. Unfortunately the disposition of her case has been seriously delayed, mainly because the circuit judge took it under

advisement and did not announce his decision until some 21 months after the last brief had been filed.

Mrs. Burden's complaint is detailed. It asserts that the district "totally failed" to comply with its policies, but her complaint itself, with its exhibits, contradicts that sweeping allegation. On April 11 the superintendent notified Mrs. Burden that non-renewal of her contract was warranted. She had five days in which to request a hearing by the superintendent, but she took no action until the sixth day, on which the board decided not to renew. On that same day Mrs. Burden made a written request for the reasons for non-renewal and for the names of witnesses against her and the nature of their testimony. Five reasons were given to her, but no witnesses' names were supplied. When she then requested a hearing before the board, the superintendent set a date for the hearing and explained, we think correctly, in his letter that the hearing was an opportunity for her to present her reasons for renewal, "not a trial or cross-examination of the board." After the requested public hearing the board notified Mrs. Burden that its members had unanimously voted to allow the non-renewal decision to stand. This suit was filed some six months later.

The statute then in force (Act 74 of 1970, §§ 3 and 4), as well as the district's policies, contemplated that a teacher's right to request the reasons for non-renewal and to ask for a hearing by the board did not arise until *after* the board's decision not to renew. Here there was substantial compliance with those requirements, which is all that is necessary. *Fullerton, supra.* Since the hearing was not to be held until after the board had already decided not to renew, the purpose of the hearing was necessarily to permit, and only to permit, the teacher to present her reasons for renewal before the board's decision became final. That opportunity was provided to Mrs. Burden. Indeed, the district's only real failure to track the statute and its policies lay in the fact that Mrs. Burden was apparently not afforded three conferences in which to assert her views to an administrative official of the district after it had first become apparent that her teaching was not satisfactory. Her complaint, however, does not

specifically mention that omission, much less narrate facts giving it substantive importance.

Finally, the complaint asserts that under federal law, 42 U.S.C. § 1983, Mrs. Burden has a cause of action for a denial of her rights under the due process clause of the Constitution. As we read the cases, however, a teacher who has only a one-year contract without tenure or a vested right to renewal cannot ordinarily assert a taking of liberty or property if the contract is not renewed. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1982); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Marion County Rural Sch. Dist. No. 1* v. *Rastle,* 265 Ark. 33, 576 S.W. 2d 502 (1979). The court did, in *Roth,* mention the possibility that a failure to rehire a teacher might interfere with his liberty if it damaged his standing in the community or imposed a stigma or other disability foreclosing his freedom to obtain other employment. Here, however, the board's reasons for not renewing Mrs. Burden's contract were not of that type and were not publicized. The board offered her a private hearing, but by demanding a public hearing she herself created the possibility that her asserted deficiencies might become a matter of record. In that situation there was no deprivation of her liberty. *Cato* v. *Collins,* 539 F. 2d 656 (8th Cir. 1976).

Affirmed.

A. M. SEAWRIGHT, Jr. *v.* UNITED STATES FIDELITY AND GUARANTY CO., et al

81-148 627 S.W. 2d 557

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Frederick S. "Rick" Spencer,* for appellant.

*Bill H. Walmsley,* for appellees.

FRANK HOLT, Justice. This appeal is from a circuit court's order granting appellee's motion to dismiss appellant's complaint because of the exclusive remedy provisions

of the Workers' Compensation Law, Ark. Stat. Ann. § 81-1304 (Repl. 1976) and for failure to state a cause of action. Appellant insists the court erred in holding the Act as being the exclusive remedy for the asserted fraudulent conduct of the insurer inasmuch as the employer-insured was also the husband of the claimant. Therefore, the court erred in dismissing his complaint as not stating a cause of action.

The appellant, the insured, brought this independent action against appellee, his insurance carrier, for fraud or deceit, bad faith in tort, breach of a fiduciary relationship and intentional interference with a protected property interest in handling a workers' compensation claim. Appellee had accepted the claim of appellant's employee-wife as a compensable one, paying only certain medical expenses. However, it is alleged that the appellee's agent fraudulently misrepresented the extent or scope of the insurance coverage to appellant employer. As a result of the fraudulent misrepresentation, the appellant and his wife were lulled into not filing a claim for additional benefits within the statute of limitations to the detriment of the employee-wife and also to the detriment of her husband, the insured employer. He alleged that he had sustained substantial compensable losses which included workers' compensation benefits; i.e., his wife's past and future medical, hospital and disability benefits. Also, he had suffered "other economic losses" in amounts not fully ascertained and reserved the right to amend his complaint according to the proof.

This separate action by appellant was filed while his wife's claim for additional benefits was pending before the Workers' Compensation Commission. The Court of Appeals affirmed the Commission's finding that her claim for additional benefits was barred by the statute of limitations and there was nothing in the record to "show that the appellee insurance carrier, because of something it had done or failed to do, caused the appellant [wife] to fail to timely file her claim with the Arkansas Workers' Compensation Commission." *Seawright* v. *Seawright Super Saver et al,* 1 Ark. App. 26 (1981).

Here, appellant argues that he is bringing this action

for fraud and deceit as the employer-insured; therefore, his cause of action is not barred by the exclusive remedy provisions of the Workers' Compensation Law. § 81-1304, *supra.* That section provides:

> The rights and remedies herein granted to an employee . . . on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next of kin, or any one otherwise entitled to recover damages from such employer . . . .

Clearly, this act provides an exclusive remedy to recover damages from an employer based on an employee's injury. *Odom* v. *Arkansas Pipe & Scrap Material Company,* 208 Ark. 678, 187 S.W. 2d 320 (1945). This type of statute is generally inclusive of common law rights. Larson, Workmen's Compensation Law, Vol. 2A, § 66.00, p. 12-20.

The Workers' Compensation Law provides coverage for employees for "accidental injury arising out of and in the course of employment . . . ." § 81-1302 (d). Under the statute the primary obligation to pay compensation is on the employer, who is required at his peril to carry a policy of insurance. Ark. Stat. Ann. § 81-1304 (Repl. 1976). For reasons of public policy there is an essential unity between the employer and his compensation insurance carrier. Otherwise the employee might have two cases to litigate, one to establish the employer's substantive liability and the other to show that the insurer's policy covered that liability. *Empire Life & Hosp. Ins. Co.* v. *Armorel Planting Co.,* 247 Ark. 994, 449 S.W. 2d 200 (1970). In the case at bar the policy is not in the record, but in the usual form such a policy insures only the employer's liability as an employer, not as an individual. That liability on the part of the appellant was discharged when his employee's claim was barred by limitations. Any liability he may have had as a husband, not as an employer, is not shown by the complaint to be within the policy, it being affirmatively alleged that the policy was issued pursuant to the Worker's Compensation Law. The appellant's general liability as an individual might be covered by some form of insurance. However, it is not shown to be covered by the appellee's policy. We hold the court

correctly dismissed appellant's complaint for failure to state a cause of action.

Neither do we agree with the appellant that § 81-1304 is unconstitutional nor is it unconstitutionally applied here. See *Seawright* v. *Seawright Super Saver et al, supra; Hagger* v. *Wortz Biscuit Co.,* 210 Ark. 318, 196 S.W. 2d 1 (1946); and *Young* v. *G. L. Tarlton Contractor, Inc.,* 204 Ark. 283, 162 S.W. 2d 477 (1942).

Affirmed.

## John W. CAIN, D.P.M. *v.* ARKANSAS STATE PODIATRY EXAMINING BOARD

81-186 628 S.W. 2d 295

Supreme Court of Arkansas
Opinion delivered February 8, 1982
[Rehearing denied March 15, 1982.]

*Gary K. Hoffman* of *Brown and Fox, P.C.,* Kansas City, Mo., and *Robert L. Robinson, Jr.* of *House, Holmes & Jewell, P.A.,* of Counsel to *Brown and Fox,* for appellant.

*Steve Clark,* Atty. Gen., by: *Robert R. Ross,* Deputy Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The Arkansas State Podiatry Board revoked the license of John W. Cain, a podiatrist, to practice in this state. He appealed that decision to the Circuit Court of Pulaski County and the court found substantial evidence to support the Board's findings and affirmed its decision. Cain raises six arguments for reversal on appeal, five of which relate to questions of law. The sixth challenges the sufficiency of the evidence before the Board. None of the five questions of law were presented to the circuit court and the circuit court did not rule on them. Therefore, we may not consider them on appeal.

Dr. Cain is a resident of Bella Vista and has offices in Bentonville, Arkansas and Joplin, Missouri. He is licensed to practice podiatry in four states. Several complaints against him were filed with the State Podiatry Board and in 1979 the Board notified Dr. Cain that a hearing would be held on his treatment of four patients. The Board met on three separate occasions and heard testimony in this matter. Two of Dr. Cain's patients testified, Mr. Ernest Staudt and Charles Tosch. Dr. Daniel Taylor, a podiatrist who formerly practiced in Newport, Arkansas, and Dr. Carl Kendrick, an orthopedic surgeon, testified for the state. Marsha Clay-

brook, an employee of Blue Cross-Blue Shield, testified regarding claims submitted by Dr. Cain. Four expert witnesses, all podiatrists, testified on behalf of Dr. Cain. The Board requested, and counsel for Dr. Cain stipulated, that the records of twelve patients would be submitted to the Board for their study and consideration. Dr. Cain has been represented by three different attorneys in this matter. At his first two hearings he was represented by Mr. William R. Wilson of Little Rock. At his third hearing and on his appeal to the circuit court he was represented by Mr. Bob Scott of Little Rock. On this appeal he is represented by a firm from Kansas City, Missouri.

At the conclusion of the Board hearings, it found that Dr. Cain committed malpractice and failed to comply with a sufficient standard of care in the treatment of Mr. Ernest Staudt. The Board further found that Dr. Cain failed to maintain proper records of procedure and medication for his patients in violation of the rules and regulations of the board and Arkansas law.

Mr. Ernest Staudt of Rogers, Arkansas, an employee of Union Carbide, testified that he first went to Dr. Cain with a problem regarding his foot. He said that Dr. Cain told him his big toe needed straightening, that it would be a simple matter, and that he should be back to work in about three days. Staudt stated that he made arrangements so that he would not miss any work. He said before the operation he was asked to sign a consent form which was blank. He testified that he did not know his toe would be operated on until he was in Dr. Cain's office and he realized that the doctor was using a kind of drill on his toe. He went back to Dr. Cain twice a week for over four months and said that he regularly complained of pain and discomfort. He said that each time the doctor would simply remove a bandage which would be bloody and replace it with a clean one. After Staudt's complaints of pain the doctor prescribed some medication for him. In October of 1979, Staudt consulted another doctor and was referred to Dr. Taylor, a podiatrist in Newport. Dr. Taylor advised him that the operation he had was not successful and he had two choices. Staudt chose the treatment that would require a bone graft and it was

performed by Dr. Taylor. Some post-operative work was done by Dr. Kendrick of Fayetteville since he was nearby and more available to Mr. Staudt who lived in nearby Rogers.

Dr. Cain conceded in his testimony that he did not note in Staudt's medical records that he had prescribed the drug Dolene, which is a "sister" to Darvon. He also conceded that he did not prepare an operative report on the operation. In fact, the record on Mr. Staudt simply shows the days over several months that he visited Dr. Cain. Dr. Cain denied that the consent form was signed in blank and said his nurse had filled in the form. He conceded that he had told Mr. Staudt that he would "straighten" the big toe but said he went into detail with him about the operation. He denied that the toe was bloody each time Staudt came back but conceded that Staudt complained of pain and that he prescribed the Dolene for the pain. Dr. Cain and his counsel both conceded that the records in Staudt's case were not adequate.

Dr. Taylor, a podiatrist, who at the time of the hearings was practicing at the Veteran's Hospital in Milwaukee, Wisconsin, testified that Dr. Cain used the wrong procedure, that the second toe instead of the great toe should have been treated. Dr. Kendrick, although an orthopedic surgeon, was not qualified as an expert witness in podiatry; but he was allowed to testify that the procedures used by Dr. Cain were not satisfactory. Dr. Kendrick said that he and the president of the county medical society visited Dr. Cain about complaints that had been made about his operations and procedures.

Miss Marsha Claybrook, an employee of Blue Cross-Blue Shield, testified that because of Dr. Cain's numerous claims it was decided that all of his claims to Blue Cross-Blue Shield would be placed on a "one hundred percent review". That is, everything that was sent in in Dr. Cain's name was to be reviewed by a doctor before he was paid. The reason given was that his procedures exceeded the normal in several categories. For example, in one quarter his claims for x-rays of the foot were 200% above the normal for x-rays by a podiatrist. On his osteectomies his percentage was 1,400% above normal. In urinalysis during one quarter he was

2,751% above normal. She said, however, that there had been no evidence of any fraud in his claims.

Of the twelve patients' records which Dr. Cain submitted to the Board, the Board found that ten of those records did not contain *any* record of the treatment of the patient but only records of insurance claims. This was not disputed.

Dr. Cain called four witnesses who were podiatrists and they all testified that Dr. Cain used proper procedures and was not guilty of any malpractice in the treatment of Staudt. Dr. Don S. Pritt, one of those witnesses, testified that he had been in practice for twenty-five years and had known Dr. Cain for many of those years. He said that Dr. Cain had an excellent reputation as a podiatrist. Through personal observations he knew that Dr. Cain acted with extreme care both before and after an operation. Dr. Albert R. Brown, a podiatrist, licensed in six states and a Canadian province, and chief podiatrist at Elliott General Hospital in Detroit, Michigan for a number of years, testified that there were at least twenty different procedures that could have been used on Staudt and the procedure chosen by Dr. Cain was appropriate.

After the third hearing in this matter and after the Board had issued its findings of fact and conclusions of law, Cain's attorney at his third hearing, Mr. Bob Scott, filed a petition for review with the Pulaski County Circuit Court. Nowhere in that petition is any question raised regarding any legal issue. It simply asks that the circuit court review the findings of the Board. The circuit court heard further testimony from Dr. Cain which, essentially, regarded his experience and reputation. After that, the court issued two relevant findings: There was substantial evidence to support the Board's findings and the Board did not act arbitrarily.

At no time did Dr. Cain's counsel argue to the circuit court that there was anything improper in the notice to Dr. Cain, the board had no authority to act as it did or any impropriety existed except the substantiality of the evidence. Now on appeal, for the first time, five legal arguments are raised with regard to why the circuit court's judgment

should be reversed and the Board's findings dismissed. First, it is argued that Ark. Stat. Ann. § 72-307 (Repl. 1979) specifically defines what "grossly unprofessional" conduct is, and it does not include the misconduct attributed to Dr. Cain by the Board. While it is conceded the Board has authority to promulgate rules and regulations, it is argued these rules cannot exceed the limits of Ark. Stat. Ann. § 72-307. Second, it is argued that the Board's rules and regulations had not been filed in the Circuit Court of Benton County as required by law and were therefore ineffective. The record reflects that they were filed with the Secretary of State and mailed to the Benton County Circuit Clerk but not filed. A copy of them was provided to counsel for Cain before the first hearing. Third, it is argued that Cain was denied a fair and impartial hearing because some of the Board members were prejudiced as evidenced by their questions during the hearing. At the third hearing counsel for Cain invited the Board to ask all the questions rather than use the usual format of counsel asking questions. Fourth, it is argued that a fair notice was not given to Dr. Cain because he was not notified that any inquiry would be made regarding medical records. His counsel at the first two hearings stipulated that twelve records could be considered by the Board. Fifth, it is argued that Ark. Stat. Ann. § 72-307 requires that both unprofessional conduct *and* dishonest conduct must be found, and since the Board found no dishonest conduct the findings must fail. Finally, it is argued there was no substantial evidence to uphold the Board's order.

Since the only issue presented to the circuit court was that of substantial evidence, that is the only issue we can consider on appeal. *Wilson* v. *Lester Hurst Nursery, Inc.*, 269 Ark. 19, 598 S.W. 2d 407 (1980); *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W. 2d 21 (1980); *Jones* v. *Reed*, 267 Ark. 237, 590 S.W. 2d 6 (1979). Considering that issue, we recognize that it is the duty of an administrative board, such as the Podiatry Board, to hear the evidence, decide the credibility of witnesses and make findings of fact. *Terrell Gordon* v. *Gordon L. Cummings*, 262 Ark. 737, 561 S.W. 2d 285 (1978); *Arkansas Savings & Loan Association Board* v. *Central*

*Arkansas Savings & Loan Association,* 256 Ark. 846, 510 S.W. 2d 872 (1974).

Our review of an administrative decision is to be based on the entire record, not merely on that evidence that supports the administrative ruling. In that review the record must reflect substantial evidence for the Board's findings. *White County Guaranty Savings & Loan* v. *Farmers & Merchants Bank of Des Arc,* 262 Ark. 893, 562 S.W. 2d 582 (1978). But it is not the place of the circuit court or us to substitute our judgment for that of the Board as to the facts.

It is not undisputed that the records were inadequate. The Board chose to believe Mr. Staudt and the witnesses called by the state regarding the malpractice finding and certainly there is substantial evidence in the record to support that finding.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I must dissent from the majority opinion for several reasons. First is that the findings of the Board did not comply with the terms of the applicable statute. Under Ark. Stat. Ann. § 72-307 (Repl. 1979), before revoking a license the Board must find a podiatrist to be guilty of grossly unprofessional and dishonest conduct. No such findings were made in this case. The words of the statute should be interpreted in their accepted meaning in common language. *Hicks* v. *Arkansas State Medical Board,* 260 Ark. 31, 537 S.W. 2d 794 (1976). Therefore, the findings are insufficient to allow the Board to revoke the license of the appellant. Ark. Stat. Ann. § 72-307 (a) states in part:

> The words "unprofessional and dishonest conduct" shall be held to mean: The wilful betrayal of a professional secret, having professional connections with, or lending the use of one's name to an unregistered podiatrist, or having professional connection with any one who has been convicted in any court of

> any criminal offense whatsoever; being guilty of offense involving moral turpitude, habitual intemperance, or being habitually addicted to the use of morphine, opium, cocaine or other drugs for other use than legal and legitimate purposes.

Another matter which was wrong with the proceeding below was that the rules had not been filed in the Circuit Court of Benton County as required by law. The Board should at least be expected to comply with the law itself before taking away the license of any person engaged in the practice of podiatry.

I realize that the majority is correct in holding that our review on administrative decisions is based on the entire record and that the record must reflect substantial evidence to support the findings of the Board. *White County Guaranty Savings & Loan Ass'n.* v. *Farmers & Merchants Bank of Des Arc,* 262 Ark. 893, 562 S.W. 2d 582 (1978). However, in the present case four podiatrists testified on behalf of the appellant and two of them testified that appellant used extreme care both before and after operations. Summed up, the testimony of the four podiatrists called on behalf of the appellant was highly favorable to him. No place in the record do I find any statement that the appellant was guilty of dishonesty. Therefore, it is my opinion that there is no substantial evidence upon which to base a finding that the appellant was guilty of "grossly unprofessional and dishonest conduct." Consequently I would reverse and dismiss.

Charles RAGLAND, Commissioner of Revenues,
Department of Finance & Administration *v.*
ARKANSAS VALLEY COAL SERVICES, INC.

81-189 627 S.W. 2d 559

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Kelly S. Jennings,* for appellant.

*Bethell, Callaway & Robertson,* by: *Bruce H. Bethell,* for appellee.

DARRELL HICKMAN, Justice. The question presented is whether machinery used by the appellee, Arkansas Valley Coal Services, Inc., to crush and blend coal qualifies for an exemption allowed by Arkansas's compensating (or use) tax law. Ark. Stat. Ann. § 84-3106 (D) (2) (Repl. 1980). The statute exempts equipment or machinery directly used in manufacturing and specifies mining as a type of manufacturing. Arkansas Valley paid a use tax of $2,383.14 under protest. The trial court held that Arkansas Valley was an

integral part of the coal mining industry within the meaning of the statute and therefore entitled to the exemption. We disagree.

The facts are undisputed. Arkansas Valley buys coal from mining companies, crushes and blends it, and then sells it to steel mills. Arkansas Valley argues that when they crush and blend coal they are converting a raw material into a useable and salable product, a process that would be included in the ordinary meaning of "manufacturing." However, our cases have held that merely putting raw material into a marketable form is not manufacturing. In *Scurlock* v. *Henderson,* 223 Ark. 727, 268 S.W. 2d 619 (1954), we held that cotton ginning was not manufacturing.[1] In *Gaddy* v. *Hummelstein Iron & Metal, Inc.,* 266 Ark. 1, 585 S.W. 2d 1 (1979), we said that a scrap metal dealer who bought scrap metal, cleaned and sorted the different kinds of metal, compressed it into cubes and sold it, was not a manufacturer. In *Hummelstein* we elaborated on the rule applied in *Scurlock*:

> The controlling principle, as we see it, is simply that the cotton ginner begins and ends with the same commodity, cotton, in an unmanufactured form, just as the appellee begins and ends with scrap metal that is yet to be made into something else.

Arkansas Valley's process does not change the essential identity of the coal. The coal is simply crushed and blended. It is a salable product when Arkansas Valley buys it and merely crushing it into smaller pieces for use as fuel is not "manufacturing." As the United States Supreme Court confirmed in *East Texas Motor Freight Lines, Inc.* v. *Frozen Foods Express,* 351 U.S. 49 (1955):

> Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But

[1]The statute then in effect, Act 487 of 1949, § 6, was amended in 1955, after *Scurlock* v. *Henderson,* to specifically include cotton ginning as a form of manufacturing. The case, nevertheless, provides guidelines helpful in determining what constitutes manufacturing.

> something more is necessary, . . . There must be a transformation; a new and different article must emerge, having a distinctive name, character or use.

The admitted facts preclude any finding that Arkansas Valley is engaged in "mining" within the meaning of the Statute. BLACK'S LAW DICTIONARY (5th ed. 1981) defines "mining" as "the process or business of extracting from the earth the precious or valuable metals either in their native state or in their ores." Arkansas Valley buys the coal, it does not mine it.

A taxpayer must clearly establish his right to an exemption. If there is any doubt as to that right, the exemption must be denied. *S.H. & J. Drilling Corp.* v. *Qualls,* 268 Ark. 71, 593 S.W. 2d 178 (1980); *Gaddy* v. *Hummelstein Iron & Metal, supra.* Arkansas Valley has not clearly established its right to the exemption allowed by Ark. Stat. Ann. § 84-3106 (D) (2).

Reversed.

Charlene STOKES, Widow of Carl STOKES *v.* Ronald E. STOKES, Executor of the Estate of Carl J. STOKES, Deceased

81-192 628 S.W. 2d 6

Supreme Court of Arkansas
Opinion delivered February 8, 1982
[Rehearing denied March 8, 1982.]

*Jonathan P. Shermer, Jr.,* for appellant.

*Richard L. Peel,* for appellee.

JOHN I. PURTLE, Justice. Carl J. Stokes died testate on January 15, 1979. His widow, Charlene, subsequently filed an election in probate to take against the will pursuant to Ark. Stat. Ann. § 60-501 et seq. (Repl. 1971). Her election was upheld by the probate court but on appeal to this court we declared the statutes unconstitutional. *Stokes* v. *Stokes,* 271 Ark. 300, 613 S.W. 2d 372 (1981). On April 29, 1981, the widow filed a new election for assignment of dower pursuant to Act 714 of 1981, codified as Ark. Stat. Ann. § 60-501 (Supp. 1981). The probate court dismissed her second election petition. At the same time the court dismissed a petition by the executor for an accounting on certain properties which were being managed by the widow as well as a third party complaint which had been filed by the widow.

The widow appeals from the order rejecting her election to take against the will, and the executor cross-appeals from the order refusing to require an accounting by the widow. We affirm both on direct and cross-appeal.

On February 23, 1981, we declared unconstitutional the original statute under which the widow claimed. Subse-

quently the legislature enacted a new statute which was not gender based and allowed a widow to take the same as she could have taken under the old statute. Act 714, under which the widow presently claims, was enacted by the legislature on March 25, 1981. In *Huffman* v. *Dawkins,* 273 Ark. 520, 622 S.W. 2d 159 (1981), we held that Act 714 cannot be applied retroactively. Appellant's claim arose prior to enactment of Act 714 and she cannot prevail under her present claim. We have previously declared the statute under which she claimed her first election to be unconstitutional. Therefore, the appellant is not entitled to dower rights from the estate of Carl J. Stokes.

On the cross-appeal we are unable to hold the judge was clearly erroneous. It appears from the abstract and briefs that the petition in probate for accounting by the executor and the third party complaint by the widow were dismissed without prejudice to have the matters heard in the chancery court. Chancery court has the power to have an accounting even though it could have been had in the probate court where the matter was pending. Ark. Stat. Ann. § 62-2004 (b) (Repl. 1971).

Affirmed on direct and cross-appeal.

Carrie Jean SPENCER *v.* Monroe Carl SPENCER

82-4 627 S.W. 2d 550

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Marsha L. Choate,* for appellant.

*G. Alan Wooten* and *Toni Swift-Nolan,* of *Warner & Smith,* for appellee.

JOHN I. PURTLE, Justice. Appellant filed suit for divorce and appellee counterclaimed for a divorce. At the commencement of the trial the appellant amended her complaint to ask for separate maintenance. The trial court rejected appellee's complaint for a divorce and granted appellant a decree of divorce from bed and board only. The property rights were divided in accordance with Ark. Stat. Ann. § 34-1214 (Supp. 1979).

Appellant appeals on the ground that the chancellor erred in granting her a divorce from bed and board and in making disposition of the property. We agree with the appellant that the chancellor was incorrect in awarding a decree from bed and board only. The appellee brought a

cross-appeal and argued that he should have been granted a divorce. We disagree with appellee's contention that he should have been granted a divorce on the evidence presented.

The facts in this case are relatively unimportant and not in dispute. Appellee clearly failed to prove his case for divorce, and the appellant obviously proved she had the right for divorce. The question before this court is whether the chancellor erred in awarding a greater degree of divorce than the appellant sought; also, whether or not property may be distributed under the statute when less than an absolute divorce is granted.

Ark. Stat. Ann. § 34-1202 (Supp. 1981) gives the chancery court power to dissolve and set aside a marriage contract not only from bed and board but from the bonds of matrimony. This portion of the statute has been in effect for many years. We held in the case of *Womack* v. *Womack,* 247 Ark. 1130, 449 S.W. 2d 399 (1970), that the statute gave chancery court the inherent authority under the broad powers of equity to grant a decree of separate maintenance. Although there is no statutory authority for such, we have continued to hold that it is within the power of the chancery court to grant a decree of separate maintenance. Prior to Act 705 of 1979, Ark. Stat. Ann. § 34-1214 provided: "In every final judgment for divorce from the bonds of matrimony . . ." the property rights were to be disposed of by the court. The present act as amended states: "At the time a divorce decree is entered . . . " the property shall be divided in accordance with the formula set forth therein. We have been unable to find any case holding that property rights are to be adjudicated upon the rendition of a decree of separate maintenance. We held in the recent case of *Mooney* v. *Mooney,* 265 Ark. 253, 578 S.W. 2d 195 (1979), that the property belonging to the parties could not be divided unless a divorce was granted.

In the present case the record clearly shows that appellant, with the consent of the court and knowledge of the appellee, amended her complaint to seek only separate maintenance. Therefore, we think this is the only type of decree which could have been entered in the present case. We

are not unmindful of the fact that the appellant's solicitor prepared and approved it as to form. However, it is customary for one of the parties' solicitors to be requested to prepare the decree. This is not binding to the extent that it would prevent an appeal from that order even though it had been approved as to form by the appellant.

In view of the fact that the court did not have the authority to dispose of the property rights the case is remanded with directions to enter an appropriate order of a decree of separate maintenance.

Reversed and remanded.

DUDLEY, J., concurs.

ROBERT H. DUDLEY, Justice, concurring. I concur, but I feel that there may be a law student or a young lawyer who does not understand the distinctions in the three causes of action discussed in the majority opinion. It is for that person that I set out the differences:

1. An absolute divorce, or divorce from the bonds of matrimony or divorce a vinculo matrimonii, is a statutory action based on the grounds set out in Ark. Stat. Ann. § 34-1202 (Supp. 1981). Property must be divided upon granting an absolute divorce. § 34-1214 (Supp. 1981). Corroboration is required in contested cases. §§ 34-1207 and 34-1207.1 (Repl. 1962 and Supp. 1981).

2. A limited divorce, or a divorce from bed and board, or a divorce a mensa et thoro, is a statutory action based on the same grounds as those specified for an absolute divorce. *Lytle* v. *Lytle,* 266 Ark. 124, 583 S.W. 2d 1 (1979). Property must be divided upon the granting of a divorce. § 4, Act 799 of 1981.[1] Corroboration is required,

[1]Section 4 of Acts 1981, No. 799, read: "It is hereby found and determined by the General Assembly that under the present Arkansas law, there is no provision for a 'decree of legal separation'; that since there is no such provision, paragraph (3) of subsection (B) of Section 461 of the Civil Code as amended by Act 705 of 1979 actually has no application; that in a recent decision, the Arkansas Supreme Court carefully distinguished the

§ 34-1207 and § 34-1207.1, but see, *Mason* v. *Mason,* 248 Ark. 1177, 455 S.W. 2d 851 (1970).

3. An independent cause of action will lie for alimony. Reference is made to the action by Ark. Stat. Ann. § 34-1201 (Repl. 1962) but it is maintained under the broad power of equity. *Wood* v. *Wood,* 54 Ark. 172, 15 S.W. 459 (1891). There are no meaningful distinctions between the action for alimony and today's action for separate maintenance. See *Rosenbaum* v. *Rosenbaum,* 206 Ark. 865, 177 S.W. 2d 926 (1944). In an action for separate maintenance it is unnecessary to establish statutory grounds, all that must be established are a separation and an absence of fault. *Hill* v. *Rowles, Chancellor,* 223 Ark. 115, 264 S.W. 2d 638 (1954). In a suit for separate maintenance there is no statutory requirement for corroboration. *Gilliam* v. *Gilliam,* 232 Ark. 765, 340 S.W. 2d 272 (1960). Property cannot be divided in a separate maintenance proceeding although possession may be awarded. Child custody actions between parents are actions derivative of divorce or separate maintenance. There is no independent cause of action by one parent against the other solely for child custody. *Robins* v. *Arkansas Social Services,* 273 Ark. 241, 617 S.W. 2d 857 (1981).

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proof requirements of absolute divorce and divorce from bed and board; that this Act is designed to clarify paragraph (3) of subsection (B) of Section 461 of the Civil Code, as amended, to specifically make the provisions thereof with respect to the division of property applicable not only in decrees of absolute divorce but also the decrees of divorce from bed and board; that this Act should be given effect immediately to render the provisions of present property division law compatible with the divorce law and cases. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved March 28, 1981.

Cloyd H. BARNES *v.* Mary K. BARNES

81-179 627 S.W. 2d 552

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Bill Walters,* of *Walters, Davis & Cox, P.A.,* for appellant.

*Rex M. Terry,* of *Hardin, Jesson & Dawson,* for appellee.

ROBERT H. DUDLEY, Justice. On September 10, 1971, Cloyd and Etta Barnes sold thirty acres to J. B. and Mary K. Barnes, their son and daughter-in-law. The conveyance was by warranty deed with no reservation by the grantors. The deed was executed, delivered and recorded on the same day. The grantees, the son and daughter-in-law, simultaneously executed an instrument styled "Sales Agreement." It sets forth the terms of payment, which have been paid-in-full, and concludes "Cloyd Barnes may have partnership use of

the above described property as long as he wishes." This instrument was executed only by the son and daughter-in-law and was not recorded at the time. A little over eight years later, on December 19, 1979, the son died and Mary K. Barnes, as survivor, acquired absolute title. Eight days later, on December 27, 1979, Cloyd Barnes filed for record the sales agreement. The daughter-in-law, Mary K. Barnes, then filed suit seeking a declaratory judgment that Cloyd Barnes, appellant, had no interest in the property. The appellant asked that his partnership use of the property be confirmed. The issues of reformation, estoppel, or damages were not raised below. On the sole issue raised, confirmation of partnership use, the chancellor held that the warranty deed was absolute on its face and that the sales agreement was void for vagueness. We affirm.

The deed is absolute on its face. The appellant, one of the grantors, reserved no interest in the title. Ark. Stat. Ann. § 50-403 (Repl. 1971) provides that an estate of fee simple is presumed to be conveyed by any deed of conveyance unless that estate is expressly limited by words in the deed. Appellant urges us to examine the sales agreement and use rules of construction to interpret the deed. We decline, because we do not resort to rules of construction when a deed is clear and contains no ambiguities. *Coffelt* v. *Decatur School District No. 17,* 212 Ark. 743, 208 S.W. 2d 1 (1948). We apply rules of construction only when the meaning of a deed or the intention of the parties is ambiguous, uncertain or doubtful. *Gibson* v. *Pickett,* 256 Ark. 1035, 512 S.W. 2d 532 (1974). The sales agreement is merged into the clear deed. *Duncan* v. *McAdams,* 222 Ark. 143, 257 S.W. 2d 568 (1953).

Additionally, the chancellor was correct in reasoning that even if the deed had not been clear the appellant could not prevail because of the vagueness of the terms "partnership use" and "as long as he wishes." These terms, as used, are vague to the extent that they are not susceptible to being understood. A court cannot enforce a contract which it cannot understand. Indeed, there is a basic question of whether the instrument is a contract since appellant did not execute it. Aside from that question, the language used is incomprehensibly vague, not simply ambiguous in the

sense it is susceptible to two or more different meanings. For example, it is impossible to determine if the word "partnership" was executed or executory and was with the other grantor, the son, the appellee daughter-in-law, some other person, or one, some or all of them. It is impossible to determine when the partnership would begin or would terminate and upon what conditions. It is impossible to know what interest a "use" creates, whether it is merely a possessory interest or is an ownership interest, whether it could be conveyed, what, if anything, the user pays and how that amount is decided. It is impossible to determine how a use is divided among users. "As long as he wishes" is equally vague. It is impossible to understand whether the appellant can convey his use, or whether it is the reservation of some interest for as long as appellant is able to use the acreage, or for life. Appellant may wish his grandchildren and great-grandchildren have the use of the property and could cloud the title into perpetuity. Such vagueness is not enforceable.

The deed is clear and conveys absolute title and is not subject to modification by a vague instrument.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent from the majority opinion which I feel is an incorrect interpretation and application of the law as well as a most unjust decision. I realize we are frequently forced by law to make unjust decisions but this one was freely and voluntarily made by the court.

This is a typical case of parents wishing to see that their children receive their property at the time of their death. However, the parents in this case deeded a small farm to their son and at the same time reserved the right of the father to work the land as long as he desired. There is no indication that the "sales agreement" was not executed before the "warranty deed." No doubt, the deed was given with the expectation that it would complete the transaction which had been agreed upon in the "sales agreement." The

parents, no doubt, desired to keep peace and harmony in the family and therefore included the name of their daughter-in-law, the present appellee, on the deed with the name of their son. This farm had been jointly tended by the father and the son many years before the instruments mentioned above were executed. In fact, they continued to tend the property together and share in the profits until the death of the son in 1979. The father even divided the profits of the farm with the widow of his son, his daughter-in-law, the present appellee, during the year following his son's death.

The widow moved to Texas and in 1980 filed this suit to get title free and clear in her own name. A more unjust and unconscionable claim could not be presented to a court of equity. I will not be a part of allowing this woman to take this property from these old people.

These two instruments were executed simultaneously and all parties acknowledged that they knew what the instruments were. Mary K. Barnes, in addition to signing the "sales agreement," accepted the benefits of the agreement for many years and then after her husband died she decided to renege on the agreement. At least since 1908 we have held that the conduct of the parties to an agreement is evidence of the parties' understanding and intentions concerning the agreement. *Field* v. *Morris,* 88 Ark. 148, 114 S.W. 2d 206 (1908). No one can seriously deny that the words in the agreement were carried out for a number of years and the action of the parties is clearly in compliance with the plain meaning of the language used in these agreements.

I agree with the appellant's statement that it is a general rule that in construing separate writings that make up one contract even though there were contemporaneous instruments drawn at the same time such instruments will be construed as constituting one contract. *Quillen* v. *Twin City Bank,* 253 Ark. 169, 485 S.W. 2d 181 (1972). The parties in the present case did approximately the same thing as has been done thousands of times when a grantor gave an absolute deed and at the same time the grantee executed a mortgage on the same property. Therefore, I would reverse and hold that the father has the right to work this land as long as he lives or desires.

Howard K. GILES, Treasurer of Miller County, Arkansas *v.* TEXARKANA SCHOOL DISTRICT NO. 7 OF MILLER COUNTY, Arkansas, and FOUKE SCHOOL DISTRICT NO. 15 OF MILLER COUNTY, Arkansas

81-183 627 S.W. 2d 554

Supreme Court of Arkansas
Opinion delivered February 8, 1982

*Jim Gunter,* Pros. Atty., by: *Kirk D. Johnson,* Deputy Pros. Atty., for appellant.

*Arnold, Lavender, Rochelle, Barnette & Franks,* by: *G. William Lavender,* for appellees.

PER CURIAM. The merits of this appeal cannot be reached because the abstract is so deficient we cannot follow, much less decide, the allegations of error. Appellant contends that the chancery court lacked jurisdiction to decide the claim, that its motion to dismiss should have been granted, that there was an adequate remedy at law and that no grounds for injunctive relief exist. We are asked to decide these procedural and substantive issues with no abstracting of the complaint, answer, motion to dismiss, the final judgment, or any of the exhibits. Where that occurs we have no real choice but to affirm the case. See our Rule 9 (e) (2). *Smith* v. *Smith,* 263 Ark. 578, 567 S.W. 2d 88 (1978); *Bank of Ozark* v. *Isaacs, et al.,* 263 Ark. 113, 563 S.W. 2d 707 (1978); *Dairyland Insurance Co.* v. *Carter,* 261 Ark. 795, 551 S.W. 2d 211 (1977).

Affirmed.

DUDLEY, J., not participating.

FARM BUREAU MUTUAL INS. CO. OF ARKANSAS, INC. *v.* James HENLEY et al

81-187 628 S.W. 2d 301

Supreme Court of Arkansas
Opinion delivered February 16, 1982
[Rehearing denied March 22, 1982.]

*Butler, Hicky & Hicky, Ltd.*, by: *Stephen A. Routon,* for appellant.

*Frierson, Walker, Snellgrove & Laser,* for appellees Henley.

*Daggett, Daggett & Van Dover,* for appellees Dane.

RICHARD B. ADKISSON, Chief Justice. At the close of appellant's case, the St. Francis County Circuit Court directed a verdict in favor of the appellees on all three counts of appellant's complaint. On appeal we reverse in part and affirm in part.

On August 30, 1975, appellees Gene Dane and David Henley, both six years old, were playing close to the trash bins of a gift shop, Cricket on the Hearth, in Forrest City. The boys began to light matches and throw them into a trash bin, starting a fire. The boys then threw dirt on the fire to put it out and returned home. Unfortunately, the fire continued

to burn and spread from the trash bin to the gift shop, causing considerable damage. Appellant insurance company paid for the damage and now brings suit to recover the amount of the loss.

I

The first count of appellant's complaint alleged that the appellees' parents were negligent in the supervision of their minor sons. The trial court directed a verdict on this count, ruling the evidence was insufficient.

The issue of negligent supervision was thoroughly discussed in *Bieker* v. *Owens,* 234 Ark. 97, 350 S.W. 2d 522 (1961) where we stated:

> Since each human mind and personality is exclusively that of the individual possessing it, it would be unreasonable to place an absolute responsibility for the acts of another on any person. But where the parent (1) has the opportunity and ability to control a minor, and (2) has knowledge of the tendency or proclivity of the minor to commit acts which could normally be expected to cause injury to others, and (3) after having such opportunity, ability and knowledge has failed to exercise reasonable means of controlling the minor or appreciably reduce the likelihood of injury to others because of the minor's acts, the parent should be made to respond to those who have been injured by such acts of the minor. . . .

We then stated that the parent is not liable when there is nothing to show any knowledge by the parent of a line of conduct on the part of the child.

In the case before us here, the only evidence on the issue of negligent supervision was the testimony of all four parents. Although both the Henleys and the Danes had the opportunity and ability to control their sons, this testimony failed to show they knew or should have known that their sons had a tendency to commit injurious acts. Mrs. Henley testified that she had never received a complaint about David

destroying property, that to her knowledge David did not carry matches, and that she had not had any problems with him in this regard. Mr. Henley testified that David might have been around fireworks, but to his knowledge David had never played with matches; also, he stated that he had never received complaints about David's character or conduct.

Mrs. Dane testified that she kept matches in a drawer three feet off the floor, but that she had not known Gene to play with matches prior to this incident. Mr. Dane testified that nothing had ever come up to cause him to give Gene a lecture about matches; that Gene carried the trash out to a barrel but had never set it on fire because he was not permitted to use matches.

As to the sufficiency of the evidence, the test for the trial court in ruling on a motion for a directed verdict by either party is to take that view of the evidence that is most favorable to the non-moving party and to give it its highest probative value, taking into account all reasonable inferences deducible from it; after viewing the evidence in this light, the trial court should: (1) grant the motion only if the evidence is so insubstantial as to require that a jury verdict for the non-moving party be set aside, or (2) deny the motion if there is substantial evidence to support a jury verdict for the non-moving party. *Miller* v. *Tipton,* 272 Ark. 1, 611 S.W. 2d 764 (1981); *O'Brian* v. *Primm,* 243 Ark. 186, 419 S.W. 2d 323 (1967); *St. Louis Southwestern Railway Co.* v. *Farrell, Adm'x.,* 242 Ark. 757, 416 S.W. 2d 334 (1967). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W. 2d 748 (1980).

Since there is insufficient evidence from which to find negligent supervision on the part of the boys' parents, the trial court is affirmed in granting a directed verdict on this issue.

II

The second count of appellant's complaint alleged that

the minor appellees had trespassed upon the property of the owners of the gift shop. The trial court directed a verdict on that issue, stating that a child under seven could not be a trespasser. The trial court based its ruling on *Ark. Power & Light Co.* v. *Kilpatrick,* 185 Ark. 678, 49 S.W. 2d 353 (1932) and *Cooper Adm.* v. *Diesel Ser., Inc.,* 254 Ark. 743, 496 S.W. 2d 383 (1973). *Kilpatrick* did hold that a seven-year-old child could not be a trespasser, but an attractive nuisance was present in that case. *Cooper* seemed to extend the principle that a seven year old cannot be a trespasser to cases in which no attractive nuisance is present. After reconsidering our decisions in those cases, we affirm our holding in *Kilpatrick,* but to the extent that *Cooper* is inconsistent with our decision in this case, it is overruled.

In *Moore* v. *Wilson,* 180 Ark. 41, 20 S.W. 2d 310 (1929) we stated that, as a general rule, an infant is liable for his torts in the same manner as an adult. The Court in *Brown* v. *Dellinger,* 355 S.W. 2d 742 (Tex. 1962) correctly stated:

> Where the only intention necessary to the commission of the tort is to perform the physical act in question, as in trespass to property or person, it seems settled that even an infant of quite tender years may be held liable.

We hold that a six-year-old child may be a trespasser which is a question of fact for the jury. Therefore, we reverse on the narrow issue presented.

III

The third count of appellant's complaint was based on Act 283 of 1975 which provided:

> Destruction of property by minors — Liability of parents. — The State, or any county, city, town or school district, or any person, corporation or organization shall be entitled to recover damages in an amount not in excess of One Thousand Dollars ($1,000) in a court of competent jurisdiction from the parents of any minor under the age of eighteen (18) years, living with the parents, who shall maliciously or willfully destroy

> property, real, personal or mixed, belonging to the State or any such county, city, town or school district, or any person, corporation or organization.

Based upon the undisputed facts of this case the trial court directed a verdict for appellees on this issue, ruling that the appellees had not acted willfully. (Appellant did not allege the children's actions were malicious.)

"Willfully" within the context of this statute, which must be strictly construed because of its penal nature, means an intent to do the act in question. This definition comports with *Webster's Third New International Dictionary* which defines willful as self-determined, voluntary, and intentional. In this case the evidence is undisputed that appellees willfully threw matches in the trash bin, but this is not to say that they willfully set fire to the gift shop. There is no evidence that the boys actually intended to set fire to the shop. Under these circumstances the damage to the shop may have been the result of their carelessness, but not their willfulness. The trial court's ruling on this issue is affirmed.

Reversed in part; affirmed in part.

HOLT and DUDLEY, JJ., dissent.

FRANK HOLT, Justice, dissenting. I cannot agree with that portion of the majority opinion which holds that the six year old children could be trespassers upon appellant's property and, therefore, the trial court erred in holding otherwise. The majority correctly notes that the trial court, in granting a motion for a directed verdict on this issue, relied upon *Arkansas Power & Light Co.* v. *Kilpatrick,* 185 Ark. 678, 49 S.W. 2d 353 (1932); and *Cooper* v. *Diesel Service, Inc.,* 254 Ark. 743, 496 S.W. 2d 383 (1973). In *Kilpatrick* we said: "Children the age of the injured boy [7], going on other's property, are not trespassers." It is true that case involved an attractive nuisance (an electric substation). In *Cooper,* however, we made it clear that our holding in *Kilpatrick* is not limited to attractive nuisance cases and reaffirmed *Kilpatrick* that a seven year old boy, who goes upon the property of another, is not a trespasser because of

his incapacity as an infant of tender age. As I read *Kilpatrick* and *Cooper,* this court is committed to the rule of law that infants of the tender age of six are incapable of committing trespass. Other jurisdictions support this reasoning. See *Queen Insurance Company* v. *Hammond,* 132 N.W. 2d 792 (Mich. 1965); *Seaburg* v. *Williams,* 161 N.E. 2d 576 (Ill. 1959); *DeLuca* v. *Bowden,* 329 N.E. 2d 109 (Ohio 1975); and *Johnson* v. *Butterworth,* 180 La. 586, 157 So. 121 (1934).

The majority cites *Moore* v. *Wilson,* 180 Ark. 41, 20 S.W. 2d 310 (1929), as authority that an infant, as a general rule, is liable for his tort like that of an adult. That case is inapposite. The minor there was involved in a traffic mishap when driving a car. His age is not specified. The court characterized him as a minor and a "young man."

I would affirm.

DUDLEY, J., joins in this dissent.

Donald R. KIRK *v.* THE CITY OF LITTLE ROCK et al

81-203 628 S.W. 2d 21

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Henry & Duckett,* by: *David P. Henry,* for appellant.

*R. Jack McGruder,* City Atty., by: *Carolyn B. Witherspoon,* Asst. City Atty., for appellees.

*Wright, Lindsey & Jennings,* for appellees-intervenors.

RICHARD B. ADKISSON, Chief Justice. Appellee, City of Little Rock, denied an application by appellant, Donald R. Kirk, to rezone 5.9 acres from R-2, single family residential, to MF-12, multifamily. Appellant then filed a complaint in Pulaski Chancery Court seeking to enjoin appellee from interfering with his desired use of the property. The trial court permitted the Caring Property Owners Association, an unincorporated association formed to oppose rezoning of the property in question, to intervene. The chancellor held the denial of the rezoning application by appellee was not arbitrary or capricious and did not deprive appellant of all reasonable use of his property. On appeal we affirm.

The property in question is located on the north side of West Markham Street, three blocks east of the intersection of

Markham and Rodney Parham, and across the street from Brady Elementary School. It is irregular in shape with frontage access to Markham Street through a corridor 50 feet wide and 229 feet deep. It is divided by a drainage ditch; the northern part is ruggedly steep and the southern part is flat.

The property is bordered on the north and east by property zoned single family residential, R-2; on the west by R-2 and R-5, apartment; and on the south by property zoned R-5 and West Markham. Appellant's property is currently zoned R-2; appellant requested rezoning to MF-12 (multi-family, 12 units per acre).

The only issue before the trial court was whether the City acted arbitrarily, capriciously, or unreasonably in refusing to rezone appellant's property. To prove that the City had acted unreasonably, appellant introduced evidence to show that he would be deprived of any reasonable use of his property unless it was rezoned as requested.

Appellant's experts testified that the northern portion of the property could not be developed as single family residential because of the cost, and that the best use for the tract would be a multifamily development of some sort. They gave examples of apartment complexes that adjoin single family residence areas in several parts of Little Rock. However, none of appellant's witnesses testified that the only appropriate zoning for appellant's property was MF-12.

A witness for the appellees, Professor Robert Wright, a land use expert, testified that rezoning the northern portion of the property to MF-12 would not be a compatible land use because it is surrounded by property zoned R-2 on three sides. Professor Wright described this as spot zoning which is shunned by land use experts as improper. Other experts for appellees testified that it would be inappropriate to extend apartments into the adjacent single family developments and that MF-12 zoning would have an adverse impact on these areas. Several property owners testified that they objected to the rezoning because of the possible devaluation

of their homes and because of potential traffic problems which could be created by an apartment complex.

The chancellor resolved this conflict in testimony in favor of appellees, finding that rezoning the entire tract MF-12 would be incompatible with the surrounding neighborhood and would have an adverse impact on homes adjacent to the northern portion of appellant's property. We stated in *Downs* v. *City of Little Rock,* 240 Ark. 623, 401 S.W. 2d 210 (1966) that the composition of the entire area must be taken into consideration in a zoning case. Also, the effect on the surrounding property is a valid consideration as well as the objections of neighboring property owners. *See Marling* v. *City of Little Rock,* 245 Ark. 876, 435 S.W. 2d 94 (1968). After reviewing the testimony, we cannot say that the chancellor clearly erred in finding by a preponderance of the evidence that the City did not act unreasonably in refusing to rezone appellant's property.

Appellant argues that R-2 zoning was unreasonable, but that issue was not before the trial court. The only issue was whether the denial of MF-12 zoning was unreasonable. Testimony revealed that there are other alternative classifications for the property which were not before the trial court.

Appellant argues that the trial court erred in giving equal weight to appellees' experts since they were not informed as to certain engineering problems in connection with development of the property. In matters of credibility we defer to the judgment of the chancellor, who has the advantage of seeing the witnesses as they testify.

Affirmed.

Bill WORTHEN *v.* Joe DILLARD, County Judge, and Arnold R. KNIGHT, County Clerk, of Baxter County, Ark.

81-238 628 S.W. 2d 7

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Roy Danuser,* for appellant.

*Friday, Eldredge & Clark,* by: *John C. Echols* and *Robert S. Shafer,* for appellees.

RICHARD B. ADKISSON, Chief Justice. Appellant brought suit under the Declaratory Judgment Act, Ark. Stat. Ann. §§ 34-2501 — 2512 (Repl. 1962), to have a Bond Purchase

Agreement entered into by appellees declared invalid as violating Arkansas' usury provision, Art. 19, § 13 of the Arkansas Constitution. The Baxter County Chancery Court's ruling in favor of appellees is now appealed.

On August 27, 1981, appellees, the County Judge and the County Clerk of Baxter County, authorized a contract for the sale of Baxter County Hospital Revenue Bonds for the purpose of upgrading and expanding the Baxter General Hospital, a county owned and operated hospital. This contract called for an interest rate on the bonds in excess of ten percent for the years 1988—2011. Appellant, a citizen, resident, and taxpayer of Baxter County, brought this action individually and as a representative of other residents of Baxter County to enjoin the sale and issuance of the bonds as an illegal county expenditure in violation of Art. 19, § 13. This section provides:

> All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, . . .

The trial court held that the Depository Institutions Deregulation and Monetary Control Act of 1980, as amended, preempted the ten percent limit on interest rates as applied to the bonds at issue here. Section 511 of this Act is codified in Title 12 U.S.C.A. § 86a (a) and provides:

> (a) If the applicable rate prescribed in this section exceeds the rate a person would be permitted to charge in the absence of this section, such person may in the case of a *business or agricultural loan* in the amount of $1,000 or more, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any such loan, interest at a rate of not more than 5 per centum in excess of the discount rate, including any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the person is located. (Emphasis added)

Appellant argues that the loan as evidenced by the

bonds is not a "business loan" within the meaning of § 86 (a). We agree. The Act does not define "business or agricultural loan" and there is nothing in the legislative history to clarify congressional intent except a Senate report which contrasts "business and agricultural loans" with "consumer and personal loans." Therefore, in absence of any guidance in the statute or legislative history, the term "business loan" must be given its plain and ordinary meaning. We conclude that a loan to upgrade a county owned and operated hospital is not within the plain meaning of the term "business loan" as used in the Monetary Control Act.

Reversed.

HAYS, J., concurs.

STEELE HAYS, Justice, concurring. I concur entirely in the result, but I believe there is a sounder basis for reversal than whether the revenue bonds to upgrade and enlarge a county hospital constitute a "business loan" within the meaning of § 511 of the Monetary Control Act. The answer is not that clear and appellees' arguments are not that easily denied. They submit that Congress intended to classify loans generally as either "consumer or personal" or "business or agricultural" and, thus, by a process of elimination the loan becomes a "business loan."

However that may be, I would reverse for another reason. It is one thing for Congress, acting under the Commerce Clause, to pre-empt the right to govern the interest rate private lenders and borrowers set between themselves, but quite another to claim the pre-emptive right to deny to a state the power to limit its own governmental subdivisions to a rate of interest fixed by the constitution of that state. I cannot say the Monetary Control Act does not purport to do that, but nothing is cited to us to support such an arrogation of power. It is questionable whether the power exists at all, and certainly not in the absence of an express provision. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514 (1926); *United States* v. *California*, 297 U.S. 175 (1936).

Appellees draw a distinction that in *Usery,* Congress sought to impose a burden on the states by amendments to the Fair Labor Standards Act, whereas here, Congress is simply providing an opportunity to compete in the bond market. But the issue is deeper than one of a burden versus a benefit; it involves the fundamental question of where state sovereignty ends and federal sovereignty begins. See *Lane County* v. *Oregon,* 7 Wall. 71, 19 L. Ed. 101 (1869).

ATKINS PICKLE COMPANY, INC. *v.*
BURROUGH-UERLING-BRASUELL CONSULTING
ENGINEERS, INC. and Allen R. HENSON

81-224 628 S.W. 2d 9

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Friday, Eldredge & Clark,* by: *John Dewey Watson,* for appellant.

*Jones, Gilbreath & Jones,* for appellee Burrough-Uerling-Brasuell Consulting Engineers, Inc.

*Barber, McCaskill, Amsler, Jones & Hale,* for appellee Henson.

GEORGE ROSE SMITH, Justice. This is the second attempt by the appellant, Atkins Pickle Company, to fix Pope county as the venue of an action against the two appellees, a corporate engineering company having its principal office in Sebastian county and an individual residing in Faulkner county. The trial court's dismissal of the first suit, for improper venue, was affirmed by the Court of Appeals. *Atkins Pickle Co.* v. *Burrough-Uerling-Brasuell,* 271 Ark. 897, 611 S.W. 2d 775 (1981). The plaintiff then filed the present suit, the complaint asserting essentially the same cause of action for breach of contract with additional language purporting to allege a cause of action for injury to real property in Pope county. See Ark. Stat. Ann. § 27-601 (Repl. 1979). The trial court again dismissed the action for improper venue. The appeal is brought to us under Rule 29 (1) (c).

Many of the salient facts are given in the Court of Appeals opinion and need not be restated. The plaintiff employed the two defendants (1) to design a large concrete storage structure, partly underground, for the long-term storage of cucumbers in brine and (2) to supervise the

construction work done by contractors and subcontractors. The present complaint alleges that after the structure had been completed and the plaintiff began to fill the tanks with brine, "the concrete walls moved with actual force and violence, resulting in permanent injury to the fixtures" and to the land described in the complaint. The complaint alleges that the defendants were negligent in designing the structure and in failing to properly supervise its construction. The complaint seeks damages of $1,205,600 for the defendants' negligent damage to the freehold, without specifying the elements of that damage.

Alternatively, the complaint seeks damages for breach of contract, also in the amount of $1,205,600, for improper design and supervision. Again the elements of damage are not stated. The complaint in the first case, as quoted in the present record and briefs, also sought damages of $1,205,600. There the items of damage were enumerated, including such matters as the cost of labor and materials for rebuilding the storage structure, excess labor costs, general inconvenience, and $113,219.73 for "[c]omplete demolition and haul off." Of the sixteen items listed in the earlier complaint only the quoted one seems to relate directly to repairing the physical injury to the real property.

The trial court's finding of improper venue was correct. Ever since the adoption of our Civil Code in 1869 our statutes have defined certain local actions and directed that all other actions be brought in the county of the defendant's residence. § 27-613. We have said repeatedly that our underlying policy is to fix the venue in the county of the defendant's residence unless for policy reasons there is a statutory exception. *Bituminous, Inc.* v. *Uerling,* 270 Ark. 904, 607 S.W. 2d 331 (1980); *Wernimont* v. *State ex rel. Little Rock Bar Assn.,* 101 Ark. 210, 142 S.W. 194, Ann. Cas. 1913D, 1156 (1911).

Here the plaintiff's asserted exception to the general rule is found in Section 27-601, which provides that actions for the recovery, partition, or sale of real property, or for an injury to real property, must be brought in the county where the land or part of it is situated. The motion to dismiss must

be taken to admit that the concrete storage tanks were fixtures and therefore part of the land. The question, however, is whether the complaint so definitely states a cause of action for an injury to real property that the venue can only be in Pope county, where the land lies. The complaint attempts to state a cause of action for an injury to the concrete fixtures on the plaintiff's land, but that allegation is subordinate to the basic breach of contract.

Which allegation governs? We have no case in point, but the decisions elsewhere reach a common-sense result, that when a complaint asserts both local and transitory causes of action the venue is determined by the real character of the action, by its principal purpose or object, by the principal right being asserted. *Haines* v. *Lamb,* 24 Cal. Rptr. 146 (1962); *McMullen* v. *McMullen,* 122 So. 2d 626 (Fla. App., 1960); *Quinn* v. *Butler Bros.,* 167 Minn. 463, 209 N.W. 270 (1926); *Bee County Coop. Assn.* v. *Dominy,* 489 S.W. 2d 418 (Tex. Civ. App., 1972); *Lake* v. *Reid,* 252 S.W. 2d 978 (Tex. Civ. App., 1952); *Fond du Lac Plaza* v. *H. C. Prange Co.,* 47 Wis. 2d 593, 178 N.W. 2d 67 (1970). The wisdom of the rule was shown in a child custody case in which the mother tried to establish venue in her own county by alleging that the father had committed a trespass on land in wrongfully taking the child from her possession. The appellate court affirmed the trial judge's conclusion that the trespass was only an incident to the mother's cause of action, not the basis for it. *Boyd* v. *Crabb,* 205 S.W. 2d 606 (Tex. Civ. App., 1947).

Here the real character of the action is not hard to determine. Professor Seaver spelled out a basic distinction: The purpose of the law of contracts is to see that promises are performed; the law of torts provides redress for various injuries. Book Review, 45 Harv. L. Rev. 209 (1931). Here the object of the pickle company's complaint is to obtain damages for a breach of contract. Under the allegations of the complaint the plaintiff cannot establish its right to recover except by proving a contract and the defendants' failure to perform their promises. That one of several consequences of that failure was a physical damage to land is merely an incident to the plaintiff's cause of action, not the

basis for it. Thus the substance of the complaint states a transitory cause of action, not a local one.

Affirmed.

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Darrell W. RODGERS *v.* UNIVERSITY OF ARKANSAS FOR MEDICAL SCIENCES

81-188 628 S.W. 2d 11

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Lynn R. McClinton,* for appellant.

*J. Gayle Windsor, Jr.,* for appellee.

FRANK HOLT, Justice. A jury awarded appellee a judgment in the amount of $3,457.65 for medical bills incurred by appellant's wife while a patient at the appellee Medical Center. For reversal he contends the trial court erred in denying his motion which asserted that counsel for the appellee could not properly represent the appellee, an agency of the state, since appellee's counsel was not the attorney general, an assistant attorney general, nor special counsel appointed by the attorney general. Ark. Stat. Ann. §§ 12-1701 and 12-719 (Repl. 1979). Neither is there any statute authorizing this state agency to hire its own attorney.

In *Wade* v. *Moody, Judge,* 255 Ark. 266, 500 S.W. 2d 593 (1973), the appellant asserted that the court erred in refusing his motion to dismiss the case because it was not brought in the name of the state as required by statute. There we said:

> The motion was oral and out of time. It was made on the morning of the trial and, of course, after the case had been set for trial. See Rule 2, Uniform Rules for Circuit and Chancery Court, March 1, 1969. Furthermore, the court's refusal to consider the oral and untimely motion suggests no prejudice to appellant; in fact the motion went to a matter of form rather than substance.

To the same effect are: *Warren* v. *State,* 261 Ark. 173, 547 S.W. 2d 392 (1977); and *City of Benton* v. *Connerly,* 261 Ark. 262, 547 S.W. 2d 432 (1977). Here, on the trial date, immediately before trial, appellant made a motion to dismiss which was untimely and not in compliance with the requirements of Rule 2 of Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Repl. 1979). Furthermore, the case had been pending for more than two years during which time appellant had filed various pleadings. Appellant has demonstrated no prejudice.

Another deficiency is that the ruling of the court denying the motion is not abstracted, which is a violation of Rule 9 (d) of the Supreme Court, Ark. Stat. Ann. Vol. 3A (Repl. 1979). In fact, it is not in the transcript; we have only a stipulation by the parties that the court overruled the

motion. Therefore, we have no way of knowing for what reason the court denied it. Suffice it to say that when the trial court reaches the right result, as here, we do not reverse, even though its refusal to dismiss the motion might be based on an erroneous reason. *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W. 2d 62 (1979).

Affirmed.

Charles E. JAMES *v.* J.F.K. CARWASH, INC., Billy D. MANSELL and David F. GRUBBS

81-196 628 S.W. 2d 299

Supreme Court of Arkansas
Opinion delivered February 16, 1982
[Rehearing denied March 22, 1982.]

*Tucker & Stafford,* for appellant.

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

ROBERT H. DUDLEY, Justice. The issues on appeal are whether a corporate promissory note which was given for an ultra vires repurchase of corporate stock is void and whether there is liability because of an accompanying personal guaranty of the corporate promissory note. Jurisdiction in this court is pursuant to Rule 29 (1) (c) as the appeal involves the interpretation and construction of Ark. Stat. Ann. § 64-105 (Repl. 1980), which provides that a corporation may repurchase its own shares out of earned surplus, and § 64-106, which restricts the use of defenses based on an ultra vires act.

Appellee Mansell organized the appellee J.F.K. Carwash, Inc., and sold a one-third interest each to appellant James and appellee Grubbs. Appellant James wanted out of the operation and eventually all three agreed that the corporation would repurchase his shares. This debt for the repurchase of corporate stock was evidenced by appellee's corporate promissory note which was secured by the personal guarantees of appellees Mansell and Grubbs. On the date the note and guaranty were signed the corporation had a deficit of $16,184.36 and had no unrestricted earned surplus. One of the applicable statutes, § 64-105, requires that stock be repurchased out of unrestricted earned surplus except in limited situations not germane to this case. The corporation was unable to make the payments as they became due and the appellant filed suit for the unpaid principal. The appellees contended that the note was void because it was ultra vires. The trial court relied on *American Fidelity Fire Insurance Co.* v. *Builders United Construction, Inc. et al,* 272 Ark. 179, 613 S.W. 2d 379 (1981) and held that appellee corporation's promissory note was void because the corporation had insufficient earned surplus to repurchase appellant James' stock as required by § 64-105. The trial

court further concluded that since the promissory note was void, the underlying personal guarantees were void. See *Ryder Truck Rental, Inc.* v. *Kramer,* 263 Ark. 169, 563 S.W. 2d 451 (1978). We reverse.

The promissory notes in *American Fidelity Fire Insurance Co.* v. *Builders United Construction, Inc.,* supra, and *Ryder Truck Rental, Inc.* v. *Kramer,* supra, were void because they were evidence of a debt arising from a transaction which had been declared by law to be prohibited. In the first case the statute required that an insurance agent be licensed in this State and we held that an indemnity agreement executed by a non-licensed agent in violation of that statute was void, while in the second case the contract called for more than 10 percent interest per annum and Article 19, § 13 of the Arkansas Constitution provides that such contracts are ". . . void as to principal and interest . . . " In the case before us the statute provides that ultra vires acts shall not be invalid except in some circumstances which are not applicable. Thus there is no prohibitory statute which in turn causes the note to be void.

The ability of a corporation to acquire and dispose of its own shares is one of the segments of a symmetrical statutory structure dealing with corporations. Section 64-104 grants general powers to a corporation. Section 64-105 delineates the restrictions on a corporation purchasing its own stock and § 64-106 provides that when a corporation acts in excess of its powers such action will not be invalid solely because the corporation was without either the capacity or the power to do such act. This latter section provides:

> Defense of ultra vires. — No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted: . . .

None of the conditions for asserting lack of capacity or power are applicable to this case. They are:

A. A shareholder may sue the corporation to enjoin the performance of an ultra vires contract.
B. A stockholder may bring a derivative suit for damages in favor of the corporation against officials who have diverted business by ultra vires acts.
C. The Attorney General is authorized to enjoin unauthorized or ultra vires acts.

The juxtaposition of the statutes is not mere coincidence; it is because the General Assembly wanted to confer limited powers on corporations and to limit causes of action and defenses based on an act in excess of those powers. None of the statutory conditions are present for an assenting stockholder to assert the defense of ultra vires. The promissory note is not invalid as an ultra vires instrument and, accordingly, the underlying personal guarantee is not invalid. The holding of the trial court that the instruments are void is reversed and remanded.

Ches WILLIAMS and Gaye B. WILLIAMS *v.*
J. W. BLACK LUMBER COMPANY

81-185 628 S.W. 2d 13

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Donald A. Forrest,* for appellants.

*Frierson, Walker, Snellgrove & Laser,* by: *G. D. Walker,* for appellee.

STEELE HAYS, Justice. Appellants Ches and Gaye Williams are the owners of Cow Island, a part of Shelby County, Tennessee, but attached to Arkansas. J. W. Black Lumber Company, appellee, brought suit against appellants claiming damages of $14,531.25 for breach of contract to sell four parcels of timber on Cow Island. The complaint alleges the parties contracted in writing on April 17, 1978, for the sale of 640 acres, more or less, for $30,000.00 but only 330 acres of timber were actually marked off for cutting, resulting in a shortage of 310 acres. The circuit judge found the buyer was due 640 acres as stated in the contract, but received only 355 acres. He awarded damages of $11,359.38 for the 285 acre shortage. Appellants argue five points for reversal. We find no error.

I.

Appellants first contend that their motion to dismiss the complaint pursuant to Rule 12 (h) (2) A.R.C.P. for failure to state facts upon which relief could be granted was denied because it was made on the morning of trial and, therefore, untimely. They contend that the rule permits the motion at any time. But appellants have misconstrued the trial court's ground for denying the motion to dismiss.

Although he did criticize the timing, the motion was denied because he found the suit was for breach of contract and jurisdiction was properly vested in the circuit court (see p. 78 of the record.).

II.

Appellants argue the complaint fails to state facts upon which relief can be granted at law because it is a suit to reform the contract rather than for its breach. Although the complaint alleges some facts which would support a reformation theory, it is nevertheless sufficient to support an action in breach of contract. A complaint that alleges facts to support a cause of action under more than one theory is not demurrable if a cause of action on at least one theory is stated. 17A C.J.S. Contracts § 533 (1963). This complaint states, first, that appellants agreed to sell all merchantable timber on four parcels of land containing 640 acres, more or less; secondly, that appellants supplied only 330 acres, and, finally, that the damages suffered as a result of the breach were $14,531.25. The complaint need only assert the "existence of a valid and enforceable contract between the plaintiff and defendant, the obligation of defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach." 17A C.J.S. Contracts § 533 (1963). See also *Caldwell* v. *Guardian Trust Co.*, 26 F. 2d 218 (8th Cir. 1928). We find no deficiency in the complaint requiring dismissal under Rule 12 (h) A.R.C.P. and conclude the trial court was correct in denying appellants' motion.

III.

Appellants allege the court erred in allowing evidence which varied the terms of the written contract over their continuing objection. The relevant section of the contract states:

> In consideration of Thirty Thousand Dollars ($30,000.00) . . . Owners hereby sell to Company and Company hereby purchases from Owners all of the merchantable timber growing, standing and lying in

> four separate parcels of land comprising portions of "Cow Island," the approximate boundaries of said parcels are shown on the aerial photograph attached hereto and incorporated herein by reference thereto, the exact boundaries of said parcels being located on the ground and established either by painted lines or lines cut by bulldozer, and shown by Company's representative, said four parcels of land containing 640 acres, more or less. . . .

In spite of the provision that the exact boundaries were marked and seen by appellee's representative, appellee was permitted to offer proof that the boundaries were not marked until well after the contract was signed and contained only about half of the 640 acres called for.

There are cases holding that "more or less" after the stated acreage is merely descriptive and does not entitle the buyer to recovery for any deficiency in acreage. But the rule is applicable where the discrepancy is slight or trifling. *Hays* v. *Hays,* 190 Ark. 751, 81 S.W. 2d 926 (1935); *Carter* v. *Finch,* 186 Ark. 954, 57 S.W. 2d 409 (1933); *First National Bank of Belleville, Illinois* v. *Tate,* 178 Ark. 1098, 13 S.W. 2d 587 (1929); *Glover* v. *Bullard,* 170 Ark. 58, 278 S.W. 645 (1926); *Harrell* v. *Hill,* 19 Ark. 108, 68 Am. Dec. 202 (1857). Where the stated acreage goes to the essence of the contract and is not merely a matter of description, the purchasers, in case of deficiency, are entitled to a reduction in price. *Glover, supra.* The appellee presented evidence of a survey of the property prepared after all the boundaries were marked. This survey revealed the total acreage of the four parcels to be 330 acres, 310 less than stated in the contract. The trial court subtracted another 25 acres to adjust for an 8% margin of error in the method of computation and fixed the deficiency at 285 acres. Where a discrepancy of this magnitude exists, representing an error of almost 50 per cent, the words "more or less" should not prevent recovery for the deficiency. We find no cases that take issue with that view.

Appellants insist any parol evidence which disputes the total acreage as being 640 acres or that the boundaries were not marked is inadmissible. We disagree. Parol evidence,

though not admissible to vary contractual terms to be performed, is admissible to show what the parties to the contract intended. In *Ward* v. *McIlroy,* 172 Ark. 704 at 709, 290 S.W. 2d 46 (1927), we said that parol evidence to vary the terms of a written contract is not admissible, but is admissible to enable the court to say what the parties intended to express by the language adopted. It is a rule of construction.

Here it is uncertain whether the consideration the appellee bargained for is "640 acres, more or less" or the four parcels as marked. And while there may have been no ambiguity on the face of the contract, there was a material disparity (according to the findings of the trial court) between the actual acreage marked and the stated acreage. That being so the court properly permitted evidence to expose a latent ambiguity. *University City Mo.* v. *Home Fire & Marine Ins. Co.,* 114 F. 2d 288 (8th Cir. 1940); *Queen Ins. Co. of America* v. *Meyer Milling,* 43 F. 2d 885 (8th Cir. 1930). In *University City,* at 295, 296, the court stated:

> Ambiguities in written instruments are of two kinds. They are either patent or latent. A patent ambiguity is one arising upon the face of the instrument without reference to the described object while a latent ambiguity is one developed by extrinsic evidence, where the particular words, in themselves clear, apply equally well to two different objects. A latent ambiguity may be one in which the description of the property is clear upon the face of the instrument, but it turns out that there is more than one estate to which the description applies; or it may be one where the property is imperfectly or in some respects erroneously described, so as not to refer with precision to any particular object. If such an ambiguity develops, extrinsic evidence is admissible to show the real intent of the parties. (Citations omitted.)

The evidence appellants dispute was admissible under yet another theory. It is always permissible to show by oral testimony that the consideration recited in the contract is not the consideration actually agreed on between the parties. *Newberry* v. *Newberry,* 218 Ark. 548, 237 S.W. 2d 447 (1951);

*Sewell* v. *Harkey,* 206 Ark. 24, 174 S.W. 2d 113 (1943); *Hockaday* v. *Warmack,* 121 Ark. 518, 182 S.W. 2d 263 (1916).

IV.

Appellants' fourth argument is that the court erred in using an erroneous measure of damages. The trial court found the acreage the appellee received to be 285 acres less than stated in the contract. The contract provided for a lump sum of $30,000.00 for the timber rights on "640 acres, more or less" but did not specify a price per acre. The trial court divided the contract price by the total acreage to arrive at a price per acre of $46.87. The damages were then fixed by multiplying 285 times $46.87 to arrive at $13,359.77.[1]

J. W. Black, an experienced timber dealer, testified that the value of the timber was approximately $50.00 per acre. There was no evidence to dispute this figure. The inference from his testimony is that if the acreage had been set at a lesser figure in the contract, his offer would have been reduced by $50.00 per acre of reduction.

Timber contracts are contracts for the sale of goods and governed by the Uniform Commercial Code. Ark. Stat. Ann. § 85-2-107 (2) (Supp. 1963). The buyer's measure of damage where there is any non-conformity of tender[2] is defined in Ark. Stat. Ann. § 85-2-714 (Repl. 1961). Subsection 1 of § 85-2-714 allows the damages to be "determined in any manner which is reasonable." In light of the testimony that the timber was worth approximately $50.00 per acre, we believe the method used by the trial court in fixing damages by reducing the price of $30,000.00 by the amount of the shortage on a ratio of $46.87 per acre was not unreasonable.

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[1]This figure was reduced to $11,359.77 for an unrelated off-set.

[2]The commentary to Ark. Stat. Ann. § 85-2-714 provides:

> 2. The "non-conformity" referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

Appellants rely on *Eagle Properties Inc.* v. *West & Co. of Louisiana,* 242 Ark. 184, 412 S.W. 2d 605 (1967), and *Harmon* v. *Frye,* 103 Ark. 584, 148 S.W. 2d 269 (1912), for the proposition that damages cannot be allowed where they are speculative or based on conjecture. But those facts are dissimilar; both cases involved the loss of use of commercial property and the damages claimed were found to be too speculative. No similar speculation is present here. "It is not a sufficient reason for disallowing damages claimed that a party can state their amount only proximately; it is enough if from the proximate estimates of witnesses a satisfactory conclusion can be reached." 25 C.J.S. Damages § 26 (1966). The amount fixed by the trial court was based on evidence of specific damage and was not unfair to appellants.

V.

Finally, appellants urge that the court's findings of fact are not supported by the record. Appellants' abstract is insufficient to enable us to address the argument on this point. Where we are unable to evaluate the merit of the argument we affirm the trial court. See Rule 9 (e) (2), Rules of the Supreme Court.

The judgment is affirmed.

Linda Ann ELROD *v.* G & R CONSTRUCTION COMPANY

81-104 628 S.W. 2d 17

Supreme Court of Arkansas
Opinion delivered February 16, 1982

*Jacoway & Sherman,* by: *William F. Sherman,* for appellant.

*Laser, Sharp & Huckabay, P.A.,* for appellee.

JOHN S. CHERRY, JR., Special Chief Justice. Plaintiff appeals from a jury verdict awarding her $5,000.00 compensatory damages and $1,000.00 punitive damages. She raises two issues on appeal. First, she urges reversal of the trial Court's refusal to allow her to go to the jury on two separate theories of recovery, i.e., respondeat superior and negligent entrustment. Second, she urges reversal of the trial Court's refusal to grant her motion for mistrial following an allegedly improper question of a witness by defense counsel. We affirm the trial Court's decision to allow the plaintiff to proceed on only the theory of respondeat superior, but reverse on other grounds.

At the time of the accident giving rise to this lawsuit, plaintiff, operator of a passenger vehicle, was stopped in a line of traffic that had developed because of a malfunctioning traffic light. Apparently, traffic was stopped in all directions and motorists were proceeding in-turn through the intersection. When it was plaintiff's turn to proceed, she moved forward too cautiously to suit the driver immediately behind her. Lemon Dye, who was immediately to plaintiff's rear, was operating a tractor-trailer owned by appellee and either pushed or struck plaintiff's vehicle from the rear with sufficient force to move it into the intersection so that Dye could effect a left turn. After striking or pushing plaintiff's vehicle into the intersection, Dye left the scene of the

accident. However, a witness to the accident followed Dye to appellee's place of business. The witness advised G & R's superintendent of that accident and the superintendent and the witness went to the accident scene.

Plaintiff, Linda Ann Elrod, sued Dye's employer, G & R Construction Company, for personal injuries. Plaintiff's complaint, as amended, sought recovery against G & R on two theories of liability and sought both compensatory and punitive damages under each theory. Plaintiff alleged that G & R was vicariously liable for Dye's negligent acts and willful and wanton conduct committed during the course and scope of his employment thereby entitling plaintiff to recover both compensatory and punitive damages. Plaintiff further alleged that she was entitled to compensatory and punitive damages against G & R because it either negligently or willfully and wantonly entrusted Dye with a motor vehicle to operate while employed by G & R.

In Chambers immediately prior to trial, G & R admitted that at the time of the accident complained of, Dye was its employee acting within the course and scope of his employment and further that G & R would be liable for any compensatory and/or punitive damages which the jury found plaintiff was entitled to recover. Following this admission, G & R moved to dismiss those portions of plaintiff's Amended Complaint which it sought to recover on the theory of negligent entrustment or willful and wanton entrustment. The Court granted this motion to dismiss as to plaintiff's second theory of recovery. Plaintiff made an offer of proof outside the hearing of the jury which offer consisted of Dye's traffic record over the last four years. The record indicated that Dye had been involved in some six motor vehicle accidents, two of which resulted in personal injury. The record also indicated that Dye had citations for failure to yield and unsafe operation of a vehicle unrelated to the accidents mentioned above. Dye's motor vehicle record did not indicate whether his negligence was the cause of any of the accidents referred to therein.

Following argument of counsel, the trial Judge ruled that when the employer admits agency, course and scope of

employment, and concedes liability for any damages which might be awarded for either the negligence or willful and wanton conduct of the employee, plaintiff could not pursue a separate claim of negligent or willful and wanton entrustment. Plaintiff recovered a jury verdict for $5,000.00 compensatory damages and $1,000.00 punitive damages.

When a defendant denies liability, no problem is encountered by allowing a plaintiff to proceed under two consistent theories of recovery such as respondeat superior and negligent entrustment. *Breeding* v. *Massey,* 378 F. 2d 171 (8th Cir. 1967); *Ozan Lumber Co.* v. *Neeley,* 214 Ark. 657, 217 S.W. 2d 341 (1949). However, when defendant admits liability under one of plaintiff's theories of recovery such as respondeat superior, difficulties do arise and the authorities are divided on the issue whether plaintiff should be allowed to proceed on one or both theories. See Woods, *Negligent Entrustment Revisited,* 30 Ark. L. Rev. 288 (1976); 74 Am. Jur. 2d, *Automobiles and Highway Traffic,* § 643 (1980). In view of this Court's holding in *Kyser* v. *Porter,* 261 Ark. 351, 548 S.W. 2d 128 (1977), we are inclined to follow the majority view which allows plaintiff to proceed on only one theory of recovery in cases where liability has been admitted as to one theory of recovery. In *Kyser,* plaintiff sought to recover from the parents of a minor who permitted their son to operate a vehicle and plaintiff based his claim upon both statutory liability of a parent pursuant to Ark. Stat. Ann. § 75-315 (Repl. 1979) and negligent entrustment. Though there was no claim for punitive damages, parents conceded liability under 75-315 and the Court prohibited plaintiff from pursuing his theory of negligent entrustment. Plaintiff's tender of the driving record of the minor was excluded and we said:

> Our cases hold that a negligent entrustor, though guilty of a separate tort, is only liable to a third party for his entrustee's negligence, if any. (cases cited) Thus, in the case at bar, had the appellant been allowed to present any available evidence on this theory of negligent entrustment to the jury, the end result could only have been established, at best, that the [defendant] was liable, . . .

Appellant argues that *Kyser* does not control because in that case, the Court was not presented with a claim for punitive damages. While appellant concedes that while *Kyser* represents a majority view, she urges that when a claim for punitive damages is made in connection with negligent entrustment, more Courts are accepting the view that plaintiff be allowed to proceed on both theories even when liability has been admitted.

The fact that appellee in this case admitted liability for both compensatory damages that might be awarded for its employee's negligent acts and punitive damages that might be awarded for its employee's willful and wanton misconduct distinguishes it from all those cases cited wherein both theories of recovery were allowed to be presented to the jury.

In this case, plaintiff was given the right to pursue her claim in its entirety, i.e., claims for both compensatory and punitive damages. Further in this case, plaintiff was allowed to introduce all proof that bore directly on her entitlement to recover both compensatory and punitive damages and the only evidence the trial court rejected was the prior driving record of G & R's employee, Dye. The potential problems and possible prejudice that could be created by the introduction of a prior bad driving record in our view outweigh any possible advantages. Moreover, for plaintiff in this case to have been entitled to punitive as well as compensatory damages from G & R on the theory of negligent entrustment plaintiff would have had to have proved that G & R not only negligently entrusted the vehicle to Dye, but also that G & R had willfully and wantonly entrusted the accident vehicle to Dye. Even in light of Dye's prior bad driving record, we can only surmise that in some of those instances, he may have negligently operated his motor vehicle. There is nothing in the record or in the offer of proof consisting of Dye's prior bad driving record which would have put the employer on notice or conceivably enabled the employer to foresee that Dye would commit a willful and wanton act or possibly an intentional act.

We affirm the trial Court dismissing that portion of the

Amended Complaint which sought to recover on negligent entrustment or willful and wanton entrustment adhering to the holding in *Kyser* and join the majority of courts that have dealt with this problem. However, we reverse the trial Court on the second issue raised by appellant.

The defense attorney, while questioning a witness who was a passenger in the plaintiff's car during the accident, said: "I believe you settled your case for two thousand dollars." The plaintiff moved for a mistrial. The trial Court denied the motion and, instead, admonished the jury. The remark was uncalled for and undoubtedly prejudiced the plaintiff's case. The excuse is that the plaintiff opened the door by questioning the witness about the extent of her injuries. The door certainly was not opened enough to permit such a statement by defense counsel. It was a statement rather than a question and the defendant's purpose was obvious — the jury was meant to infer that $2,000.00 would be enough for the plaintiff. Offers of compromise or settlement are not admissible. Ark. Stat. Ann. § 28-1001, Rule 408 (Repl. 1979); 2 *Weinstein's* par. 408 [06] (1981).

The trial Court should have granted plaintiff's motion for a mistrial. Realizing that declaration of a mistrial is a drastic step, we feel that in this case no admonition of the jury by the Court would have been sufficient to eliminate any possible prejudice which might have resulted to plaintiff by the statement referring to the offer of settlement.

Reversed and remanded.

PURTLE, DUDLEY and HAYS, JJ., dissent.

ADKISSON, C.J., not participating.

STEELE HAYS, Justice, concurring in part, dissenting in part. I disagree with that part of the majority opinion which denies to the plaintiff the right to introduce evidence of the driving history of an employee where punitive damages against the employer is an issue. The majority opinion purports to follow the majority view "which allows the plaintiff to proceed on only one theory of recovery in cases

where liability has been admitted as to one theory of recovery." But that does not reach the issue of this case at all. That issue was settled, sensibly, in *Kyser* v. *Porter,* 261 Ark. 351, 548 S.W. 2d 128 (1977). But in *Kyser, only* compensatory damages were sought. Here the plaintiff is claiming punitive damages from the employer, based on allegations of wanton misconduct by the employer, so how can he be denied the opportunity to prove those allegations?

Where there is a valid claim against an employer, a parent or other entrustor for punitive damages in the wanton entrustment of a dangerous instrumentality to someone incompetent to justify that trust, the injured party is entitled to have the evidence supporting that theory submitted to the jury, if the evidence is such that reasonable minds could reach differing results. The exact issue presented here was decided affirmatively by United States District Judge Gordon E. Young in a thoughtful and well-reasoned opinion which the Court of Appeals for the Eighth Circuit upheld. See *Breeding* v. *Massey,* 378 F. 2d 171 (1967). To the same effect see *Plummer* v. *Henry,* 7 NC App. 84, 171 S.E. 2d 330 (1969). Both the District Court and the Court of Appeals in *Breeding,* after reviewing Arkansas decisions in the general fields of negligent entrustment and punitive damages expressed the conviction that the Arkansas Supreme Court would, if presented with the question, permit the issue of punitive damages to be submitted to the jury. We are not bound by those assumptions, of course, but the merit of their reasoning deserves at least the attention of the majority opinion.

The result reached here cannot be justified by the argument that a plaintiff cannot complain if he is compensated for all the damages caused by an employee, including punitive damages, for willful and wanton misconduct. The error of that lies in the rationale for punitive damages: such damages are recoverable in appropriate cases not to compensate the injured party but to exemplify the conduct of the wrongdoer. The purpose is to deter others from like conduct. *Ray Dodge* v. *Moore,* 251 Ark. 1036, 479 S.W. 2d 518 (1972); *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W. 2d 613 (1960).

The effect of this decision is that no matter how culpable the conduct of one who entrusts to another the means of injury to third persons, such entrustor cannot incur direct liability for punitive damages and can prevent evidence of wanton misconduct from being considered by the jury by the simple expediency of admitting agency or entrustment. I can see no logic in this holding.

PURTLE and DUDLEY, JJ., join.

John W. WALKER *v.* SUPREME COURT OF ARKANSAS COMMITTEE ON PROFESSIONAL CONDUCT

81-158 628 S.W. 2d 552

Supreme Court of Arkansas
Opinion delivered February 16, 1982
[Rehearing denied March 29, 1982.]

*John P. Sizemore, E. J. Ball,* and *Vashti O. Varnado,* for appellant.

*Winslow Drummond,* for appellee.

PER CURIAM. This appeal is brought before this Court

from a proceeding and determination of the Arkansas Supreme Court's Committee on Professional Conduct, involving the conduct of appellant, John W. Walker, who is a member of the bar of this state. Roosevelt Watson, the complainant, having been previously represented by the law firm of Kaplan & Walker, of which appellant was a member, allegedly engaged appellant to represent him in connection with an automobile accident which occurred on July 8, 1975. On July 12, 1980, Mr. Watson initiated proceedings before the Committee on Professional Conduct alleging that appellant failed to undertake any legal action on his behalf during the period permitted by the Statute of Limitations. On April 6, 1981, after hearing, the Committee determined appellant's conduct to be in violation of DR6-101 (A) (3) and DR6-102 (A). A Caution was accordingly given to appellant by the committee. This appeal was thereafter instituted by appellant, John W. Walker.

Appellant bases his appeal upon four points:

I.

Appellant submits that he was deprived of procedural due process by being deprived of the right to participate in an inquiry by the committee addressed to this court regarding use of discovery procedures in proceedings before the committee.

II.

Appellant further alleges that he was denied procedural due process by the failure of the committee to separate the adjudicatory and prosecutorial functions of its Executive Secretary.

III.

Appellant further states that he was deprived of procedural due process when he was found to be in violation of DR6-102 (A) without having first been charged with such violation.

IV.

Appellant lastly states that the finding that appellant's conduct was in violation of DR6-101 (A) (3) and DR6-102 (A) is not supported by a preponderance of the evidence presented before the committee.

The court will address each of these points in the order presented.

I.

Appellant submits, in support of his first point, that the ex parte communication of the committee, through its Executive Secretary, and the response thereto by this court, constituted a proceeding before and a determination by this court of appellant's right to discovery procedures before the committee. Appellant cites, as supportive of his *right* to discovery, *Weems* v. *Supreme Court Committee on Professional Conduct,* 257 Ark. 673, 523 S.W. 2d 900 (1975). This court is unable to extrapolate from the principles of the *Weems* decision, *supra,* that any right to discovery exists in disciplinary proceedings before the Committee on Professional Conduct. Hearings before the Committee on Professional Conduct take neither the form of criminal nor civil trials. They are, for the most part, administrative proceedings carried out through an administrative agency of the court, to-wit: The Committee on Professional Conduct. The rules of procedure promulgated by this court make no provision therein for discovery in disciplinary proceedings. Discovery in such instances appears also to be unauthorized by the statutes of this state. This court feels compelled to establish such discovery procedures, as a matter of right, to proceedings of the Committee on Professional Conduct.

The record of this case does not reflect that appellant Walker was involved in the communication between this court and the Committee on Professional Conduct regarding discovery. This communication consisted of no more than administrative inquiry to the court by its own committee, seeking advice under the rule-making power of the court. Such action did not constitute a "proceeding" before

this court involving appellant and appellant's exclusion from such process could not deprive him of procedural due process. The action of the committee and this court was not one of adjudication, but was one of rule-making. *Supreme Court of Virginia, et. al.* v. *Consumers Union of the United States, et. al.,* 446 U.S. 719 (1980).

II.

Appellant Walker submits, in support of his second point, that the Executive Secretary of the committee, Taylor Roberts, acted as "prosecutor" before the committee and was permitted to participate in the deliberations of the committee. He alleges this deprived him of procedural due process of law. Such a committee, with dual functions of prosecution and adjudication has been held constitutional. *Withrow* v. *Larkin,* 421 U.S. 35 (1975). The Executive Secretary did remain with the committee when it deliberated. But there is no evidence he participated or acted improperly in any way. The appellant has the burden of demonstrating that he was denied due process of law. *Omni Farms, Inc.* v. *Arkansas Power & Light Co.,* 270 Ark. 61, 607 S.W. 2d 363 (1980). He has not done so. The Executive Secretary should not have remained with the committee when it deliberated. No doubt this caveat will prevent such actions in the future.

III.

It appears that appellant's argument is uncontroverted regarding the committee's finding that appellant's conduct was a violation of DR6-102 (A). The basic principles of procedural due process support appellant's entitlement to notice of any alleged violation of this rule. *In re Buffalo,* 390 U.S. 544 (1968). No notice of such charge appears to have been given appellant in advance of the proceeding and the finding of the committee in this respect cannot be permitted to stand. The finding of the committee regarding appel-

lant's violation of the provisions of DR6-102 (A) is, therefore, accordingly, vacated.

IV.

Having disposed of the committee's finding that appellant's conduct constituted a violation of DR6-102 (A) upon the reasons hereinbefore stated, this court will consider appellant's fourth point only in light of the charge that his conduct was a violation of DR6-101 (A) (3).

Review of the transcript in this proceeding leads this court to conclude that the findings of the committee, whereby appellant has been found to be in violation of DR6-101 (A) (3), are supported by a preponderance of the evidence. The findings of the committee, in this respect, are not contrary to the weight of the evidence and must be affirmed. *Hurst* v. *Bar Rules Committee of the State of Arkansas,* 202 Ark. 1101, 155 S.W. 2d 697 (1941). This court is not unaware that "neglect", as set out in DR6-101 (A) (3), can be interpreted to mean any conduct ranging from a single act or omission to one of gross negligence which would support an action for malpractice. However, this court takes notice that the guidelines of this rule have been sufficiently established by its previous applications and review. The *Weems* case, *supra,* is illustrative of such. Any neglectful conduct of a member of this bar regarding the interests of a client is, in fact, contemplated as answerable under the provisions of DR6-101 (A) (3). That is not to say, however, that citations incommensurate with the degree of neglect involved under this rule will never be subject to review by this court. In the instant case it is argued by appellant Walker that his conduct falls far short of negligence which might be required to support an action for malpractice and he should not, therefore, be held accountable under the provisions of the rule. For the reasons aforesaid, this court is unable to be so persuaded. It is also to be noted that the citation levied by the committee was a "Caution" rather than a "Reprimand". We believe such action is not incommensurate with the neglect of appellant Walker as reflected by the evidence in this proceeding. The

findings of the committee in this respect will be undisturbed by this court.

With the exception of the modification of the finding as to appellant's violation of DR6-102 (A), the findings and decision of the Committee on Professional Conduct are affirmed.

Special Justice CLAUDE M. WILLIAMS, JR. joins in this opinion.

GEORGE ROSE SMITH, J., not participating.

DUDLEY, J., did not participate in the final decision.

## ARKANSAS POWER & LIGHT COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

81-204 628 S.W. 2d 555

Supreme Court of Arkansas
Opinion delivered February 22, 1982
[Rehearing denied March 29, 1982.]

*House, Holmes & Jewell, P.A.,* and *Mitchell, Williams & Selig,* by: *E. B. Dillon, Jr.,* for appellants.

*Jeff Broadwater,* for appellee.

GEORGE ROSE SMITH, Justice. In 1979 the Attorney General began this proceeding by filing a complaint with the Public Service Commission, asserting that the Arkansas Power & Light Company had misinterpreted a 1976 Commission decision approving part of a requested rate increase. The discussion part of that decision was reported as *Re Ark. Power & Light Co.,* 15 PUR 4th 153 (April 21, 1976). The Attorney General's complaint alleged that the Company's misinterpretation of the decision had resulted in overcharges to its ratepayers of $17,297,124, which should be refunded. The Company answered, first, that its interpretation was correct, and second, that the Commission was estopped to interpret the decision any other way. The Commission rejected both the Company's defenses, but found that the refunds should total only $7,791,544.59, with interest. This appeal is from a circuit court judgment affirming the Commission.

The issue is whether the fuel adjustment clause that the Company put into effect after the 1976 decision conformed to that decision. The Commission held that the Company's clause did not conform and that there was no estoppel.

A fuel adjustment clause permits a power company to pass on to its ratepayers all or part of any increase (or decrease) in the cost of the fuel the company uses to generate electricity. AP&L's three principal sources of electricity are the Company's own generation of current by using nuclear fuel, its own generation by burning fossil fuel (oil or gas, for example), and its purchase of current from other power

companies. The proportion in which the Company's electricity is being derived at any particular time from those three sources is called the "generation mix."

Several possible fuel adjustment clauses were presented to the Commission in 1976. The Company sought a single-base clause, which it had used for many years. The Commission refused to approve the continued use of that clause, on the ground, as more fully explained in a slightly later but overlapping AP&L rate case, that the single-base clause provides a utility no incentive to use its most efficient plants. *Re Arkansas Power & Light Co.,* 19 PUR 4th 53, 81 (March 15, 1977).

The Commission, in discontinuing the single-base fuel adjustment clause, directed AP&L to use a multiple-base clause, which necessarily takes the generation mix into account. The Commission's exact language was: "The base generating mix shall be that mix used in the system redispatch for determining the test-year revenue and expenses." Two phrases in that directive need explanation. The test year is the hypothetical year that AP&L used, as is customary in rate cases, to demonstrate its need for a rate increase. The system redispatch is a computation made every 90 seconds by AP&L's parent company, Middle South Utilities, to determine the cheapest combination of the system's available sources of power. In AP&L's test year the redispatch generation mix was 22.516% fossil fuel, 35.806% nuclear, 40.467% purchased power, and 1.211% hydroelectricity. In the next succeeding AP&L rate case, cited above, the Commission adhered to its position, using this language: "The commission determines the appropriate fuel adjustment clause is the one specified in [the 1976 case]. The generation mix will be that mix used to determine the test-year revenue and expenses." 19 PUR 4th 81.

There is no doubt that the Commission's 1976 discussion recognized the importance of the generation mix to be used in the fuel adjustment clause, but the question is: Just what generation mix did the Commission intend? The Commission found in the present case that it had intended a *fixed* mix in the proportion used in the system redispatch

shown in the test year. The Company contends that the Commission's discussion contemplated not a fixed mix but whatever *actual* mix the Company might select in serving its ratepayers. The Commission's final order, implementing its 1976 opinion, was entered on April 8, 1977, but it did not mention the generation mix and so provides us no assistance. (It may be added that a multiple-base mix is never exact in its operation. It may result in the utility company's recovery through the fuel adjustment clause of either more or less than the true change in the cost of fuel.)

The appellant first argues that there is no substantial evidence to support the view that the Commission's 1976 decision contemplated a fixed generation mix rather than a variable actual mix. In making this argument the Company's brief in chief discusses only the testimony of the Company's own witnesses, with the broad statement: "There is no evidence to the contrary." The Commission's brief responds by citing the testimony of the witnesses Copeland, Burns, and Douglas. In reply the appellant insists that Copeland and Burns merely gave "unsupported opinions" about what the Commission had intended — opinions that the Commission itself disregarded.

We cannot accept that narrow view of the testimony supporting the decision under review. Counsel for AP&L did move to strike a few lines from Copeland's testimony, which ran to scores of pages, as being merely his opinion about what the Commission intended. The motion to strike was not acted upon, but in any event it questioned the admissibility of only a small fraction of Copeland's testimony. Copeland testified concerning various formulas that were doubtless understood by the Commission but are beyond our expertise as appellate judges, in the absence of any attempt by the parties to explain the formulas. Copeland stated, and was not cross-examined on the point, that during the 1976 case a Staff witness, Gary Goble, had urged the Commission to adopt a formula that was mathematically identical to AP&L's later actual generation mix, but Goble's formula was rejected. Yet AP&L's actual practice put that formula into effect, according to Copeland.

Douglas's testimony also supported the Commission's conclusion. He impliedly recognized the Commission's earlier emphasis on the need for incentives for the use of the most efficient sources of electricity and pointed out that the Company had profited by using fossil fuel even when it was more expensive than purchased fuel. He said that in 21 of the 22 months in question fossil fuel generation was more expensive than purchased power, but the Company apparently used it. His conclusion, as the Commission noted in the present case, was that AP&L's fuel adjustment clause had the potential for "rewarding increased waste with increased profits." On the case as a whole we cannot say that the Commission's decision is not supported by substantial evidence.

The appellant argues, secondly, that the Commission is estopped to disapprove AP&L's interpretation of the 1976 decision. This argument was summarily rejected by the Commission under our long-standing rule that the state cannot be estopped by the acts of its agents. Since the Commission's decision, however, we have modified our rule by holding that although estoppel is not a defense that should be readily available against the state, our inflexible rule that the state can never be estopped should be abandoned. *Foote's Dixie Dandy* v. *McHenry,* 270 Ark. 816, 607 S.W. 2d 323 (1980). We therefore consider AP&L's argument on its merits.

After the 1976 decision a Commissioner suggested to AP&L that it work with Goble, who was then the Commission's Chief of Rates, in designing new rate schedules and in drafting a fuel adjustment clause. Goble and AP&L representatives did work together in the matter. However, neither the new rate schedules nor the order implementing the Commission's decision contained any specific reference to the generation mix. Goble did not inform the Commission that the proposed fuel adjustment clause did not specify the redispatch fixed mix, but he did submit a memorandum to the Commission stating that he thought the proposed rate schedules conformed to the 1976 decision. The Commission entered a brief order approving the proposed rates, apparently as a matter of routine. AP&L filed 22 monthly

reports that showed the actual generation mix was being used. Goble examined the first few reports before he left the Commission's employ and evidently considered them to be in conformity with the Commission's decision. It is not contended that the Commission itself ever reviewed the monthly reports or that it was expected to do so.

We find hardly any real basis for an estoppel and certainly not the comparatively clear showing that is essential if the state is to be estopped. Goble, as an employee of the Commission, had no authority to make a binding interpretation of the Commission's language. His participation in the drafting of rate schedules which, according to Copeland, represented Goble's own views but not those of the Commission, could not create an estoppel. No doubt there was some ambiguity in the Commission's 1976 decision, but we discern hardly any want of clarity in this sentence from its 1977 decision, handed down before the entry of the implementing order: "A multiple fuel adjustment clause, when the generation mix is determined by the optimum redispatch system for the test year, provides the necessary incentives for the firm always to employ the most efficient plants." 19 PUR 4th 81.

We think it clear that if the Commission's decision was open to different interpretations, as the estoppel argument assumes, that fact was readily apparent to AP&L. On this point the Commission said in the present case, with respect to the substantial evidence argument: "[I]nsofar as the Company may be understood to argue that the Orders are susceptible to more than one interpretation, we point out the obvious fact that the Company should have petitioned the Commission to resolve ambiguities. It proceeded at its peril in placing what we find to be an unreasonable interpretation most favorable to its interests on the Orders involved and acted accordingly." That reasoning also pinpoints the weakness in the Company's defense of estoppel: The necessary reliance upon misleading action by the Commission is lacking.

Affirmed.

HAYS, J., not participating.

Chester PERRY *v.* STATE of Arkansas

CR 82-11 628 S.W. 2d 304

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Haskins & Wilson,* by: *John W. Achor,* for petitioner.

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

GEORGE ROSE SMITH, Justice. Less than three weeks ago the petitioner was tried by jury, found guilty of first-degree murder and second-degree battery, and sentenced to concurrent terms of 40 and 6 years and to a $10,000 fine. Prior to trial Perry had been free on a $10,000 bond, set by a municipal judge; but after the return of the verdicts the circuit judge, without making written findings, fixed the appeal bond at $50,000. On the day after trial, counsel for

Perry filed a notice of appeal and also filed the present petition for certiorari, asking that we set aside the requirement of a $50,000 appeal bond and immediately release Perry on his original bond, pending appeal. There is no indication that counsel has applied to the circuit judge for a reduction of the appeal bond. A writ of certiorari lies to correct proceedings erroneous on their face. *Bridges* v. *Ark. Motor Coaches,* 256 Ark. 1054, 511 S.W. 2d 651 (1974). We find no such patent error and deny the petition.

Petitioner's argument is based on Rule 9.2 (e), A. R. Crim. P., which provides among other things that the pretrial release bond serves to guarantee subsequent appearances of the defendant on the same charge before any court, including appearances relating to appeals, and that a judicial officer (here the circuit judge) may upon making written findings increase the amount of a bond required by another judicial officer (here the municipal judge). It is accordingly argued that the circuit judge was without power to fix an increased appeal bond without making written findings.

The fallacy in this argument is its failure to distinguish between a pretrial release bond and an appeal bond. The pretrial bond is usually a matter of right. It is governed by Rule 9.2, which provides in subparagraph (c) (viii) that the judicial officer may consider the nature of the charges, the apparent probability of conviction, and the likely sentence as affecting the risk of nonappearance.

Even though the pretrial bond guarantees the defendant's appearance in appellate proceedings if the bond is still in force, that does not make it an appeal bond. Appeal bonds are governed by Rules 36.5, 36.6, and 36.7. When such a bond is to be set the circuit judge has already heard the evidence at the trial, knows the actual sentence imposed, and is thus in an improved position to weigh the risk of the defendant's nonappearance pending appeal. Moreover, under Rule 36.5 the trial judge may deny an appeal bond altogether and deliver the defendant to the custody of the sheriff, under conditions that were not even applicable when the pretrial bond was set. With respect to the appeal bond there is no

requirement that the trial judge make written findings in fixing the amount of the bond. If this petitioner thinks that the appeal bond is too high, his remedy is not in this court but in the trial court.

Writ denied.

SHARP COUNTY, Arkansas *v.* NORTHEAST ARKANSAS PLANNING AND CONSULTING COMPANY

81-207 628 S.W. 2d 559

Supreme Court of Arkansas
Opinion delivered February 22, 1982
[Rehearing denied March 29, 1982.]

*Jim Stallcup,* Pros. Atty., and *Stewart K. Lambert,* for appellant.

*William R. Haas* and *H. David Blair,* for appellee.

FRANK HOLT, Justice. The appellee filed a claim in Sharp County Court against the appellant for $7,000 based upon an alleged agreement between the two parties whereby appellee was to provide consulting services for the appellant in preparing a preapplication and application for federal assistance under the Housing and Community Development Act of 1974. The county court found that the claim was not valid and denied payment. The appellee appealed to the circuit court where a jury awarded it a judgment for $4,530 plus interest.

Appellant first contends the trial court erred in permitting appellee to amend its claim in circuit court by reducing the amount from $7,000 to $4,530. It further asserts that the claim in county court was based upon a February 9, 1975, order and the amended claim was based upon a December, 30, 1976, order. It argues that these amendments constituted a new cause of action permitting the circuit court to exercise original jurisdiction which is vested in the county court. Art. 7, § 28, Arkansas Constitution (1874).

We have held that on appeal from the county court, the

circuit court could not allow a substitution of parties since this would permit the circuit court to exercise original jurisdiction, *McLain* v. *Miller County,* 180 Ark. 828, 23 S.W. 2d 264 (1930); nor can the circuit court allow claims to be amended which increases the amount of relief sought, *Madison County* v. *Nance,* 182 Ark. 775, 32 S.W. 2d 1073 (1930) (one from $185 to $500 and one from $200 to $1,000). However, the circuit court, in its discretion, may permit amendments which do not change the original cause of action. *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S.W. 2d 680 (1895); and *Saline County* v. *Kinkead,* 84 Ark. 329, 105 S.W. 581 (1907).

Appellee submitted its claim to the county court on November 16, 1977. One document, bearing that date, was an unnotarized instrument captioned "Affidavit to County Account" bearing the notation February 9, 1975, court order in the amount of $7,000. Another document, dated November 16, 1977, was an invoice or statement of charges showing professional services were rendered between the dates of December 31, 1976, to March 31, 1977, and itemizing the number of hours and hourly rate of charges totaling $7,000. Appellant argues that there is no February 9, 1975, court order evidencing this agreement or a basis for a valid claim. In other words, appellant asserts that the claim, as amended in circuit court, is based upon a 1976 county court resolution and a different amount, neither of which was presented to the county court.

However, the appellant overlooks appellee's cover letter dated November 16, 1977, enclosing the county claim and itemized invoice. That letter reads:

> On the 30th day of December, 1976, the County Court of Sharp County entered into a contract with Northeast Arkansas Planning and Development Corporation to prepare and file a pre-application for federal assistance to the Department of Housing and Urban Development in Little Rock. Provisions of this order required the County to pay a fee of $7,000.00. According to information that we have, this contract has been fulfilled and the County is in receipt and has accepted a

> $250,000 grant from the Department of Housing and Urban Development. I feel that the employment of our firm has been completed and fulfilled as per the agreement and payment of $7,000.00 is due our company. You will find our invoice for these services included within this letter and should you have any questions pertaining to the statement of the services rendered, please feel free to contact me at any time.

Even so, the appellant argues that an affidavit in circuit court by a successor county judge states that the county could not pay the claim since it referred to a February 9, 1975, county court order which has been adjudicated by the courts. (*Sharp County* v. *Northeast Ark. Plng. & Cnsltg.*, 269 Ark. 336, 602 S.W. 2d 627 [1980]). However, appellant overlooks that the affiant also stated that he knew from his own personal knowledge that a resolution was passed by Sharp County, Arkansas, dated December 30, 1976, which permitted Sharp County to enter into the asserted agreement with the appellee. In our view appellant was clearly aware that appellee was claiming payment for services pursuant to the December 30, 1976, resolution. Further, we cannot perceive how the county was prejudiced when the circuit court permitted the claim of $7,000, the maximum contingent fee, to be reduced to $4,530. No prejudice is demonstrated. Therefore, the circuit court did not abuse its discretion in permitting the amendments since it did not change the original cause of action in the county court.

Appellant next asserts that the trial court erred in overruling its motion for summary judgment in that (a) the trial court was without jurisdiction to hear the amended claim of plaintiff and (b) plaintiff was allowed to file an affidavit during or after the hearing. A sufficient answer to this contention is that "the denial of a motion for summary judgment is not subject to review even after final judgment in a suit." *Henslee* v. *Kennedy*, 262 Ark. 198, 555 S.W. 2d 937 (1977). See also *Life and Cas. Ins. Co. of Tenn.* v. *Gilkey*, 255 Ark. 1060, 505 S.W. 2d 200 (1974).

Appellant further argues the county court resolution dated December 30, 1976, was not an agreement for appellee

to perform any services for appellant which were compensable, and, therefore, the trial court erred in overruling appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict. These motions were based upon the assertion that the circuit court lacked jurisdiction. We have already determined that the circuit court had jurisdiction. Further, a directed verdict is proper only when there is no substantial evidence from which the jurors, as reasonable persons, could possibly find the issues for the party opposing the motion. *Ark. Kraft Corp.* v. *Johnson, Adm'n,* 257 Ark. 629, 519 S.W. 2d 74 (1975). Here, the resolution dated December 30, 1976, was in evidence. There was ample testimony and other evidence that an agreement existed between the parties and the services were rendered pursuant to it. Whether or not this resolution and the acts of the parties constituted an agreement is a question of fact for the jury to decide. *Manhattan Factoring Corp.* v. *Orsburn,* 238 Ark. 947, 385 S.W. 2d 785 (1965).

Appellant next contends the trial court erred in awarding appellee interest on its judgment. Appellee concedes this is correct. Ark. Stat. Ann. § 29-125 (Repl. 1979). To this extent the judgment is modified.

Affirmed as modified.

HICKMAN, J., dissents as to first issue.

Billy J. CHAMBERS *v.* STATE of Arkansas

CR 81-109 628 S.W. 2d 306

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Robert A. Newcomb,* for appellant.

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

JOHN I. PURTLE, Justice. The appellant was convicted of rape by a jury and sentenced to 50 years.

Appellant filed a timely notice of appeal and alleged three points for reversal: (1) that the victim's testimony should have been excluded because of her age; (2) that appellant's statement should have been suppressed due to the lack of a valid waiver of counsel; and, (3) that the remarks of the deputy prosecutor in closing arguments were improper and should have been grounds for a mistrial. We find no merit in any of the contentions of the appellant and affirm the judgment as expressed by the trial court.

The facts of the case reveal that in July 1980 appellant's wife had gone to Texas for her sister's funeral. On July 26, 1980, appellant took the victim, age six, and her brother, age 13, from their home with their mother's permission. The appellant was apparently a family friend. That evening appellant and the 13 year old brother were drinking beer and at one point a game of strip poker was played which resulted in at least the two children stripping completely naked. Later, in the appellant's bedroom, appellant had oral sexual contact with the victim and she was forced to take appellant's penis into her mouth. Afterwards, appellant, the girl and her brother all slept naked in the appellant's bed.

The appellant feels that due to victim's tender age (she was six at the time of the incident, seven at the time of trial) the trial court should have excluded her testimony. In *DeVoe* v. *State,* 193 Ark. 3, 97 S.W. 2d 75 (1936), this court held, in regard to an 8 year old rape prosecutrix:

> As to her competency, it may be said, first, that her competency was peculiarly within the trial court's

> discretion, and the trial court's ruling on the question will not be disturbed unless there was a gross abuse of discretion.

In the present case, the victim stated that she had learned about telling the truth from Bible stories read to her, and that if she told a lie she would be put in jail. The trial court was apparently convinced of the victim's ability to understand the consequences of not telling the truth. Our guidelines in regard to the common law tests of the competency of a witness in a criminal trial have been set out numerous times, they are:

> The ability to understand the obligation of an oath and to comprehend the obligation imposed by it; an understanding of the consequences of false swearing; and the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the factfinder a reasonable statement of what was seen, felt or heard.

*Kitchen* v. *State,* 271 Ark. 1, 607 S.W. 2d 345 (1980). The question of the competency of witnesses in a criminal trial is a matter lying within the sound discretion of the trial judge and in the absence of clear abuse of discretion, or obvious error, its exercise is not reviewable on appeal. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W. 2d 589 (1980).

The appellant was arrested on July 27, 1980, by the Pulaski County Sheriff's Office. During the investigation, Deputy Prosecutor Mike Martin was called to assist in interviewing the appellant. The appellant signed a standard rights form and then gave a statement to Martin which was recorded. The rights statement contained the language: "I have been advised . . . that I have the right to talk with an attorney, either retained by me or appointed by the court, before giving a statement, and to have my attorney present when answering any questions." We have recently ruled on the question of the validity of this particular portion of a similar Miranda warning and held it to be adequate. *Thomerson* v. *State,* 274 Ark. 17, 621 S.W. 2d 690 (1981). When we examine the totality of the circumstances sur-

rounding the giving of the appellant's statement we cannot say that his right to counsel was not voluntarily waived. Deputy Prosecutor Martin, being an attorney and in attendance at the taking of the statement should have perhaps exercised more authority and specifically advised the appellant that he could have had immediate access to an attorney without cost. However, according to the record, appellant was advised of his rights on at least two occasions, and from all of the evidence presented, signed the waiver freely and voluntarily. We feel that the appellant's constitutional rights as expressed in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), have been adequately safeguarded.

Appellant's final contention is that the deputy prosecutor's closing remarks were improper and that a mistrial should have been granted by the trial court. Upon looking at the record we find that the remarks were not prejudicial. In any event, after defense counsel objected, the trial court admonished the jury that the deputy prosecutor was presenting argument, not evidence, and that they should not consider it as evidence. The trial court has broad discretion in controlling, supervising and determining the propriety of arguments of counsel, and its exercise will not be reversed in the absence of gross abuse. *Shaw* v. *State,* 271 Ark. 926, 611 S.W. 2d 522 (1981).

Therefore, the judgment is affirmed.

Affirmed.

Melody ROBERTS *v.* Leon L. SIMPSON

81-197 628 S.W. 2d 308

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Barrett, Wheatley, Smith & Deacon,* for appellant.

*William C. Ayres,* for appellee.

ROBERT H. DUDLEY, Justice. Appellee Leon Simpson brought suit against appellant Melody Roberts for damages incurred in an automobile accident. The material evidence is appellee indisputably suffered $1,441.00 in property damage and $6,659.22 in medical expense. These damages total $8,100.22. In addition appellee testified that during a period of disability totalling thirteen and one-half months following the accident, he suffered $24,439.00 in loss of earnings. Appellee's doctor corroborated the amount of time lost from work. The $8,100.22 in undisputed damages plus the $24,439.00 which appellee claims for loss of earnings amounts to $32,539.22. The trial judge gave an instruction on comparative negligence and the jury returned with a verdict of $7,500.00. Appellee filed a motion for new trial which the court granted upon the grounds set forth in Rule 59 (a) (5) and 59 (a) (6), A. R. Civ. P., Ark. Stat. Ann., Vol. 3A (Repl. 1979), which are, "error in the assessment of the amount of recovery" and "the verdict . . . is contrary to the . . .

evidence . . ." This appeal is from the granting of the new trial. We affirm.

In *Worth James Construction Co.* v. *Jean Herring,* 242 Ark. 156, 412 S.W. 2d 838 (1967), we said that a new trial is proper "where the injury is susceptible of definite pecuniary measurement such as in loss of earnings and medical expense, and where the amount of the verdict may be based on comparative negligence." In the case before us $8,100.22 of the damages were not disputed and were exact. The $24,439.00, which appellee testified was his loss of earnings is disputed as a matter of law because a party's testimony is not treated as undisputed. *Raiborn* v. *Raiborn,* 254 Ark. 711, 495 S.W. 2d 858 (1973). Still, this loss of earnings testimony concerns damages which are susceptible of pecuniary measurement as distinguished from those not easily measurable, such as pain, suffering or mental anguish. See *Law* v. *Collins,* 242 Ark. 83, 411 S.W. 2d 877 (1967).

The trial judge held that the $7,500.00 verdict was contrary to evidence of damage which was susceptible of pecuniary measurement and that ruling was not an abuse of discretion. The trial judge is vested with great discretion in ruling on a motion for a new trial and will not be reversed unless there is a manifest abuse of that discretion. *Garner* v. *Finch,* 272 Ark. 151, 612 S.W. 2d 304 (1981). In addition, a showing of abuse of discretion is even more difficult when a new trial has been granted because the beneficiary of the verdict which was set aside has less basis for a claim of prejudice than does one who has unsuccessfully moved for a new trial. *Security Insurance* v. *Owen,* 255 Ark. 526, 501 S.W. 2d 229 (1973).

The trial judge did not abuse his considerable discretion.

Affirmed.

CONSTRUCTION ADVISORS, INC. and
WEAVER-BAILEY CONTRACTORS, INC. *v.*
Charles H. SHERRELL and Bernice B. SHERRELL

81-211 628 S.W. 2d 309

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Penix, Penix & Mixon,* for appellants.

*Robert D. Stroud* and *H. David Blair,* of *Murphy, Blair, Post & Stroud,* for appellees.

ROBERT H. DUDLEY, Justice. Appellee Charles Sherrell was injured while performing construction work on the Baxter-Travenol industrial plant at Ash Flat. The jury awarded $450,000 to appellee Charles Sherrell and $25,000 to appellee Bernice Sherrell for loss of consortium. Ninety percent of the negligence was apportioned to appellant Construction Advisors, Inc., and ten percent to appellant Weaver-Bailey Contractors, Inc. We affirm.

The primary issue on appeal is whether a comment by the judge to the jury compromised the rights of the appellants. While the issue is simple, the facts leading to the comment are rather complex. Baxter-Travenol Laboratories desired to construct a large industrial plant in Ash Flat and entered into a contract with appellant Construction Advisors. A part of the contract was that Construction Advisors would procure all of the contractors and subcontractors who would actually construct the plant. Construction Advisors was to have all of the supervisory responsibility over the construction work and had the specific duty of seeing that there was compliance with all safety laws and regulations. Appellant Construction Advisors subsequently entered into a contract with Fiske-Carter Construction Company to

perform the rough carpentry work and the masonry work. Appellee Charles Sherrell was an employee of Fiske-Carter. Appellant Weaver-Bailey was a concrete subcontractor under Fiske-Carter. The contracts of Fiske-Carter and Weaver-Bailey provided that they would comply with all safety codes. On the date of the injury Charles Sherrell was directed by his Fiske-Carter supervisor to assist one of Weaver-Bailey's crews in the finishing of a concrete floor. He was severely injured trying to move a 40-foot vibrating screed used to level wet concrete. Fiske-Carter's workers' compensation carrier commenced making payments to appellee. Because workers' compensation is an exclusive remedy for workers injured in the course of their employment, Charles Sherrell was *prohibited by law* from suing his employer, Fiske-Carter. However, Sherrell did have a cause of action against appellants Construction Advisors and Weaver-Bailey for failing to follow safety codes and creating an unreasonably dangerous work area. The appellees filed their suit against appellants and then appellant Construction Advisors filed a third party complaint against Fiske-Carter alleging that their contract provided for indemnity to appellant Construction Advisors. Two material procedural steps took place prior to trial: One, the indemnity suit by appellant Construction Advisors against Fiske-Carter Construction Company was severed for a later trial and, two, the trial court granted appellees' threshold motion to prohibit mention of the fact that appellee had received workers' compensation benefits.

During opening statement, during cross-examination and during closing argument the apparent strategy of appellant Construction Advisors was to lead the jury to believe there was some importance to the absence of Fiske-Carter. To illustrate, we quote from one of the many references to Fiske-Carter, this particular one being made during appellants' opening statement.

> Fiske-Carter was Mr. Sherrell's employer. The Plaintiffs have *chosen* not to sue Fiske-Carter in this case . . . but that does not mean that you are not going to be asked to consider whether or not Fiske-Carter is the one at fault, and I want you to keep in mind what I

> think the proof is going to indicate to you . . . What was the involvement of Fiske-Carter, did they live up to their obligation to meet these OSHA regulations or not . . .

The case was submitted to the jury on interrogatories. All of the interrogatories were read to the jury but they were initially asked to decide only three. The three interrogatories asked the jury to determine whether appellee Charles Sherrell, appellant Construction Advisors and appellant Weaver-Bailey were negligent. After a short deliberation the jury returned to ask the court if they were to give a yes or no answer or a percentage answer. Then one juror stated:

> I'd sure like to know why they didn't sue Fiske-Carter. A lot of us would. I will just put it that way.

In response, and by agreement of all parties, the judge replied:

> . . . Fiske-Carter is a party to this lawsuit, but the extent of responsibility of Fiske-Carter, if any, is not being submitted to you at this time. The case has been separated to be tried in two stages, and we need . . . to take care of this part of the lawsuit now and then that part of it will be taken care of at that time. Now, let me re-emphasize to you, when you start trying to worry about something that you haven't been asked to worry about and trying to figure the ramifications of things, it does not help you reach justice but more likely injustice. It has been agreed that I tell you what I did because of your apparent concern about it, but I must remind you again to remember the evidence in this case, the instructions in this case without regard to any other part of this case or any other.

Then over the objection of appellants the judge made the following additional statement to the jury:

> One other clarification, Mr. Sherrell won't be involved in the other part of the case.

Appellant Construction Advisors argues on appeal that when the jury was told that appellee Sherrell would not be involved in the subsequent trial there were two implications to the jury: One, appellee Sherrell would have no chance for additional damages and, two, appellant Construction Advisors had indemnity against the verdict.

Appellant is correct in stating that our rule prohibits a trial court, in submitting a case upon special interrogatories, from informing the jury of the effect that their answers may have on the ultimate liability of the parties. The reason for the rule is that the special interrogatories are intended to elicit the jury's unbiased judgment upon the issues of fact, and this purpose might be frustrated if the jurors are in a position to frame the answers with a conscious desire to aid one side or the other. *Wright* v. *Covey,* 233 Ark. 798, 349 S.W. 2d 344 (1961). We do not decide whether the comment by the court informed the jury of the effect of their answer to the interrogatories because the appellant led the jury to think that there was a great significance to the absence of Fiske-Carter, which in turn, quite naturally gave rise to the question by the juror. Even if the comment was error, it was invited. The trial court gave a factually correct answer which was not improper under these circumstances.

We quickly dispose of the second phase of the argument because the only comments which could have left a suggestion of indemnity were those comments agreed to by all parties.

Appellant Construction Advisors, the prime contractor, next contends that it has no liability to a subcontractor's employee when the prime contractor and the subcontractor agreed for the subcontractor to comply with all safety codes. It argues specifically that the trial court erred in not granting a directed verdict. Our general rule is that a prime contractor only has a duty to exercise ordinary care and to give warning in event there are any unusually hazardous conditions which might affect the welfare of the employees. *Gordon* v. *Matson,* 246 Ark. 533, 439 S.W. 2d 627 (1969). However, where the primary contractor is guilty of negligence which causes the injury there can be liability. *Aluminum Ore Co.* v.

*George,* 208 Ark. 419, 186 S.W. 2d 656 (1945). Thus, a prime contractor may be held liable for failure to perform a duty which it has undertaken. Here, Baxter-Travenol entered into a contract with Construction Advisors by which Construction Advisors undertook to supervise the construction and see that there was compliance with all safety laws and regulations. The safety codes are for the benefit of workers like Charles Sherrell and those workers were the third-party beneficiaries of the contract. Construction Advisors was liable to any worker injured as a result of its negligent failure to perform its contract. The fact that the subcontractor also agreed to comply with the safety codes does not absolve the prime contractor of liability. The trial court did not err in denying the motion for a directed verdict.

Affirmed.

HAMLIN FLYING SERVICE, INC. and James HESS
*v.* B. J. BRECKENRIDGE and Earl D. ANDERSON

81-199 628 S.W. 2d 312

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Wright, Lindsey & Jennings,* for appellants.

*Fletcher C. Lewis,* for appellees.

STEELE HAYS, Justice. The single issue presented by this appeal is a challenge to the sufficiency of the evidence in support of a jury verdict. Appellees Breckenridge and Anderson brought suit against appellants James Hess and his company, Hamlin Flying Service, Inc., alleging damage to plaintiffs' cotton as a result of hormone herbicides sprayed on a nearby rice field belonging to Davis Brothers, Incorporated (not a party to the suit). The jury awarded $29,000.00 in damages to Breckenridge and Anderson and for reversal Hess argues that the trial court should have granted defense motions for a directed verdict and for judgment n.o.v. because there was no substantial evidence the defendants caused the damage. We think the evidence was sufficient.

In 1979 Breckenridge and Anderson planted 160 acres of cotton in Woodruff County. The acreage was in eight parcels, relatively close together, just west of Bayou DeView and south of the Jackson County line except for one parcel just north of the line. The bayou runs north and south at that point and approximately three-quarters of a mile east of the bayou lies the Davis rice field, an 80-acre tract and the subject of this dispute. The rice field is one-half mile long, north to south, and one-quarter mile wide, east to west, Jackson County being its northern boundary. Near the northwest corner of the rice field, just inside Jackson County, is what is described as a "tall communication tower."

Stating the facts most favorably to the appellees, around 6 a.m. one morning in mid July, 1979, a yellow, single wing airplane was observed spraying an area just south of the

tower and east of the bayou. The wind was from the east. A strong odor of 2-4 D was present in appellees' cotton fields, which lay almost due west of the Davis rice field. The plane appeared to be working an east-west pattern and twice crossed over the bayou as it made its turns. Some five or six days afterward, on what appellees say was July 16, the cotton began to show initial signs of hormone herbicide poisoning characteristic of 2-4 D and 2-4-5 T. The residual damage to appellees' cotton was moderate to severe resulting in an appreciable loss. It is conceded by both sides that the effects of hormone herbicide poisoning require a five-to-six day incubation period. Several witnesses for appellees testified positively the spraying occurred on July 11 and the ill effects were visible by July 16.

Appellants admit they sprayed 2-4 D and 2-4-5 T on the Davis field, but they insist it was on July 16, and they stoutly deny any responsibility for appellees' damage because, they say, they did not spray the herbicides anywhere near the area in question on July 11 or at any time which could conceivably produce visible damage to cotton on July 16. Thus, the very crux of this dispute is not so much whether the appellants sprayed herbicides in the manner and location claimed by appellees, but whether they sprayed on July 11, as appellees claim. Appellants point out, correctly, that there is no direct evidence that the plane seen by the appellants' witness, David Pritchard, was theirs — Pritchard could only say that the plane was a yellow, single wing plane that resembled appellants' plane, a Rockwell Thrush. Pritchard testified to having seen the plane spraying east of the bayou and south of the tower at about 6 a.m. on the morning of July 11. He went immediately to appellees' cotton fields and detected a strong odor of 2-4 D. Shown a photograph of appellants' plane and asked if he had ever seen a plane like it before, he answered that he had, saying the plane looked like the one he saw.

Appellants concede that at about 6:30 on a July morning, which they say was the 16th, James Hess, flying the Thrush, sprayed 30 gallons of 2-4 D and 2-4-5 T on the rice field belonging to Davis Brothers. Hess insisted he worked north and south, that being the longer leg, rather

than east to west, always turning away from the bayou. He said that at no time did he cross the bayou or come closer than a half mile. To prove he kept a greater distance from the cotton fields, Hess and Walter Davis, who flagged for him, testified that only the east 40 acres of rice was sprayed (farthest from the bayou) there being "no indigo problem" in the west half.

The only issue on appeal is the sufficiency of proof and in gauging that we are required by a multitude of cases to view the evidence, with all reasonable inferences to be drawn from it, in the light most favorable to the appellees and we are bound to affirm if any substantial evidence exists. *Washington National Insurance Co.* v. *Meeks,* 252 Ark. 1178, 482 S.W. 2d 618 (1972). In order to reverse we must be able to say there is no reasonable probability that the incident could have occurred as found by the jury. *Fanning* v. *Hembree Oil Co.,* 245 Ark. 825, 434 S.W. 2d 822 (1968).

Appellants point to two weaknesses in appellees' evidence: (1) the absence of positive identification of the yellow plane and (2) the absence of direct evidence that the plane was spraying the Davis rice field. We agree the proof on the first point is weak, though we disagree it is fatal. Pritchard was unable to see the markings or registration numbers of the yellow plane and, hence, his testimony was inconclusive, in spite of what he perceived to be a resemblance between the plane he saw and the one in the photograph. If that were the sum and substance of the evidence connecting the appellants to the spraying we would be hard pressed to say the verdict was supported by substantial evidence. But that is not the entire proof, and when all the circumstantial evidence is examined, we believe it meets the test.

With respect to the two contentions, the solution to each point provides a clue to the other, because if it was the Davis rice field being sprayed by the yellow plane Pritchard saw, then the reasonable inference is that it was the appellants' plane he saw. Mr. Walter Davis of Davis Brothers testified that Hess sprayed the rice with 2-4 D and 2-4-5 T around the middle of July (he was not sure of the exact date). He spoke of only one such spraying. Moreover, Hess testified

that the fields could not have been sprayed twice with herbicides because it would have damaged the rice to apply that much.

As to the second point, both direct and circumstantial evidence supports the finding that it was the Davis rice field being sprayed. Direct testimony by David Pritchard placed the plane spraying the herbicides as east of the bayou and south of the tower, or adjacent to the rice field. Added to this testimony is the evidence supplied by plaintiffs' Exhibit 2, which shows the rice field to be surrounded by soybean fields on the east, south and west sides (the exhibit does not identify crops to the north). Mr. John Chronister, an inspector for the State Plant Board, testified that 2-4-5 T, and to some extent 2-4 D, were harmful to soybeans. Thus, the only likely spraying of 2-4 D and 2-4-5 T south of the tower and east of the bayou would be the Davis rice field, being the only rice field fitting that description. Since the plane Pritchard saw was spraying 2-4 D and 2-4-5 T, it follows that it was the Davis field being sprayed and the appellants' plane that was spraying.

Turning to the dispute over dates, appellants ask in effect that we reverse the jury's findings based on their contention that the spraying could only have occurred on July 16 because their records permit no other conclusion. It is true that a variety of appellants' records, consisting of a report to the State Plant Board (plaintiffs' Exhibit 3), invoices from his flying company and supply company, as well as an accounting ledger, support July 16 as the date the spraying was done. But the weight and credibility of these records were matters for the jury to consider and it was not bound to accept the records as more credible than the oral testimony. The proof showed that Hess kept his own records and could have completed them as he chose. There is nothing to suggest the records were altered in any manner, but the credibility of business records of a litigant is an issue for the jury to determine. There is no requirement in the law that a fact-finder must give greater weight to records than to oral testimony in determining when events occur. Besides, while appellants' records seem worthy of probative value, even a casual inspection reveals a distinct variation between

appellants' records and their proof: Hess and Walter Davis testified that when the 80-acre rice field was sprayed by Hess *only* the east half, the 40 acres away from the bayou, was sprayed. But plaintiffs' Exhibit 5, Hess's report to the State Plant Board, reflects that he treated the entire 80 acres of rice, not just the 40 acres he claims to have treated. That discrepancy is further evidenced by appellants' invoice no. 866 of Hamlin Flying Service, Inc., which shows Davis Brothers being charged $372.00 for spraying the full 80 acres ($4.40 per acre of "D & T," or $352.00; and 25 cents per acre of "lo-drift," or $20.00). Hess's report to the State Plant Board also reflects that he applied a spray mixture of 3 gallons per acre. Since 30 gallons of 2-4 D and 2-4-5 T were used (appellants' invoice no. 1597) a ratio of 3 gallons per acre would be correct only if the entire 80 acres of rice were sprayed. Thus, if the testimony of Walter Davis and James Hess is true and only 40 acres of rice was sprayed with herbicides, then appellants' report to the State Plant Board and his invoices are incorrect. Be that as it may, we cannot say that there is no reasonable probability that the events could have occurred so as to be consistent with the jury's findings and we affirm the judgment.

Carolyn Ann RUSSELL *v.* James Edgar RUSSELL

81-175 628 S.W. 2d 315

Supreme Court of Arkansas
Opinion delivered February 22, 1982

*Howell & Price,* for appellant.

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

STAN MILLER, Special Justice. James Edgar Russell sued Carolyn Ann Russell for divorce on August 29, 1980, alleging as grounds the three year separation of the parties. Since Mr. and Mrs. Russell married in 1963, they acquired both real and personal property, including a residence and stock in Matthews International Corporation, Mr. Russell's employer. The Russells are the parents of one child who was sixteen years of age at the time of the trial. The Court granted a divorce to Mr. Russell on the basis of the three year separation and ordered a division of the marital property. Mrs. Russell was awarded possession of the residence until the minor child reached his majority or finished high school at which time the Court ordered the residence to be sold and the proceeds divided equally. In making the division, the Court valued the Matthews International Stock and awarded it to Mr. Russell. Mrs. Russell received a monetary award equal to one-half the value of the marital property after adjustments for certain in-kind distributions not at issue here. Pursuant to the decree, Mr. Russell was permitted to satisfy the monetary obligation from his share of the net proceeds of the residence when it sold. Finally, the Court continued a temporary child support award of $200.00 per month and also ordered Mr. Russell to continue paying Mrs. Russell $500.00 per month in alimony until the residence is sold.

Appellant contends each of these findings are reversible error. We affirm the decision of the Chancellor as modified herein.

I.

Appellant first contends that the trial court erred in finding that there was sufficient corroboration of the three

year separation of the parties. We disagree. Mr. Russell's corroborating witness, Harold Peterson, testified that he worked with Mr. Russell and had known him for 23 or 24 years and had known Mrs. Russell for 17 or 18 years. He testified that during the entire time he had known them, they had both lived in White County; that he had visited in Mr. Russell's present home three or four times since the separation and that he had visited the home owned jointly by the parties shortly after the separation occurred. Mr. Peterson's uncontradicted testimony was that Mr. and Mrs. Russell had been separated since August 29th of 1977, a period of more than three years. Corroboration is as essential to the granting of a divorce on the grounds of three year separation as it is in any other case. But, where it is plain that the divorce action is not collusive, the corroboration may be comparatively slight. *Lewis* v. *Lewis,* 255 Ark. 583, 502 S.W. 2d 505 (1973); *Owen* v. *Owen,* 208 Ark. 23, 184 S.W. 2d 808 (1945); *Allen* v. *Allen,* 211 Ark. 335, 200 S.W. 2d 324 (1947). Nonetheless, there must be corroboration to some substantial fact or circumstance independent of the Appellee's testimony which would lead an impartial and reasonable mind to believe that the material testimony is true. *Lewis, supra; Welch* v. *Welch,* 254 Ark. 84, 491 S.W. 2d 598 (1973). Appellant insists that the Appellee's corroborating testimony does not meet the standard outlined in *Hair* v. *Hair,* 272 Ark. 80, 613 S.W. 2d 376 (1981). In that case, it was undisputed that the parties had continued to reside in the same household during the purported three year period of separation. The testimony of the parties in that case was in direct conflict as to when sexual relations terminated; and, according to the neighbors, there was no appearance of estrangement. In the instant case, the uncontradicted testimony of Mr. Russell and his corroborating witness is considerably more substantial than the corroborating testimony in *Hair, supra,* and is sufficient to corroborate the three year separation.

II.

Appellant next contends that the trial court erred in not ordering a distribution of the marital property at the time the divorce decree was entered.

During his marriage to the Appellant, Mr. Russell acquired 535 shares of stock in Matthews International Corporation, his employer. During the three year separation period, he sold 200 of those shares. The trial court awarded Mrs. Russell an amount equal to one-half of the after-tax proceeds of the 200 shares of stock which were sold and one-half the value, as determined by the Court, of the shares which were awarded to Mr. Russell. After adjustments were made for the in-kind distribution of other marital property not at issue here, Mrs. Russell's monetary award totaled $18,310.93.

The Court provided that this amount would be paid to Mrs. Russell from the proceeds of the sale of the home which would occur when the parties' sixteen year old son attained his majority or finished high school. The Court retained jurisdiction to make adjustments in the event the house did not sell for enough money to enable the parties to divide their property as contemplated in the decree.

Appellant points out that under the arrangement ordered by the trial court she will not receive her monetary award for some period of time. During that time, the money is beyond her control, so she has no means of investing it to prevent its value from being eroded by inflation or to realize income from it. At the same time, she points out that this arrangement permits Mr. Russell to invest the cash he realized from the sale of the 200 shares and also to realize any appreciation in the value of the stock he was awarded. She also points out the possibility that the proceeds of the sale of the residence might be inadequate to satisfy Mr. Russell's obligation and that, in that event, she has no assurance the Appellee will have resources sufficient to make up the difference. Even though jurisdiction was retained, the Chancellor could do little to ameliorate this kind of circumstance.

The concern expressed by Appellant is consistent with the language of Ark. Stat. Ann. § 34-1214 (Cum. Supp. 1981) which clearly does not contemplate the delayed division of marital property ordered here. In relevant part, the statute provides that:

(A) *At the time a divorce decree is entered:*

(1) All marital property shall be distributed one-half (½) to each party unless the Court finds such a division to be inequitable. . . . (Emphasis Added)

We do not read this section so narrowly as to require the Chancellor in every case to mechanically divide the marital property in kind upon the granting of the Decree of Divorce. We do conclude, however, that the portion of the decree permtting the Appellee to delay payment of the Appellant's share of the marital property until the sale of the home following the minor child's attaining majority or graduation from high school is not consistent with the requirement of Ark. Stat. Ann. § 34-1214 that marital property be distributed at the time the decree is entered. Under these circumstances, the Chancellor should have required Mr. Russell to pay Mrs. Russell for her interest in the marital property within a reasonable time after the decree was entered. A reasonable period of time would, in this instance, be the time reasonably required for Mr. Russell to obtain a loan to satisfy the obligation. If Mr. Russell cannot satisfy the monetary award within a reasonable period of time, and certainly within 45 days from the date of this opinion, the undivided marital property will be divided in-kind and distributed to the parties. Therefore, the decree of the Chancery Court is modified as indicated and judgment entered accordingly. This is consistent with the usual practice of this Court to resolve controversies here without remand to the trial court whenever possible. *Ferguson* v. *Green,* 266 Ark. 556, 587 S.W. 2d 18 (1979). However, in the event the monetary award is not satisfied within the time specified the Chancellor is directed to take such further action as may be required consistent with this opinion.

Since the residence was owned by both parties as an estate by the entirety, it is not marital property which must be divided pursuant to Ark. Stat. Ann. § 34-1214. *Warren* v. *Warren,* 273 Ark. 528, 623 S.W. 2d 818 (1981). The award of possession of the home to Mrs. Russell as provided in the decree is a reasonable application of a well recognized equitable remedy and is consistent with the Appellant's

request at trial. *Schaefer* v. *Schaefer,* 235 Ark. 870, 362 S.W. 2d 444 (1962); *Fitzgerald* v. *Fitzgerald,* 227 Ark. 1063, 303 S.W. 2d 576 (1975); see also, *Stevens* v. *Stevens,* 271 Ark. 248, 608 S.W. 2d 17 (1980).

III.

Appellant next contends that the trial court erred in valuing the 335 unsold shares of stock in Matthews International Corporation, Mr. Russell's employer. Mr. Russell purchased the stock in several transactions between 1968 and 1976. In each case he executed a promissory note in favor of the corporation for the purchase price. At the same time the various notes were executed, Mr. Russell executed a stock purchase agreement[1] which granted the corporation an option to repurchase the shares in the event of Mr. Russell's termination of employment (other than by death or retirement) if that termination occurred before the particular promissory note was satisfied or within a three year period thereafter. The purchase price of the shares pursuant to the option was the lesser of (1) the price paid by the stockholder, or (2) the book value of the stock as determined by the company's certified public accountants. This re-purchase right was optional with the corporation, so Mr. Russell, during the period of the restriction, could not require Matthews International to re-purchase the shares. According to Mr. Russell's testimony, the consolidated book value of the shares at the time of the trial was substantially higher than their original purchase price, but the shares could not be sold for their book value until all of the restrictions contained in the stock purchase agreement had been satisfied. Paragraph 12 of that agreement defines precisely when the shares become free of the restrictions:

> 12. Three (3) years after the date of the final payment of the total amount of the Note, the Company will

[1]In addition to the stock purchase agreement discussed here, these shares were also subject to a separate re-purchase agreement granted the company on July 28, 1977. The second agreement grants the corporation certain options to re-purchase the shares upon the employee's retirement or attaining of age 65. It is not relevant to the determination of the issues in this case.

> deliver a certificate to the Employee representing the Stock purchased pursuant to this Agreement without the legend referred to in paragraph 10 hereof (but bearing the legend referred to in the Option Agreement), all collateral which has been deposited with the Company in accordance with paragraph 5 hereof and the Note marked "Satisfied in Full". At such time this Agreement shall be terminated and of no further force and effect.

We interpret this agreement to mean that the subject shares had a value equal to their book value if they had been delivered to Mr. Russell at the time of the trial and had a value equal to their cost if he had not yet received them.

Two Hundred of the 335 shares had been paid for and the three year period had expired, but no evidence was presented at the trial or in the Appellant's Motion for a New Trial which contradicts Mr. Russell's testimony that he had not received the shares at the time of the trial; nor does the Appellant allege any collusion between the Appellee and the corporation in withholding delivery of the shares. The Appellant's motion merely contained the general allegation that the Appellant "has learned that Matthews International Corporation stock of the type Plaintiff owned was actually worth $161.80 per share." The motion lacked supporting affidavits required by Rule 59 (c), Ark. R. Civ. P., so any specific facts which would shed light on whether or not Mr. Russell had actually received the shares are missing. We will not reverse the decision of the Chancellor on a disputed fact question unless the decision is clearly against the preponderance of the evidence. Rule 52, Ark. R. Civ. P. Without more, we cannot say that the decision of the Chancellor is clearly against the preponderance of the evidence and conclude that the net value of the shares at the time of the trial was correctly determined by the Chancellor to be $12,494.33.

V.

The Appellant insists that the trial court should not have awarded all of the Matthews International Corporation

stock to the Appellee with an offsetting monetary award to the Appellant. Appellant contends that an equal division of the stock in kind or a forced sale of the stock are the only methods available to the Court to divide the stock in this case. We disagree. The language in Act 705 of 1979 [Ark. Stat. Ann. § 34-1214 (A) (3)] clearly contemplates the kind of division made by the Chancellor here:

> (3) Every such final order or judgment shall designate the specific property both real and personal, to which each party is entitled;

The intent of Act 705 of 1979 was to insure that the chancellor had the discretion to make an equitable division of all of the marital property with the least possible prejudice to either party. In this instance, Mr. Russell was only able to purchase the Matthews International Corporation stock because he was an employee of the company. The stock was subject to substantial retransfer restrictions and some of the stock was still subject to indebtedness at the time of trial. The testimony indicates that ownership of this stock is important to Mr. Russell's relationship with his employer, but the same stock would only have a monetary value to Mrs. Russell. The Chancellor's award of the stock to Mr. Russell with an offsetting monetary award to Appellant is a reasonable exercise of discretion amply supported by the record.

VI.

Appellant claims the Chancellor should have awarded her 80% of the marital property. Such a division would require the application of the factors pertaining to the division of marital property found in Ark. Stat. Ann. § 34-1214 which reads as follows:

> "DIVISION OF PROPERTY. (A) at the time a divorce decree is entered:
>
> (1) all marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable, in which event the court shall make some

other division that the court deems equitable taking into consideration (1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker. When property is divided pursuant to the foregoing considerations the court must state in writing its basis and reasons for not dividing the marital property equally between the parties."

Appellant bases her contention that she should receive a larger share of the marital property on her physical condition and present prospects for future employment. There was some evidence of a physical impairment suffered by Mrs. Russell. Her testimony indicated that this impairment was partially a result of an accident which occurred at McCain Mall in 1975. In settling the claim arising out of that injury, she testified in depositions that she was disabled from working as a result of the accident, but records reflect that she had actually worked and received raises during the same period she alleged she was disabled. Further, the Chancellor may have found significance in the fact that Mrs. Russell's visits to the doctor increased substantially after this action was filed.

Appellant also urges this Court to consider her relative financial position as a basis for awarding her a larger share of the marital property, but the application of this factor and all of the other factors outlined in Ark. Stat. Ann. § 34-1214 (A) (1) contemplates an element of discretion best exercised by the Chancellor since he actually has the opportunity to hear the testimony of the witnesses. As this Court indicated in *Dennis* v. *Dennis,* 239 Ark. 384, 389 S.W. 2d 63 (1965), the opportunity to observe the witnesses firsthand puts the Chancellor in a position "immeasurably superior to ours" to resolve conflicting testimony. See also, *Marine Mart, Inc.* v. *Pearce,* 252 Ark. 601, 480 S.W. 2d 133 (1972). The

application of these factors is a factual determination; therefore, this Court will not reverse the decision of the Chancellor in making a division of marital property unless the property division is clearly against the preponderance of the evidence. Rule 52, Ark. R. Civ. P. We have reviewed the record in this case being particularly mindful of the factors identified in Ark. Stat. Ann. § 34-1214 urged by the Appellant and have concluded that an equal division of the marital property is supported by the preponderance of the evidence.

VII.

Appellant next claims the trial court erred in providing that alimony be terminated when the house is sold. Appellant contends that she is completely unemployable and that the proceeds from the sale of the residence are so speculative that she may not be able to support herself when the alimony terminates.

The Chancellor heard the Appellant's testimony at the trial, including testimony relating to Mrs. Russell's illness, her employment record, and her monthly financial needs. In his Memorandum Opinion, the Chancellor indicated the reasons for terminating alimony when the house is sold:

> The court is not allowing alimony after the house is sold for the reason that she will be receiving substantial property settlement at that time, she settled her claim for disability, this period of time together with the long period of separation should be ample time for her to rehabilitate herself in order to secure employment.

The trial court has broad powers to determine the award of alimony, particularly when the divorce is granted on the grounds of three year separation, and we cannot say that the termination of alimony when the house is sold is clearly against the preponderance of evidence. *Narisi* v. *Narisi,* 233 Ark. 525, 345 S.W. 2d 620 (1961). As we have indicated earlier, we do not reverse the decision of the Chancellor on a disputed fact question unless the decision is clearly against the preponderance of the evidence. Rule 52, Ark. R. Civ. P. In the event Mrs. Russell's physical and financial circum-

stances at the time of the sale of the home are different from what the Chancellor anticipated in his Memorandum Opinion, our law is sufficiently flexible to permit the Chancellor to modify the alimony award at that time. See Ark. Stat. Ann. § 34-1211 (Cum. Supp. 1981); *Ford* v. *Ford,* 272 Ark. 506, 616 S.W. 2d 3 (1981); *Boyles* v. *Boyles,* 268 Ark. 120, 594 S.W. 2d 17 (1980); *Pledger* v. *Pledger,* 199 Ark. 604, 135 S.W. 2d 851 (1940).

VIII.

Finally, the Appellant contends that the $500.00 per month alimony award and the $200.00 per month child support award are inadequate.

Appellant insists that Mr. Russell's admitted marital misconduct[2] should increase the amount of the alimony award. However, we think our holding in *Drummond* v. *Drummond,* 267 Ark. 449, 590 S.W. 2d 658 (1979) largely settles this issue. *Drummond* arose out of an alimony termination hearing, but the reasoning of that case is equally applicable here:

> . . . Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is charged. It is an effort, insofar as is reasonably possible, to rectify the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. Its continuation is not dependent on the good conduct of either spouse. While each case must and should be governed by its particular facts, it can be stated as a general principle that alimony should be terminated or modified by circumstances which relate to its need by the recipient or the ability to pay by the spouse against whom it is assessed.

Unless the alleged misconduct meaningfully relates to the need for support by the recipient or the ability to pay by the spouse against whom it is charged, the misconduct is not

[2]Appellee admitted in interrogatories filed with the Court that he was living with his former wife, Mrs. Joan Russell.

a permissible consideration in the determination of the alimony award. If we adopted Appellant's view that marital misconduct is a permissible consideration, we would, for dubious benefit, measurably expand the opportunity for acrimonious litigation. Consistent with our holding in *Drummond,* we conclude that Appellee's marital conduct prior to the divorce should not serve as a basis for increasing the alimony award. See *Byrd* v. *Byrd,* 252 Ark. 202, 478 S.W. 2d 45 (1972).

The amount of child support and alimony awarded must depend upon the particular facts of each case. *Dean* v. *Dean,* 222 Ark. 219, 258 S.W. 2d 54 (1953). Mr. and Mrs. Russell had been married for 18 years and had lived together for 14 years. Mrs. Russell testified that she had been under the continual care of physicians for the last year and that she was unable to work. However, she also has received a sizable award of marital property and will receive a substantial equity in the family residence when the home sells.

Mr. Russell's gross pay at the time of the trial was $2,903.00 per month. The record indicates that $881.24 is taken out of that amount each month for state and federal income taxes and social security withholding, leaving a net take-home pay of $2,021.76. Together, the child support and alimony awards total $700.00 per month, a substantial amount in relation to Mr. Russell's take-home pay. See *Knopf* v. *Knopf,* 264 Ark. 946, 576 S.W. 2d 193 (1979); see also *Stevens* v. *Stevens,* 271 Ark. 248, 608 S.W. 2d 17 (1980). In making the award, the Chancellor evidently believed that Mrs. Russell would be able to rehabilitate herself and find employment. If Mrs. Russell was not required to make the $275 monthly house payment from this amount, this award would be adequate. In this case, however, Mr. Russell will recover one-half of that portion of the house payment which reduces the principal balance of the mortgage when the house sells. In the meantime, he may deduct the alimony payment while Mrs. Russell will be required to report the alimony award, including that portion used to make the house payment, as taxable income. See, INT. REV. CODE of 1954, § 71 (a) and (d). Under these circumstances, we hold that the Appellant should receive an additional award of

$225 per month in alimony. That allowance is always subject to modification upon the application of either party. *Knopf, supra; Pledger, supra.*

The Appellant's attorneys are awarded a fee of $750.00 for services rendered in connection with this appeal, to be paid by Appellee. Costs of this appeal are assessed against the Appellee.

Affirmed as modified.

HICKMAN, J., not particpating.

John Paul COOPER *v.* STATE of Arkansas

CR 81-113 628 S.W. 2d 324

Supreme Court of Arkansas
Opinion delivered March 1, 1982

*Keith, Clegg & Eckert,* for appellant.

*Steve Clark,* Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, appellant, John Paul Cooper, was convicted of aggravated robbery and sentenced as a habitual offender to 40 years in the Arkansas Department of Correction. On appeal appellant alleges the evidence is insufficient to support his conviction.

Testimony at trial revealed that Mr. Bill Cheatham, part owner of the Wilson-Bearden Drug Store in Magnolia, Arkansas, was robbed on January 25, 1980. Cheatham testified that he opened his store at 7:30 a.m. and that shortly thereafter two black males entered the store and began looking at sunglasses. Cheatham offered to help them, but they declined. He then filled prescriptions for two other customers in the back part of the store. Approximately 10 to 15 minutes later he heard someone up front. As he started in that direction, a black male stuck a gun in his chest and told him not to move. Another black male, who had a stocking over his face, put a gun to his head and said, "We want Delaudid and Preludin."

Cheatham recognized the unmasked man as one of the two men who had been looking at sunglasses. He later picked this man out of a photo lineup and identified him as Earl Mosley.

Cheatham stated that the man with the stocking over his face had the same build and was dressed in the same flowered tannish sport shirt as the person who was with Mosley at the sunglasses rack. Cheatham picked this man out of a subsequent photo lineup and identified him as appellant.

After Cheatham gave the drugs to the men, they took his

billfold and tied him up with tape. The men were unable to open the cash register; they then left the store. Cheatham broke the tape and called the police. The police took the tape from the scene of the crime for testing. At trial, an expert latent fingerprint examiner testified that appellant's fingerprint was on the tape.

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. Substantial evidence is that which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W. 2d 748 (1980). The fact that evidence is circumstantial does not render it insubstantial — the law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact may be inferred. *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377 (1975).

In this case there was substantial circumstantial evidence from which the jury could conclude that the person at the sunglasses rack, who was identified as appellant by Mr. Cheatham, was the same person who participated in the robbery a few minutes later. Both were black males, had the same physique, and were wearing the same clothes. Apparently, the only difference was that appellant was wearing a stocking over his head at the later meeting.

The State's fingerprint expert testified that a fingerprint located on the smooth side in the middle of one of the strips of tape belonged to appellant. Appellant contends it was impossible for appellant's fingerprint to have been placed on the tape during the robbery because in wrapping the tape around Mr. Cheatham the sticky side of the tape would have adhered to the smooth side, thereby transferring the print to the sticky side. Appellant contends that the better explanation for the presence of the print is that it was placed there when appellant tore off a strip of tape for a friend to use in repairing wires of a tape player. In any event, it was for the jury to decide from the evidence presented how appellant's print got on the piece of tape. There was

substantial evidence from which the jury could find that the print was placed on the tape during the robbery.

Affirmed.

Harold L. HYATT et ux *v.* CITY OF BENTONVILLE, Arkansas, an Arkansas Municipal Corporation of the First Class

81-208 628 S.W. 2d 326

Supreme Court of Arkansas
Opinion delivered March 1, 1982

*J. L. Hendren,* for appellants.

*Kevin J. Pawlik,* for appellee.

FRANK HOLT, Justice. The appellee city initiated this suit in circuit court seeking to exercise its power of eminent domain to procure an easement across appellants' property. Appellee alleged the easement was necessary to complete the construction of a public improvement, i.e. an underground primary electrical service line and placing a pad mount thereon. Appellants answered and denied that the appellee had any statutory authority to exercise the power of eminent

domain for the purpose stated. Appellant landowners then filed a motion requesting that the circuit court transfer the case to chancery court for a resolution of the issue of the city's "right to take" and, if the chancellor found the "right to take" existed, appellants requested that the case be retransferred to circuit court for a determination of damages by a jury.

The chancery court, on the pleadings and without any proof whatsoever as to need, held that the appellee city had the authority to enter and take private property for the lawful purpose of furnishing light and power to consumers in connection with the operation of the municipal corporation. Ark. Stat. Ann. § 35-902 (Repl. 1962) and Ark. Stat. Ann. § 19-2318 (Repl. 1980). Hence this appeal which presents the sole issue as to whether the appellee city has the power to condemn land within its city limits for the purpose of constructing an underground primary electrical service line and placing thereon a pad mount transformer.

We hold the order of the chancellor is not an appealable order and dismiss the appeal. Even though the parties do not raise the issue of the existence of a final order, it is a jurisdictional question which the appellate court has the right and duty to raise in order to avoid piecemeal litigation. *Ark. S & L* v. *Corning S & L,* 252 Ark. 264, 478 S.W. 2d 431 (1972); *McConnell* v. *Sadle,* 248 Ark. 1182, 455 S.W. 2d 880 (1970); *Ark. State Highway Comm.* v. *Kesner,* 239 Ark. 270, 388 S.W. 2d 905 (1965); and *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S.W. 2d 1110 (1943). It is well established that before a judgment is final and appealable, it must dismiss the parties from the court, discharge them from the action or conclude their rights to the subject matter which is in controversy. *McConnell* v. *Sadle, supra; Ark. State Highway Comm.* v. *Kesner, supra; Piercy* v. *Baldwin, supra;* and *Roy* v. *Int'l Multifoods Corp.,* 268 Ark. 958, 597 S.W. 2d 129 (Ark. App. 1980). ARAP, Rule 2, Ark. Stat. Ann. Vol. 3A (Repl. 1979). Here, there are two facets to this litigation which are to be resolved before there is a final judgment: 1) the right of the city to exercise eminent domain, and 2) the right of the landowners to just compensation. Only this preliminary right and need of the city was attempted to be resolved by a

temporary transfer from circuit to chancery court. As requested by the appellant landowners, the matter was retransferred to the circuit court for a future determination of damages by a jury. This constitutes piecemeal litigation.

Appeal dismissed.

HICKMAN, J., concurs.

John P. BALLENTINE *v.* Harrell BALLENTINE and BALLENTINE PRODUCE, INC.

81-212 628 S.W. 2d 327

Supreme Court of Arkansas
Opinion delivered March 1, 1982

*William M. Stocks,* for appellant.

*Carl K. Creekmore,* for appellees.

FRANK HOLT, Justice. Appellant brought this action to recover damages based upon an asserted fraudulent representation by appellees in violation of state and federal securities acts. The Securities and Exchange Act of 1934 applies to "the offer or sale of any security." 17 C.F.R. § 240.10b-5 (1981). 15 U.S.C. § 77 q. The Arkansas Securities Act applies to "the offer, sale or purchase of any security." Ark. Stat. Ann. §§ 67-1235 and 67-1256 (Repl. 1980). The appellant contends that the chancellor erred in finding that these state and federal securities laws were inapplicable to the facts of this case and that as a result of that erroneous finding the court further erred in holding that the appellant failed to sustain his burden of proof in establishing fraud or damages.

The appellant filed suit against the appellees, his older brother, Harrell Ballentine, and Ballentine Produce, Inc., which is principally owned by Harrell, in September, 1979, alleging Harrell made fraudulent misrepresentations prior to 1970 and continued them through 1974 concerning an oral employment agreement whereby appellant was to receive 49% of the stock in a proposed "spin-off" corporation of Ballentine Produce for appellant's past and future services. The spin-off corporation would be established to handle the transportation aspects of Ballentine Produce. Based upon the offer to sell or issue stock in exchange for services rendered or to be rendered, appellant alleges he suffered substantial damages. Further, the corporation also was liable for the alleged fraudulent and misleading offer to transfer the stock, all of which was in violation of federal and state securities laws. He sought damages in excess of $200,000 and in the alternative specific performance of the oral agreement to issue stock to him in exchange for his past and future services.

The appellant had worked in the trucking operation of Ballentine Produce since 1954. In 1970 he was supervisor of transportation operations and received a salary of $12,000 per year. In May or June of 1970, he left his employment following a dispute with Harrell. A few days later, at the request of another brother, Ralph, a meeting was arranged at a local bank where Ralph was an official to discuss the

differences between the two brothers. Attending the meeting were the three brothers, an attorney friend of the family and a long time accountant for the appellee produce company. The appellant testified that he had a salary offer of $30,000 annually plus expenses from another organization. At the meeting Harrell agreed to meet his terms for an increase in salary to $15,000 annually and there would be a spin-off of the corporation with John receiving 49% of the new corporation. It would be formed within a reasonable time. This understanding had previously been discussed and agreed upon. He had not mentioned the subject to appellee Harrell nor made any demands on him since he left his employment in 1974 until he filed this lawsuit in 1979.

The attorney testified that he understood the subject of the meeting was John's reemployment, an increase in salary, and ratifying a previous agreement between them about appellant's participation in the division of some company stock. However, he could not recall the specifics of the agreement. He recalled it was to be performed within a reasonable time.

Ralph testified that he called the meeting to resolve the differences between his two brothers, i.e., John's reemployment and to draw up the necessary documents and legal papers about John owning a part of the business. The subject of a spin-off was discussed and Harrell instructed the accountant to accomplish the necessary paper work. The accountant never did comply. He further testified that when John severed his employment again in 1974 that Harrell urged him to persuade John to return to work and, should he sell his business within a few years, he would give John three or four hundred thousand dollars. Ralph acknowledged that he and Harrell had been at odds since their father's death in January, 1976, and Harrell had harassed, humiliated and embarrassed him at great lengths. On one occasion when he was out of town, Harrell had resigned from the board of Ralph's bank and become a board member of a rival bank which resulted in considerable publicity in the local paper.

The accountant for the appellee corporation testified that he had served in that capacity since 1954 until his

retirement in 1976. He had incorporated the produce business. He had no definite recollection of the meeting since it had occurred approximately ten years ago. He had discussed the feasibility of a spin-off for tax purposes with Harrell, and it was decided that it was too expensive and, therefore, never materialized.

Harrell testified that he had incorporated his business in 1954. John had worked for him since then and would walk off the job about four times a year. He would continue paying John and Ralph would relay to appellant that if he wanted his job he could come back to work. He recalled the May or June 1970 meeting at the local bank where he was a vice president and on the board. Ralph initiated the meeting in order to get John back to work. Ralph said he would have to keep him up if he, Harrell, didn't. The meeting resulted. At the meeting he agreed to raise John's salary from $12,000 to $15,000 a year plus a new car, expenses and a country club membership. John drew this salary plus the extras until he quit in 1974. He and John drew the same salary including the same Christmas bonus. He denied that he ever promised appellant any percentage of the business or made any statement that he would share with him any proceeds should he sell it. The first he even knew about the alleged promise or representation to give him 49% of the new corporation in a spin-off arrangement was when appellant filed this action about five years after he had voluntarily left his employment. He had considered a spin-off for tax purposes but determined it was too expensive and, therefore, not feasible. At appellant's request he permitted him to purchase trucks and lease them to the corporation. Appellant voluntarily left his job threatening to "break you" when a dispute arose concerning dispatching of the leased trucks. Before bringing this law suit, the appellant had been unsuccessful in two business ventures. He had assisted John since he was 14 years old, including high school and college. He is spoiled and when Ralph would call about putting him back to work, he would always do so. Two other brothers had worked for him and each, with his assistance, has a successful business in other states.

The findings of the chancellor as to a fact question will

not be disturbed on appellate review unless clearly erroneous (clearly against the preponderance of the evidence) and due regard shall be given the trial court to judge the credibility of the witnesses. Rule 52, ARCP, Ark. Stat. Ann. Vol. 3A (Repl. 1979). *Ratliff* v. *Thompson,* 267 Ark. 349, 590 S.W. 2d 291 (1979). Here, when we give due regard to the chancellor's superior position to observe the witnesses and resolve the conflict in their testimony, we cannot say that his findings are clearly erroneous.

Affirmed.

CITY OF WALDO *v.* Peggy POETKER et al

81-214 628 S.W. 2d 329

Supreme Court of Arkansas
Opinion delivered March 1, 1982

*David B. Simmons,* Public Employees Claims Div., Ark. Insurance Dept., for appellant.

*Tom Forest Lovett, P.A.,* for appellees.

JOHN I. PURTLE, Justice. This involves a workers' compensation claim by the survivors of two employees of the city of Waldo, Arkansas. The administrative law judge ruled that there was "coincidental" and "dual" coverage between Home Insurance Company and the State of Arkansas Workers' Compensation Fund. The state fund has appealed from the decision.

The Court of Appeals affirmed the action of the Workers' Compensation Commission in holding there was dual coverage at 3 Ark. App. 12, 621 S.W. 2d 491 (1981). This was a case of first impression and decided by a 3-3 vote in the

Court of Appeals thereby affording this court the opportunity to grant certiorari. We affirm the holdings of the Court of Appeals and the Arkansas Workers' Compensation Commission.

On appeal it is argued that the Commission erred in (1) determining that the legislature intended to automatically include all city employees unless there was strict compliance with Act 469 of 1973 and (2) that the Commission erred in determining that the failure of the city of Waldo to strictly comply with the law mandates a finding of "coincidental" or "dual" coverage. We disagree with the appellant on both arguments.

The facts are undisputed. The General Assembly passed Act 469 of 1973 which is now codified as Ark. Stat. Ann. § 81-1350 et seq. (Repl. 1976). The act was effective July 1, 1974. The chief purpose of the act is to provide workers' compensation coverage for all city employees in cases where the city does not furnish a private plan providing similar benefits. In the event a city elects to provide a private plan it is required by the act to submit the plan for approval to the Workers' Compensation Commission in order that it might be certified as comparable to the state plan. The city can also avoid coverage under the state plan by calling a referendum wherein the employees could elect not to be covered by the Arkansas Workers' Compensation Act. In the present case the mayor of the city of Waldo notified the Workers' Compensation Commission that the city would continue with a private plan. The plan was a regular workers' compensation policy written by Home Insurance Company. The private plan carried by Waldo was effective until October 1976.

In May 1974, shortly before the act was to become effective, the Commission requested the city of Waldo to provide it with a copy of its policy. The city of Waldo did not respond to this letter and was subsequently placed on the list of participating cities. In October 1975 assessment was made against the city's turnback funds for the fiscal year 1974-75 as required by Act 469.

On April 16, 1976, two police officers in Waldo were killed when their vehicle collided with a train. Home Insurance Company immediately accepted the deaths as compensable and commenced making payment to the widows of the two deceased policemen.

In October 1976 Mayor Beasley became aware that the state plan existed. By this time another year's turnback funds were to be withheld for the purpose of compensating the state plan. He wanted a refund of the assessments against the city's turnback funds for the years 1974 and 1975.

Home Insurance Company filed a claim with the Workers' Compensation Commission contending the state plan should share in 50% of the liability since there was double coverage. The administrative law judge ruled that dual coverage existed and that the state and Home Insurance should share equally in the losses. The administrative law judge's opinion was affirmed by the full Commission and the city of Waldo filed notice of appeal.

The question to be determined by this court is whether there was dual liability at the time or whether Home Insurance Company alone was liable for the loss. The title of Act 469 of 1973 reads as follows:

> An Act to Provide Workmen's Compensation Coverage for Employees of Municipalities in this State; to Provide the Method of Financing Such Coverage; to Vest Exclusive Jurisdiction of the Workmen's Compensation Claims of Such Employees in the Arkansas Workers' Compensation Commission; to Prescribe the Procedure for Filing Claims; and for Other Purposes.

The pertinent provisions of the body of the act are as follows:

> Section 1 (b). Provided, however, that any municipality which maintains a plan providing benefits to its employees because of accidental injury or death which arises out of and occurs in the employment of such employee may present such plan in full to the Workmen's Compensation Commission. If the Commission

> determines that such voluntary plan provides benefits substantially comparable to the benefits provided under the Arkansas Workers' Compensation Law, it may certify such fact to the Chief Fiscal Officer of the State and to the city making such application, and any city or municipality obtaining such certificate shall be exempt from the provisions of this Act and no amount shall be deducted from such exempted city's share of the municipal aid fund.
>
> * * *

In giving the above words their plain and ordinary meaning it is clear the Workers' Compensation Commission is vested with exclusive authority in implementing this act. In the present case the Commission did not place the city of Waldo on the nonparticipating list because Waldo failed to comply with the provisions of the act allowing for private plan exemptions. So far as the Commission's records were concerned, Waldo had no private plan available to its employees. Therefore, the provisions of the act were mandatory so far as the Commission was concerned.

It was conceded by all parties that the city of Waldo failed to strictly comply with the provisions of Section 1 (b) as set out above. Neither is it disputed that the city of Waldo intended to come within the exception of the act by providing its own private policy through Home Insurance Company. We do not have the benefit of any Arkansas decision on the question here for review. The question to be decided is whether the failure of the city of Waldo to furnish a copy of its plan to the Commission, as requested, caused it to be included in the state plan. None of the cases cited by the parties sheds any particular light on the question before us. All of the cases cited appear to cover cancellations rather than coverage. It is stated by the appellant that this court has dealt with the issue of strict construction in *St. Paul Fire & Marine Ins. Co.* v. *Central Surety & Ins. Corp.*, 234 Ark. 160, 350 S.W. 2d 685 (1961). Again, this case involved the cancellation of a policy. The employer in *St. Paul* originally had a policy with Central Surety and requested that it be cancelled. St. Paul wrote a policy which went into effect on

September 9. Under state law Central Surety could not have terminated its policy until October 7. Meantime, on October 3 a claim arose and there was an argument of dual coverage. In that case we stated:

> We recognize the rule relied upon by the appellant, that the statute is to be construed strictly to the end that employees will not be left without the protection of insurance coverage. But the rule of strict construction should not be carried beyond the reason for its existence. The legislature was plainly concerned with the protection of employees, but it still permitted an accelerated cancellation date when other insurance had been procured. Double coverage is not contemplated. The statute contains only two substantive requirements, that notice be given and that other insurance be procured. Inasmuch as both requirements had been met on September 22 there was then no longer any reason for deferring the effective date of cancellation.

The above quotation states the statute is to be construed strictly to the end that the employee will not be left without protection. This seems to be in conformity with our general rule of liberal construction of the benefits under the workers' compensation laws. We have stated that it is a well-established rule that in workers' compensation cases when a doubt exists we must remember the act is remedial in nature and should be construed liberally to effectuate its purpose. *Gill* v. *Ozark Forest Products, et al,* 255 Ark. 951, 504 S.W. 2d 357 (1974). See also *Alred* v. *Jackson Atlantic, Inc.,* 268 Ark. 695, 595 S.W. 2d 249 (App. 1980), wherein we stated the workers' compensation act is highly remedial and is therefore entitled to a liberal construction.

We think the reasoning that was applied in *St. Paul Fire & Marine Ins. Co.* v. *Central Surety & Ins. Corp.,* supra, against double coverage applies here. However, there is no provision for exclusion of coverage by either insurer in the event such should happen. It is obvious the state had received funds for this coverage just as Home did. Both were paid the required premium by the city of Waldo although the city did so unwittingly. We know that the legislature

intended that city employees be covered by workers' compensation or a policy approved by the Commission. Certainly, it goes without saying that a private policy could be terminated and the city could revert to coverage by the state or it could obtain private coverage and withdraw from the state plan. However, notice in the form of a copy of the private policy was a requirement and was lacking in this case.

Workers' compensation is not truly insurance nor is it a true pension. It is a type of hybrid obligation based upon moral and equitable principles for the protection of society in general. It gives workers a remedy which did not exist under common law, in most cases. It is designed for the protection of workers who are unable to work because of injury or disease arising out of their employment.

The Arkansas Workers' Compensation laws originated in Amendment 26 to the Arkansas Constitution. The first Arkansas legislation in regard to workers' compensation was Act 319 of 1939. Subsequently, initiated Act No. 4 of 1948 was adopted as the basis of our present system. The law provides maximum and minimum benefits and requires insurance companies or self-insureds to provide coverage for all employees. The rates charged are set by the state. Ark. Stat. Ann. § 81-1310 (Supp. 1981) sets out the maximum and minimum benefits to be paid for scheduled injuries. Other sections provide for payments to those who are disabled because of occupational disease. It is clearly intended that there be a set of single guaranteed benefits to employees which inherently implies single coverage. The Workers' Compensation Act is public policy of the state of Arkansas as set out by initiated Act No. 4 and subsequent actions by the General Assembly.

Certainly, there is nothing to prevent an individual or groups of individuals from obtaining other benefits but such benefits are supplemental to and are not a part of the workers' compensation requirements. Therefore, it is logical that only single benefits are contemplated by the act. In case of dual coverage either one or both carriers are liable — but only for the benefits mandated by the act. The act

itself prevents double payments by setting out the maximum benefits which may be paid on account of disability arising out of employment.

In the present case there was no attempted cancellation of either policy until after the loss. The only equitable and fair way to apportion the loss is to divide it equally.

Affirmed.

ADKISSON, C.J., and HAYS and DUDLEY, JJ., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority correctly held that there was dual coverage in this case. However, they were incorrect in not holding the State and Home Insurance Company each liable for the entire amount.

The Workers' Compensation Act sets maximum and minimum benefits for which an employer will be liable. This provision is a limitation on the coverage required to be carried by the employer, but it is not a limitation on coverage employers may wish to provide for their employees. There is nothing in the statute or public policy which prevents an employer from providing benefits in excess of those provided by Workers' Compensation.

It is undisputed that the City of Waldo paid both Home Insurance Company and the State for coverage. It is undisputed that both Home Insurance Company and the State accepted this money and provided the coverage. It is also undisputed that if there were no coverage by Home Insurance Company, the State would have to pay the dependency benefits and vice versa. Therefore, the full amount of these dependency benefits should be recovered from both Home Insurance Company and the State.

ROBERT H. DUDLEY, Justice, dissenting. The statutes involved in this case, Ark. Stat. Ann. § 81-1350, et seq. (Repl. 1976 and Supp. 1981), extend the protection afforded by the Workers' Compensation Act to municipal employees, who were formerly excluded from coverage. The State is required

to provide workers' compensation benefits from the State Fund in the event a municipality does not enter into an adequate contract with a private insurance carrier. In this case an adequate insurance contract existed with a private carrier, the Home Insurance Company, and the State should not be required to provide a part of the benefits.

If dual insurance contracts with private carriers existed, it would be fair to require each private carrier to share 50 percent of the liability because double coverage would exist. I do not consider the provocative argument of double payment advanced in one of the dissenting opinions because it was not raised below and was not briefed by either party. However, in this case no double coverage existed because the State Fund was intended to provide benefits only when there was no adequate private insurance contract.

The majority opinion treats the private carrier and the State Fund as co-insurors and, as a result, reaches an unfair decision. It is unfair because the Home Insurance Company, a private carrier, received its full premium and now is allowed to shift 50 percent of its just debt to the taxpayers of this State. Such a result was not intended when the statutes were enacted.

I dissent.

STEELE HAYS, Justice, dissenting. I agree with the views expressed in the dissenting opinions in the Court of Appeals. See *City of Waldo* v. *Poetker,* 3 Ark. App. 12, 621 S.W. 2d 491 (1981).

C. L. ALDRIDGE and Robbie ALDRIDGE *v.* WATLING LADDER COMPANY and P. C. HARDWARE & MACHINERY CO.

81-206 628 S.W. 2d 322

Supreme Court of Arkansas
Opinion delivered March 1, 1982

*Barron, Coleman & Barket, P.A.*, by: *John W. Barron, Jr.* and *Gary P. Barket,* for petitioners.

*Rose Law Firm,* by: *Webster L. Hubbell* and *Jerry C. Jones,* for respondents.

ROBERT H. DUDLEY, Justice. This case involves the

construction of Rule 4 (i) of the Rules of Civil Procedure, Ark. Stat. Ann. Vol. 3A (Repl. 1979). The Court of Appeals decided the case, *Watling Ladder Co. and P. C. Hardware & Machinery Co.* v. *Aldridge,* 3 Ark. App. 27, 621 S.W. 2d 499 (1981). However, Rule 29 (1) (c) of the Rules of the Supreme Court and Court of Appeals, Ark. Stat. Ann. Vol. 3A (Supp. 1981), provides that jurisdiction shall be vested in the Supreme Court to interpret a rule or regulation of any court. This case should have been certified to this court by the Court of Appeals because Rule 29 requires that all such cases be decided by this court. To resolve any confusion we have granted certiorari.

Petitioners C. L. Aldridge and Robbie Aldridge filed a products liability suit against respondents Watling Ladder Company, a non-resident manufacturer, and P. C. Hardware, a resident retailer of ladders. On February 28, 1980, in accordance with A. R. Civ. P., Rule 4 (e) (3), the long-arm service rule, petitioners' attorney sent the complaint and summons by certified mail to Watling Ladder Company in Valley, Park, Missouri. This rule authorizes service outside the state . . . "By any form of mail addressed to the person to be served and requiring a signed receipt; . . . " The complaint and summons were received by the president of Watling on March 3, 1980.

However, when petitioners filed their complaint they did not cause the court clerk to appoint an attorney ad litem. On April 7, which was more than 30 days after respondent Watling received the complaint, the petitioners filed a motion asking for a default judgment against Watling and asked for the appointment of an attorney ad litem. The next day, April 8, an attorney ad litem was appointed, and on April 24, Watling's answer was filed. Thus respondent Watling's answer was filed within 30 days of the appointment of an attorney ad litem but more than 30 days from the date of notice by mail. The trial court granted a default judgment. We affirm the Court of Appeals in reversing and remanding to the trial court.

Rule 4 (i) provides:

> (i) *Default in Case of Service by Mail:* Before judgment is rendered against a defendant who is served by mail only or by warning order and who has not appeared, it shall be necessary —
>
> First. An attorney be appointed at least thirty [30] days before the judgment is rendered to defend for the defendant and inform him of the action and of such other matters as may be useful to him in preparing for his defense. He may take any step in the progress of the action, except filing an answer, without it having the effect of entering the appearance of such defendant. The attorney may be appointed by the clerk when a warning order is made, or by the court, and shall receive a reasonable compensation for his services, to be paid by the plaintiff and taxed in the costs. *Where service is to be made only by mail, the clerk shall appoint an attorney ad litem upon application of the party or attorney seeking to have such service.* [Emphasis supplied.]

The meaning of the rule is that a default judgment cannot be taken against a non-resident defendant who has been served by mail until thirty days have elapsed after the appointment of an attorney ad litem and the attorney ad litem's report has been made. Here the plaintiffs, petitioners, did not cause the court clerk to appoint an attorney ad litem on the date the case was filed. The attorney ad litem was not appointed until a later date and the respondent filed its answer within 30 days of the appointment of the attorney ad litem. As a result, the filing of the answer was timely and a default judgment should not have been granted.

The rule and this interpretation are in accordance with decisions construing the prior comparable statutory provision. See *Frank* v. *Frank,* 175 Ark. 285, 298 S.W. 1026 (1927), and *Gaines* v. *Gaines,* 187 Ark. 935, 63 S.W. 2d 333 (1933).

There is a second reason for reversing the default judgment against respondent Watling. P. C. Hardware was allowed to file a late answer by agreement of petitioners'

attorney and P. C. Hardware's attorney. Respondent Watling contends that the answer of P. C. Hardware should inure to Watling's benefit. We agree. It has been settled in this State for almost a century and a half that the answer of one co-defendant inures to the benefit of the other co-defendants. *Allied Chemical Corp.* v. *Van Buren School Dist. No. 42,* 264 Ark. 810, 575 S.W. 2d 445 (1979); *Bruton et al* v. *Gregory,* 8 Ark. 177 (1847).

Petitioners contend that P. C. Hardware is technically in default as its answer was also late and therefore there is no answer by P. C. Hardware which can inure to the benefit of respondent Watling. This argument overlooks the fact that P. C. Hardware did file a late answer, the petitioners did not move to strike it and they admit that the late answer is filed by agreement. Under the circumstances a default judgment could not be granted against P. C. Hardware. Therefore, the answer of co-defendant P. C. Hardware denying the material allegations of the complaint inures to the benefit of Watling. Hence, default judgment should not have been entered against Watling.

Affirmed.

ADKISSON, C.J., and HAYS, J., not participating.

HICKMAN, J., concurs for the reasons stated in the concurring opinion filed in *Watling Ladder Co. & P. C. Hardware & Machinery Co.* v. *Aldridge,* 3 Ark. App. 27, 621 S.W. 2d 499 (1981).

# DES ARC WATERSHED IMPROVEMENT DISTRICT *v.* Richard M. FINCH

81-232 630 S.W. 2d 17

Supreme Court of Arkansas
Opinion delivered March 8, 1982
[Amended on Denial of Rehearing April 19, 1982.]

*Lightle, Beebe, Raney & Bell,* for appellant.

*Rose Law Firm, P.A.,* by: *W. Dane Clay,* for appellee.

RICHARD B. ADKISSON, Chief Justice. This litigation

was originally before this Court in *Des Arc Bayou Watershed Improvement District* v. *Finch,* 271 Ark. 603, 609 S.W. 2d 70 (1980); we held that appellee, a landowner, could recover his attorneys' fees if appellant, the condemnor, had acted in bad faith in instituting and then later abandoning condemnation proceedings. We remanded for a finding by the trial court on the issue of bad faith. On remand, the White County Circuit Court found that appellant had acted in bad faith and that appellee could recover his attorneys' fees; on appeal from that judgment, we affirm.

The Des Arc Bayou Watershed Improvement District was established in 1966 as a White County flood control and recreation project; it has never been completed although over $3,000,000 in public funds have been spent on the project. In planning the project, the Soil Conservation Service found that fifty-seven acres of appellee's property would be affected by the project; however, appellant took the position that this property would not be damaged. Before releasing the funds for the project, the Soil Conservation Service required that appellant expressly agree to pay "such damages as are finally awarded by the Court" in condemnation proceedings. Appellant offered nothing for the property, and appellee refused to grant a needed floodage easement. Appellant then initiated condemnation proceedings against appellee's property.

Appellant refused to pay the jury award of $30,000 in damages pursuant to Ark. Stat. Ann. § 35-1105 (Repl. 1962):

> Refusal to pay award on abandonment of line — Relocation of project — Liability for costs. — Any levee or drainage district may refuse to pay the award which may have been made by any board of appraisers herein provided for, or the judgment of any court assessing the damages for right of way, and abandon the line and relocate the levee, drain, ditch, or canal anew without being liable for any award or judgments rendered in any proceeding for the condemnation of right of way, except as to the costs.

Therefore the question: Was there sufficient evidence of bad faith to enable the trial court to award attorneys' fees as "costs" under this statute?

Generally, attorneys' fees are not recoverable as a part of the cost unless specifically authorized by statute. There is, however, an exception to that rule when the condemnor has acted in bad faith. *Housing Authority of North Little Rock* v. *Amsler,* 239 Ark. 592, 393 S.W. 2d 268 (1965). In *Amsler* we indicated that bad faith was inferred from the fact that the condemnor alleged in the complaint that the taking was "necessary" and then elected to dismiss the proceedings without explanation after a jury awarded damages. Bad faith was further explained in *Housing Authority of North Little Rock* v. *Green,* 241 Ark. 47, 406 S.W. 2d 139 (1966) where we held that lack of funds to pay an award did not establish good faith on the part of the condemnor, stating that the lack of funds could not be attributed to any fault of the landowner.

Here, appellant alleged in the complaint that the taking of appellee's property was "necessary," but after the jury awarded damages, appellant dismissed the proceeding, stating that there were insufficient funds to pay the $30,000 award. It is significant that after dismissing the proceeding and claiming that no funds were available to pay the award, appellant authorized a second condemnation proceeding in fee against the property. Under these circumstances, the claim of lack of funds is contradicted by appellant's own actions and is an affirmative indication of bad faith. *See Whitestone* v. *Town of South Tucson,* 2 Ariz. App. 494, 410 P. 2d 116 (1966).

Appellant's state of mind is further illustrated by the fact that an appraiser paid by appellant initially filed an appraisal with the court stating that there were no damages to appellee's property; this same appraiser later testified at trial that he not only found damage but found damages in a substantial amount. This change in the amount of the appraisal is reflected by the trial judge's question and the answer of Mr. Clay, attorney for the appellee:

> THE COURT:
>
> . . . .
>
> For example, Quattlebaum, $6,950. A transcript might answer this question, did Mr. Quattlebaum

sign an appraisal and file it with the Court saying no damages, and then later testify in Court to $6,950 damages?

Mr. CLAY [The landowner's attorney]: Yes, he did.

Appellant did not dispute this statement, and therefore it must be taken as true. This change of position by appellant's own appraiser is indicative of bad faith and is attributable to appellant.

Another indication of bad faith arises from the length of time it took appellant to make the election to dismiss under Ark. Stat. Ann. § 35-1105 (Repl. 1962). The jury verdict was returned in October 1977, and judgment was entered in March 1978. Appellant filed a notice of appeal in April 1978, and the next day a six months extension for preparing the transcript was granted. Then, in May appellant decided to abandon the proceedings but did not notify the appellee of this decision until December of 1978. During this entire time the cloud and uncertainty of the condemnation action hovered about, detracting from appellant's right to the quiet enjoyment of his property.

In light of the above instances of appellant's bad faith, we cannot say that the trial court's finding was clearly against the preponderance of the evidence.

Affirmed.

GARRISON MOTOR FREIGHT, INC. *v.* David E. HAMMONS, d/b/a TRIANGLE LEASING COMPANY

81-198 628 S.W. 2d 567

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Rex M. Terry,* of *Hardin, Jesson & Dawson,* for appellant.

*Lawrence W. Fitting,* of *Gean, Gean & Gean,* for appellee.

GEORGE ROSE SMITH, Justice. The Court of Appeals properly transferred this usury case to us. Rule 29 (1) (*1*). The contract in issue, a three-year lease of an accounting machine, is in many respects similar to the ostensible leases found to be usurious in *Standard Leasing Corp.* v. *Schmidt Aviation,* 264 Ark. 851, 576 S.W. 2d 181 (1979), and *Bell* v. *Itek Leasing Corp.,* 262 Ark. 22, 555 S.W. 2d 1 (1977). The circuit court, however, sitting without a jury, upheld this contract on the ground that the appellee Hammons was in the leasing business and that an intent to charge usury will not be presumed when the opposite result can reasonably be reached. We affirm the trial judge's decision, not on the basis of a presumption but because on the facts his conclusion is not clearly against the weight of the evidence. Rule 52, A. R. Civ. P.

When the contract was made in 1975 (before *Itek* was decided), Hammons was the majority stockholder in Fort Smith Cash Register Company, a corporation, and also operated Triangle Leasing Company as an individual proprietorship. When a person desiring to buy a cash register or similar machine from the corporation could not pay cash, Hammons had the needed forms for handling the transaction as a lease. The corporation first sold the machine to Triangle, which then leased it. The form of lease was similar to those in *Schmidt* and *Itek* in that most of the risk was on the lessee, the remedies on default were those

available to a conditional seller, a financing statement was executed in which the lessee was shown as the debtor, and at the expiration of the lease the lessee had an option to purchase the property for not more than 10% of the original price, plus options to surrender the machine or to continue to lease it on a year-to-year basis by paying one monthly payment per year.

There is, however, at least one significant, substantial difference between this case and the earlier two. The cash price of the machine in this case, which was rebuilt especially for the purchaser's requirements, would have been $4,300, plus sales tax. Hammons testified that if the machine had been sold by the corporation for cash, the buyer would have been required to pay an additional $300 for an optional six-months maintenance contract, $200 for the installation of the machine, and $600 for the training of the purchaser's employees in its operation. The appellant argues that those three added items were merely part of the cash price, but we do not so construe Hammons' testimony. He testified that he trained this purchaser's employees in the use of the machine. Since the six-months maintenance contract was optional, it could hardly have been part of the basic cash price. And certainly the machine was installed, though the record does not show by whom.

The appellant, having pleaded the defense of usury, had the burden of proving that the transaction was usurious. *Temple* v. *Hamilton,* 178 Ark. 355, 11 S.W. 2d 465 (1928). The appellant offered no testimony about the original transaction and did not cross-examine Hammons in detail about the three extra services. If the prospective buyer was unable to pay the entire purchase price and the cost of the services in cash, it would not be a sham as a matter of law for Triangle Leasing to buy the machine from the corporation and lease it to the purchaser at a sufficient monthly rental to include the services to be provided by Hammons's two related companies. The trial court was justified in finding that the defendant's burden of proof had not been met. It is undisputed that the agreement did not entail as much as 10% interest if the $1,100 total for the three extra services were added to the cash price as principal. We cannot say that the

trial court's resolution of a disputed issue of fact is clearly erroneous.

Affirmed.

Jack ECKLES *v.* PERRY-AUSTEN BOWLING PRODUCTS, INC.

81-223 628 S.W. 2d 869

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Herschel W. Cleveland,* of *Hixson, Cleveland & Rush,* for appellant.

*Bruce H. Bethell,* of *Bethell, Callaway & Robertson,* for appellee.

GEORGE ROSE SMITH, Justice. This action against Eckles was brought by Perry-Austen, an Iowa company, to recover the purchase price of bowling equipment shipped to Eckles on an open account. The complaint, without itemizing the account, sought judgment for $6,127.20 "and other relief as [plaintiff] may be deemed entitled." At the trial the plaintiff's testimony disclosed that the $6,127.20 claim, calculated as of the date the suit was filed, consisted of a $5,520.24 principal account and $606.96 in interest at 1% a month. This appeal, from a verdict and judgment for $7,065.84, comes to us because there is an assertion of usury. Rule 29 (1) (*1*). Four points for reversal are argued.

The testimony of the two main witnesses was in absolute conflict. The witness Sherwood, an officer of Perry-Austen, testified that the delinquent account arose from seven shipments to Eckles, evidenced by seven itemized invoices that were introduced. Each invoice recited that an interest charge accumulated at 1% a month on past-due balances. Sherwood said that he had telephoned Eckles 8 or 10 times about the account. Eckles never disputed the account, and promised repeatedly to pay it, and once agreed to sign a note for the total amount, with interest, but did not do so. Eckles testified that he never admitted the indebtedness. He said he owed only two of the invoices, the other shipments having been ordered by Eckles to be shipped to other consignees and to be billed to them. The verdict shows that the jury accepted Sherwood's testimony.

First, the issue of usury was not preserved for review. It was raised only once in the trial court, by a motion for a directed verdict at the close of the plaintiff's case. The court denied the motion, finding (on sufficient evidence) that the suit was based upon an Iowa contract. The motion was not renewed at the close of all the evidence and was therefore waived. *Sanson* v. *Pullum,* 273 Ark. 325, 619 S.W. 2d 641 (1981).

Second, the defense objected to the introduction of the invoices because Sherwood admitted that before sending them to Perry-Austen's attorney he had written notations on them, such as: "This order phoned to us by Art Kirk, Eckles' office accountant." The jury heard Sherwood's explanation of the notations, and both Eckles and Kirk in effect admitted on the witness stand that the information was true. No possibility of prejudice is shown.

Third, during the closing arguments plaintiff's counsel displayed to the jury a sheet of paper containing, in large letters and figures, this summation of the account:

| | | |
|---|---|---|
| Goods | | $5,520.24 |
| Interest | | |
| 1% per mon. | 55.20 | |
| X # months X | 28 | $1,545.60 |
| Total | | $7,065.84 |

It happened that the jurors carried the piece of paper into the jury room along with the exhibits. When that fact was discovered after the jury had returned its verdict for $7,065.84, defense counsel moved for a mistrial. We find no error in the denial of the motion. Sherwood had testified to the accuracy of the total figure, which had again been brought to the jury's attention in argument. The trial judge did not abuse his discretion in refusing to order a new trial merely because the jury had taken into the jury room a calculation already known to them.

Fourth, it is argued that the court should not have entered judgment for 12% interest, because the complaint contained no such prayer. This point is well taken. The

complaint simply sought judgment for $6,127.20 and other relief. It was impossible for the defendant to learn from the pleadings that 12% interest under Iowa law was being asked. Rule 44.1, A. R. Civ. P., provides that a party who intends to raise an issue concerning the law of another jurisdiction shall give notice in his pleading or other reasonable written notice. Had the rule been complied with by the plaintiff, defense counsel would have been alerted to the need for determining the permissible interest rate in Iowa. It is impossible for us to take notice of it, for it seems to be a variable rate that fluctuates with a rate published by the federal reserve system and is determined every month by the superintendent of banking in Iowa. Iowa Code Annotated, Vol. 32, § 535.2 (Supp. 1981-1982).

In the complaint there is a prayer for general relief. This is a sufficient basis for an award of 6% prejudgment interest. Under our law it is the statement of facts in the complaint that constitutes the cause of action; the court may in the absence of surprise grant whatever relief the facts warrant. *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S.W. 2d 633 (1950). An open account for goods sold bears interest after maturity. *Frazer* v. *Pettit-Galloway Co.,* 172 Ark. 209, 287 S.W. 1010 (1926). The basic principle is that interest is ordinarily allowable for the wrongful detention of money. *City of Fort Smith* v. *Southwestern Bell Tel. Co.,* 220 Ark. 70, 247 S.W. 2d 474 (1952). Under our Constitution the legal interest rate for obligations not in writing is 6%. Ark. Const., Art. 19, § 16; *Wilson* v. *Lester Hurst Nursery,* 269 Ark. 19, 598 S.W. 2d 407 (1980). The judgment will therefore be modified by reducing the interest before judgment from $1,545.60 to half that amount, $772.80, being 6% instead of 12% interest.

Modified and affirmed.

Virgil WILBUR & Wilma WILBUR, His Wife *v.*
Robert L. KERR, M.D. et al

81-174 628 S.W. 2d 568

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Bailey & Paden, P.A.*, for appellants.

*Sidney P. Davis*, of *Davis, Cox & Wright*, for appellees.

DARRELL HICKMAN, Justice. The issue presented to us is whether the parents of a normal, healthy child may recover the expenses of raising that child from a doctor who negligently and unsuccessfully performed a vasectomy on the father resulting in the birth of the unexpected child. The trial court held that as a matter of law such expenses were not recoverable and we agree with that judgment.

The question comes to us from a summary judgment granted to the appellees, Dr. Robert L. Kerr and his professional association. The parties narrowed the issue to the trial court, as they have on appeal, by admitting certain facts. The appellant, Virgil Wilbur, the father of two, sought

a vasectomy to prevent having any more children. The appellee negligently performed two unsuccessful vasectomies on Mr. Wilbur. Mr. Wilbur did not know the operations were unsuccessful, and he and his wife had a normal, healthy daughter — a child neither planned nor expected.[1]

Originally Mr. Wilbur's lawsuit sought other damages besides the expense of raising the child: Mr. Wilbur's medical expenses, pain and suffering, loss of wages and the cost of yet a third vasectomy, damages on behalf of his wife, occasioned by the pregnancy and the birth of the child. The trial court ruled that Mr. Wilbur could claim all of these damages but ruled that the cost of the care, maintenance, support, and education of the child could not be recovered. Mr. Wilbur then amended his request, deleting all damages requested except the expenses for rearing the child, choosing to base his whole lawsuit on that issue.

This is a matter of first impression with us. A lawsuit for the cost of raising an unwanted or unplanned child has been referred to as one for "wrongful birth" or "wrongful conception."[2] The development of the law by the various states which have dealt with this question is relatively recent but rapid. *See* 50 CIN. L. REV. 65 (1981). Most states recognize this as a valid cause for action grounded in tort, but the courts disagree on what damages should be allowed. *Mason* v. *Western Pennsylvania Hospital,* 428 A. 2d 1366 (1981); *Wilczynski* v. *Goodman,* 73 Ill. App. 3d 51, 391 N.E. 2d 479 (1979); *Sherlock* v. *Stillwater Clinic,* 260 N.W. 2d 169 (Minn. 1977); *Anonymous* v. *Hospital,* 33 Conn. Sup. 126, 366 A. 2d 204(1976); *Bowman* v. *Davis,* 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976); *Stills* v. *Gratton,* 55 Cal. App. 3d 698, 127

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[1]When the question concerns the birth of an *impaired* child, the courts treat it differently. *See, e.g., Speck* v. *Finegold,* 408 A. 2d 496 (Pa. Super. Ct. 1979); *Jacobs* v. *Theimer,* 519 S.W. 2d 846 (Tex. 1975).

[2]The situation varies. Sometimes it is primarily on behalf of the wife who sought a tubal ligation; sometimes it is against a pharmacist who negligently filled a prescription which would prevent conception. *See Sard* v. *Hardy,* 34 Md. App. 217, 367 A. 2d 525 (1976), rev'd 281 Md. 432, 379 A. 2d 1014 (1977) (tubal ligation); *Troppi* v. *Scarf,* 31 Mich. App. 240, 187 N.W. 2d 511 (1971) (oral contraceptives).

Cal. Rptr. 652 (1976); *Betancourt* v. *Gaylor,* 136 N.J. Super., 344 A. 2d 336 (1975); *Ziemba* v. *Sternberg,* 45 App. Div. 2d 230, 357 N.Y.S. 2d 265 (1974); *Hackworth* v. *Hart,* 474 S.W. 2d 377 (Ky. 1971); *Troppi* v. *Scarf,* 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Custodio* v. *Bauer,* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). Several courts have recognized that the expenses for raising a child who is either unplanned or unwanted are foreseeable damages directly resulting from the negligence of the doctor; a negligent act was committed and there must be compensation for that negligent act. *Sherlock* v. *Stillwater Clinic, supra; Bowman* v. *Davis, supra; Troppi* v. *Scarf, supra; Custodio* v. *Bauer, supra; Ziemba* v. *Sternberg, supra.*

The courts that have allowed such recovery have done so for logical reasons, treating the question as one of ordinary damages. Should parents in this sophisticated day and time not have a right to plan their family and avoid the economic hardship of raising a child they chose not to have? Should a doctor not pay for all the damages occasioned by his negligent act? *Custodio* v. *Bauer, supra.*

Other courts have denied recovery for the expenses of raising a child, on the basis that it is against "public policy." *Wilczynski* v. *Goodman, supra; Rieck* v. *Medical Protective Co.,* 64 Wis. 2d 514, 219 N.W. 2d 243 (1974); *Hays* v. *Hall,* 477 S.W. 2d 402 (Tex. Civ. App. 1972), *rev'd on other grounds,* 488 S.W. 2d 412 (Tex. 1973); *Stewart* v. *Long Island College Hospital,* 35 A.D. 2d 531, 313 N.Y.S. 2d 502 (1970); aff'd. 30 N.Y.S. 2d 695, 332 N.Y.S. 2d 640 (1972); *Shaheen* v. *Knight,* 11 Pa. D. & C. 2d 41 (1957); *Christensen* v. *Thornby,* 192 Minn. 123, 255 N.W. 620 (1934) (Holding the question of damages to be a matter for the legislature).

The questions that have been raised by the judges and courts who have examined this problem demonstrate that the answer is not easy, nor can any disposition be completely satisfactory. The courts that have denied recovery because of public policy articulate that policy in different ways. For example, the Texas Court of Civil Appeals decided that the joy and pride in raising a healthy child far outweighs any economic loss suffered by the parents; the birth of a child is a benefit on which an economic price tag cannot be placed.

The court also remarked that recovery should be denied because damages are too speculative and uncertain. *Terrell* v. *Garcia,* 496 S.W. 2d 124 (Tex. Civ. App. 1973), *writ ref.* N.R.E (Tex. 1974), *cert. denied* 415 U.S. 927 (1974). In *Rieck* v. *Medical Protective Co., supra,* the Wisconsin court viewed the issue as parents pursuing a claim for an unwanted child; they now choose to keep the child but transfer the cost of rearing the child to the doctor, creating a new category of surrogate parent. The Wisconsin Court decided in the final analysis it would be against public policy to allow such damages.

The question has been properly raised whether parents who do not want a child should place it up for adoption or abort the child's birth to mitigate their damages. *See Ziemba* v. *Sternberg, supra* (dissenting opinion). Parties are supposed to mitigate their damages. DOBBS, HANDBOOK ON THE LAW OF REMEDIES. But courts recognizing this cause of action have rejected the argument that parents should have to make such an election. *See,* e.g. *Sherlock* v. *Stillwater Clinic, supra.*

Examining the problem more deeply, authors have addressed the possible harm to the unwanted child referring to it, indelicately but realistically, as an "emotional bastard;" that is, a child who is unwanted by his family, one who will know some day that he was unwanted and whose cost of raising was paid for by another person. *Shaheen* v. *Knight, supra;* 50 CIN. L. REV. 65 (1981); Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation,* 4 Am. J. of L. & M. No. 2, 131. One court has gone so far as to make the parents' name anonymous to protect the child. *Anonymous* v. *Hospital, supra.* Another court in its opinion excused the parents for filing the lawsuit, saying that no doubt they did so on principle, and not because the child was unwanted. *Rieck* v. *Medical Protective Co., supra.* One writer went so far as to suggest that the possible harm to the child might not be great when it discovered $50,000 was collected on its behalf. Bryan, *Damages — The Not So "Blessed Event,"* 46 N.C. L. REV. 949, 952 (1968). So, the child's welfare has troubled all who have examined the problem.

Another line of cases has reached a compromise of sorts between those states that allow such damages and those that deny them. Recognizing that a child, although unwanted, is usually a joy, pleasure and benefit, these states allow recovery of expenses for raising the child but allow the jury to offset an award if they find the parents actually love the child and it is a "benefit" to them. *Troppi* v. *Scarf, supra; Anonymous* v. *Hospital, supra; Mason* v. *Western Pennsylvania Hospital, supra; See* RESTATEMENT (SECOND) OF TORTS § 920 (1979). Of course this view places the parents in the position of going before a jury and demonstrating they do not want the child in order to get a greater award. If they admit that the child is a welcome addition that will be loved, cherished, and properly raised, they may get nothing.

There is also the problem of the money recovered. Should it be kept by the parents for the sole use of the unwanted child or used by the whole family? One writer has suggested that a guardian ad litem should be appointed for the benefit of the child to see that the money recovered actually goes to the raising of the child. *See* Robertson, Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation, supra, at 153.

In sifting through these decisions and studying the words and thoughts of judges and writers, it is understandable why the courts have reached different results. It is a question that searches the nature and validity of our civil law system which allows money damages to compensate for wrongs that are intangible, such as wrongful death or emotional anguish, things which cannot really be made right by money. Courts denying recovery because of "public policy" are bothered by the idea that a normal, healthy life should be the basis for compensable wrong. *Wilczynski* v. *Goodman, supra.*

We are persuaded for several reasons to follow those courts which have declined to grant damages for the expense of raising a child. It is a question which meddles with the concept of life and the stability of the family unit. Litigation cannot answer every question; every question cannot be

answered in terms of dollars and cents. We are also convinced that the damage to the child will be significant; that being an unwanted or "emotional bastard," who will some day learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising, will be harmful to that child. It will undermine society's need for a strong and healthy family relationship. We have not become so sophisticated a society to dismiss that emotional trauma as nonsense.

We do not say that a doctor performing such a negligent act should not have to pay for that act. He would be responsible for any and all proper damages connected with the operation and connected with the pregnancy. *Wilczynski* v. *Goodman, supra.* We join those courts which recognize these as valid damages that may be recovered in such cases. It is the expense of raising an unwanted, healthy child that we find should not be allowed. We must deny that claim as against public policy.

Affirmed.

ADKISSON, C.J., and DUDLEY, J., dissent.

ROBERT H. DUDLEY, Justice, dissenting. The issue is whether public policy should be invoked to prevent a common law cause of action against a doctor who is admittedly negligent in a surgical attempt at vasectomy.

It was resolved at common law, first in a line of specific, reasoned decisions, that a tortfeasor should be liable for his negligence. Those specific decisions built, by gradual accretion, to the principle of law that a tortfeasor is liable for all damages flowing from the negligent act. That principle became the major premise from which conclusions are now deduced. See Aldisert, The Nature of the Judicial Process: Revisited, 49 U. of Cincinnati L. Rev. 1 (1980). Today, in the case at bar, the majority declines to deduce liability from the major premise of liability for a negligent act and invokes public policy as the rationale to avoid years of well-settled common law.

For some time I have been disquieted by the lack of a standard by which we determine when to apply public policy and the lack of a meaningful definition by which we discover what constitutes public policy. This case involves wide-ranging social and economic issues which will affect parents and children for a number of years. Today we have invoked public policy with no true understanding of why it is applied or how it is discovered. The doctrine of public policy has not been built by accretion, but has experienced growth by eruption. I hope, at some later time, to be able to define standards for its use. Perhaps, in the meantime, our friends in academe will be of assistance by writing a deep and meaningful treatise on a suggested doctrine. While I cannot yet define when and why I would invoke public policy, I can define when I would not invoke public policy. I would not invoke the doctrine of public policy when there is no logical sense of conscience. While, in this case, I find many good policy reasons to support the view of the majority I find an equal number of policy reasons against that view. Therefore, I would not invoke the doctrine; instead, I would follow the common law.

The well written majority opinion correctly points out many of the holdings including those in Wisconsin and Texas. In *Rieck* v. *Medical Protective Co.*, 64 Wis. 2d 514, 219 N.W. 2d 243 (1974) and *Terrell* v. *Garcia*, 496 S.W. 2d 124 (Tex. Civ. App. 1973), there is the suggestion that the child be considered as worth its cost or else it be put up for adoption. Yet, many parents feel a moral sense of obligation to raise, as best they can, a child unwanted at conception. "A living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break." *Troppi* v. *Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 at 519 (1971). I can find no logical sense of conscience for a public policy which requires the mother to abort, put the child up for adoption, or else deprive the family members, including brothers and sisters, of their planned share of family income. "The compensation is not for the so-called unwanted child or 'emotional bastard' [see Case Note, 9 Utah Law Rev. 808 (1965)] but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just

share of the family income." *Custodio* v. *Bauer,* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

A public policy which subtly encourages abortion or adoption, as today's holding necessarily does, is inconsistent with the stated goal of family stability and has no logical sense of conscience. Reference is made to the emotional damage of the child who finds out he or she was unwanted, but that emotional injury is no greater "than to be found in many families where 'planned parenthood' has not followed the blueprint." *Custodio* v. *Bauer,* supra. The expense of raising an unwanted and healthy child should not be considered as a matter of public policy when we will find that the same public policy allows us to hold that the parents of a deformed or diseased child are able to recover. This is inconsistent, see *Mason* v. *Western Pennsylvania Hospital,* Pa. Super., 428 A. 2d 1366 (1980), and demonstrates the consequence of invoking public policy without standards.

I would not invoke public policy in order to deny a cause of action against the common law rules of tort damages when there is no logical sense of conscience.

I recognize this is an extremely difficult case but rather than invoke public policy I would allow the cause of action and would allow the jury to reduce damages by the "benefit rule," § 920 Restatement of Torts (Second). It provides:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damges, to the extent that this is equitable.

Thus, the jury in setting damages would be allowed to offset the value of the child's aid, comfort and society during the parents' life expectancy against the cost of rearing the unplanned child. See *Sherlock* v. *Stillwater Clinic,* 260 N.W. 2d 169 (Minn. 1977).

I am authorized to state that Chief Justice ADKISSON joins in this opinion.

Reba Faye O'BAR, as Admx. of the Estate of Jeweral Wayne O'BAR, Deceased *v.* MFA MUTUAL INSURANCE COMPANY

81-209 628 S.W. 2d 561

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Daily, West, Core, Coffman & Canfield* and *Robert S. Blatt,* for appellant.

*Jones, Gilbreath & Jones,* for appellee.

DARRELL HICKMAN, Justice. The only issue on appeal is whether a reduction clause in an automobile insurance policy that provides for $5,000 in accidental death benefits is void because it violates public policy. The trial court held that the clause which reduced payment by any amounts paid under workers' compensation law was valid. We disagree and find such a provision void as against public policy.

The appellant's husband, Jeweral Wayne O'Bar, was killed in a vehicle accident while driving his employer's truck. His widow, Reba Faye O'Bar, the appellant, and his child received over $5,000 for his death from workers'

compensation. O'Bar had an automobile insurance policy with the appellee, MFA Mutual Insurance Company, and it provided $5,000 in benefits for accidental death. MFA refused to pay, relying on a clause in the policy which reads:

> REDUCTION OF AMOUNT PAYABLE — Any amount payable under the terms of this coverage on account of death of an insured shall be reduced by the amount paid and the present value of all amounts payable on account of such death under any workmen's compenstion law, disability benefits law or any other similar law.

The case was submitted to the trial court for summary judgment and the court ruled for MFA. Both parties relied to an extent on our decision in *Aetna Ins. Co.* v. *Smith,* 263 Ark. 849, 568 S.W. 2d 11 (1978), which held such a reduction clause for medical and disability benefits was not void. *Aetna* interpreted Arkansas's no fault insurance law, enacted in 1973. Ark. Stat. Ann. § 66-4014 — 66-4021 (Repl. 1980 & Supp. 1981). The no fault law was enacted " . . . to make an insured whole on relatively minor automobile injury damage claims without regard to fault. . . " *Aetna Ins. Co.* v. *Smith, supra.* It provided that policies must give an insured the right to certain minimum medical and hospital benefits, income disability benefits and accidental death benefits. Ark. Stat. Ann. § 66-4014 (Repl. 1980 & Supp. 1981). But the insured has the right to reject in writing any one or all of such benefits. Ark. Stat. Ann. § 66-4015.

More importantly, an insurance company has the *right* to reduce, or claim reimbursement for any medical hospital benefits or income disability benefits paid out. Ark. Stat. Ann. § 66-4019. No such right was granted in regard to accidental death benefits. Therein lies the crux of this case. While requiring automobile insurance policies to provide for three different types of benefits, the General Assembly granted the insurer the right to reduce only medical and income disability benefits by any amount recovered by the insured from another source. Obviously medical or income disability benefits if not so reduced would allow double recovery to certain beneficiaries. Accidental death benefits

are like life insurance and life insurance is treated differently from medical and income disability benefits so far as double coverage is concerned. Life insurance is more in the nature of an investment and is actually a contract to pay a sum certain upon the death of the insured. 43 Am. Jur. 2d *Insurance* §§ 3, 1594 (1969).

There is no convincing reason such a benefit should be reduced simply because an insured also receives workers' compensation and since the General Assembly made no such provision, we hold such a clause to be in violation of public policy.

Reversed.

PROFESSIONAL ADJUSTMENT BUREAU, INC.
*v.* Billie STRONG

81-220 629 S.W. 2d 284

Supreme Court of Arkansas
Opinion delivered March 8, 1982
[Rehearing denied April 5, 1982.]

*R. Douglas Schrantz,* of *Kendall & Schrantz,* for appellant.

*Wommack, Lindsay & Associates, P.A.,* by: *Mark Lindsay,* for appellee.

DARRELL HICKMAN, Justice. The only issue on appeal is whether the trial court was wrong in dismissing the appellant's case with prejudice when the appellant and appellant's attorney failed to appear for trial. We find that in this case the court should not have dismissed the case with prejudice.

The appellant, a collection agency, filed suit to collect an $823.00 debt the appellee owed to Sisco Chapel, Inc. The case was set for trial March 31, 1980. When the case was called and the appellant did not answer, the court ordered the bailiff to call the appellant and its attorney three times, all to no avail. The judge inquired of the appellee's attorney whether he wanted the case dismissed with or without prejudice. Understandably the response was with prejudice, and it was done.

A motion to set aside the order was filed, and at a hearing appellant's attorney explained that a former associate attorney just failed to attend to the matter. The court found no "excusable neglect."

The appellant argues that Ark. R. Civ. P., Rule 41, prohibits a trial judge from ever dismissing a case with prejudice the first time, that it can only be on a second dismissal.

The appellee argues that our decision in *Gordon* v. *Wellman,* 265 Ark. 914, 582 S.W. 2d 22 (1979), permits a case to be dismissed with prejudice upon failure to prosecute, regardless of Ark. R. Civ. P., Rule 41 (b).

Rule 41 (b) provides that:

> (b) Involuntary Dismissal: Effect thereof. The court may, upon its own motion, or upon motion of any defendant, dismiss an action for failure of the plaintiff to prosecute or to comply with these rules or any order of court. A dismissal under this subdivision is without

> prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily in which event such a dismissal operates as an adjudication on the merits.

We did say in *Gordon* that a trial court has the inherent power, independent of statute or rule, to dismiss a case for failure to prosecute. However, we do not read Rule 41 (b) and the *Gordon* case to be inconsistent. Rule 41 is a tool for trial courts to dispose of cases filed and forgotten, and, ordinarily, the disposition for lack of prosecution should be without prejudice, allowing the plaintiff the right to refile the case. But, as we said in *Gordon,* Rule 41 does not absolutely prohibit a trial court from dismissing with prejudice a case for lack of prosecution. Obviously circumstances can vary and a trial court's discretion should not be bound in irons.

In this case, it was the first trial setting. An answer had been filed the day before. (A motion to quash had been pending for some time.) The court, at the request of the appellee, dismissed the case with prejudice, making no findings of its own why this action should be taken. Unlike the facts in *Gordon* where the case had been pending for thirteen years, this was evidently a case of one-time neglect by counsel. Dismissal without prejudice would have been in order and consistent with the intent of Rule 41 and the *Gordon* case. Consequently, we reverse the judgment and remand the case for further proceedings.

Reversed and remanded.

ADKISSON, C.J., and PURTLE, J., concur.

RICHARD B. ADKISSON, Chief Justice, concurring. Rule 41 states very clearly that the sanction for failure to prosecute a case is dismissal without prejudice. This rule, adopted by this Court, supersedes all prior rules on this subject, inherent or otherwise. If this Court had intended that the trial courts retain the right to dismiss with prejudice for failure to prosecute, surely, we would have said so.

The Reporter's note No. 4 following this rule recites

that the Federal Rule on this subject provides for a dismissal with prejudice and states the reason our rule was written as it is.

I am hereby authorized to state that PURTLE, J., joins in this concurrence.

John Herbert KELLENSWORTH *v.* STATE of Arkansas

CR 82-1 631 S.W. 2d 1

Supreme Court of Arkansas
Opinion delivered March 8, 1982
[Supplemental Opinion on Denial of Rehearing delivered April 19, 1982.]

*L. Gene Worsham* and *Beth G. Coulson,* for appellant.

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

DARRELL HICKMAN, Justice. John Herbert Kellensworth, Jr. was convicted and sentenced to ten years imprisonment for rape and three years for burglary. The crimes occurred in Pulaski County, Arkansas, but the case was tried to a jury in nearby Perry County to preclude any possibility of prejudice to the defendant because of pretrial publicity.

Kellensworth's conviction must be reversed because the trial court erroneously permitted certain testimony by Kellensworth's former wife. The State called her after the defense rested and the sole purpose of her testimony was to impeach testimony by Kellensworth and his parents. Kellensworth's mother had testified that Kellensworth "wor-

shipped" his former wife and child. On cross-examination Kellensworth and his father testified that Kellensworth loved his former wife. The former wife, Vickie Kellensworth, was allowed to rebut this by testifying that Kellensworth, at various times, pulled a gun on her, tried to run her off the road, knocked her up against a brick wall, and on a separate occasion struck her.

The trial judge admitted the testimony because he considered it simple rebuttal evidence. But it was more than mere rebuttal testimony. It was offered to impeach, or discredit, the testimony of Kellensworth and his parents.

A witness cannot be impeached on a collateral matter by calling another witness to contradict the testimony of the first witness. 3A WIGMORE ON EVIDENCE § 1001; *Swaim* v. *State,* 257 Ark. 166, 514 S.W. 2d 706 (1974); *See Haight* v. *State,* 259 Ark. 478, 533 S.W. 2d 510 (1976); *Mathis* v. *State,* 267 Ark. App. 904, 591 S.W. 2d 679 (1980). The reason for the rule is that to permit such a tactic would only distract the jury from the main issue, waste time and prejudice a defendant. McCORMICK'S EVIDENCE § 47 (1972).

The rule does not mean a witness can never be discredited on a collateral matter. Cross-examination is the usual tool available. Or in some instances, judicial notice can be taken of a fact which will contradict testimony of a witness.

The question of whether the matter was collateral in this case is not easy. One test of whether a fact is collateral is whether the fact is independently provable. If the fact is independently provable it is not collateral. Generally, two kinds of facts meet this test: Those that are relevant to the substantive issue in the case and those facts that show bias, interest, conviction of a crime, or want of capacity, opportunity, or knowledge of the witness. 3A WIGMORE ON EVIDENCE §§ 1004, 1005. The mother's testimony does not seem to fall into either category and is therefore collateral.

At most, the statement by the mother would be one of "good character," a fact any defendant can choose to place before a jury. Ark. Stat. Ann. § 28-1001, Rule 404 (Repl. 1979); *Finnie* v. *State,* 267 Ark. 638, 593 S.W. 2d 32 (1980). In that narrow sense the evidence might not be deemed collateral. Ark. Stat. Ann. § 28-1001, Rule 405, permits a defendant to offer evidence of his good character but that evidence is limited to testimony as to his reputation and opinion testimony. Such evidence may be directly challenged through cross-examination. *Michelson* v. *U.S.,* 335 U.S. 469 (1948). Or the State can rebut the evidence in kind with contrary evidence of reputation. But the State cannot produce witnesses to testify to specific acts of misconduct. McCORMICK'S EVIDENCE states: ". . . The witnesses for the prosecution are limited on direct [of their witnesses called in rebuttal] to assertions about the reputation and may not testify to particular acts or rumors thereof." McCORMICK'S EVIDENCE § 192. Also *see* 29 Ark. L. Rev. 14. Rule 405 (b) provides that when character or a character trait is an essential element of a charge, claim or defense, proof may be made of specific instances of misconduct. But obviously the evidence offered is not an essential element of a charge of rape. Rule 404 (a) (1) speaks to a "pertinent trait of character." But there is no such character trait at issue in this case. McCORMICK'S EVIDENCE identifies character traits as either moral or nonmoral. The nonmoral traits are ones of care, competence, skill or sanity; the moral character traits being peacefulness, honesty and the like. McCORMICK'S EVIDENCE § 187. Our Rules of Evidence mention only peacefulness as a trait, Rule 404 (a) (2), but do not exclude generally accepted character traits. In our judgment it is not a character trait to "worship" one's wife. As we said, if anything, such a statement might qualify as a statement of good character in general, and only that. The State chose to disprove this general statement in a completely unacceptable way; they called Kellensworth's former wife to tell the jury of specific acts of misconduct to contradict the testimony of the mother that Kellensworth "worshipped" his former wife and child. The prejudicial effect of the testimony cannot be denied. Threatening another with a deadly weapon and striking another are both criminal

offenses. So, regardless of whether the statement by the mother was collateral, the court was wrong in permitting the prejudicial evidence to go to the jury.

The other issues raised by Kellensworth are without merit. It is argued that it was error for the State to allow the victim to testify that she had identified Kellensworth at a pretrial lineup because she admitted that she never saw Kellensworth's face. The defense reasons that such an identification was too improbable. But at a pretrial lineup the victim picked out Kellensworth because of his posture, hair, and build. A voice identification was conducted at which the victim could not see the speakers. Each man in the lineup spoke several phrases that the victim said were spoken by her assailant. The victim positively identified Kellensworth's voice as that of her assailant. Identification was *the* issue in this case and the victim was closely cross-examined about her pretrial identifications of Kellensworth. Recently we held that a victim can tell the jury she identified her assailant in a pretrial lineup. *Conley* v. *State,* 272 Ark. 33, 612 S.W. 2d 722 (1981). There was no error in allowing the testimony.

A victim of another rape was allowed to testify during the State's case in chief that Kellensworth was her assailant. She was called during the State's case in rebuttal to testify that she had identified Kellensworth in a lineup and in a voice identification procedure. The State also called a detective in rebuttal who testified that this victim in the separate rape case had positively identified Kellensworth as her assailant. This evidence had not been brought out during the State's case in chief, and Kellensworth argues this was, therefore, improper rebuttal testimony. Again, identification was the critical issue in this case and Kellensworth had testified after the victim's testimony that he was not her attacker, offering evidence of an alibi. Rebuttal is a discretionary matter with the court and we cannot say that that discretion was abused. *Decker* v. *State,* 255 Ark. 138, 499 S.W. 2d 612 (1973); *See* Ark. Stat. Ann. § 43-2114 (Repl. 1977).

Before the victim of the separate rape was allowed to

testify that Kellensworth was her assailant the defense objected that that tetimony had no relevance to the case for which Kellensworth was being tried. The testimony was allowed solely on the issue of identification. The trial court concluded that because the circumstances of the two rapes were very much alike, the other victim should be permitted to testify. Indeed we said in *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971), that such evidence is admissible. *Norris* v. *State,* 170 Ark. 484, 280 S.W. 398 (1926). However, we do not reach that issue because it is not raised on appeal.

On appeal the objection is not that the court was wrong in permitting the evidence by the other victim, but that it was wrong in giving a cautionary instruction to the jury before the testimony because it called undue attention to the testimony and because the instruction amounted to a comment on the evidence. The instruction reads:

> The Court shall admit testimony of another event that you may find to be similar to the one charged in the Information. You will not be permitted to convict the defendant upon such testimony. Such evidence of another similar event committed under similar circumstances is admitted solely for the purpose of establishing the identity of the defendant. And you should consider such evidence for this purpose alone. Whether the two events are similar is for you to decide. The defendant is not on trial for any offense except the offenses alleged in the Information.

In no way does this instruction make a comment on the facts in violation of Art. 7, § 23 of the Arkansas Constitution. It simply tells the jury what it ought to be told regardless of the objection of a defendant: That the sole purpose of the testimony is to determine whether the two rapes were committed by the same person. The jury decides the facts. *Compare* to AMI 301. On remand if the defense insists the court should not give the instruction because it will call undue attention to the evidence, it should not be given.

A ski cap was found some distance from the residence of the victim. Apparently it was several blocks away. A policeman testified he was on the scene shortly after the incident and the cap was dry when there was dew on the ground. Four hairs found in the cap were examined by an expert who testified they were similar to Kellensworth's. Kellensworth's argument is that since the victim could not identify the cap, it should not have been admitted. The court found it relevant and we agree. Ark. Stat. Ann. § 28-1001, Rule 401 (Repl. 1979).

Finally, Kellensworth argues that the charges in another case, Case #CR 81-57, *State* v. *Kellensworth,* must be dismissed because the victim in the rape case testified against him in this trial; that was the victim who positively identified him. Kellensworth argues it amounts to double jeopardy if he is tried on that charge. Double jeopardy does not attach where there is no possibility of conviction. Ark. Stat. Ann. § 41-107 (Repl. 1977). The argument merits no further discussion.

Reversed and remanded.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I do not agree that the trial court abused its discretion in permitting the rebuttal testimony of appellant's former wife relative to his conduct toward her. The testimony was initiated, not by the prosecution but by the defense in repeated questions to appellant's mother as to appellant's behavior and conduct toward his wife and son. The obvious purpose was to create an impression by the jury that appellant was an adoring and devoted husband and father. No other inference is possible. Where that occurs the State is entitled to some latitude to rebut that kind of evidence with facts from which other inferences could be drawn. Otherwise, the prosecution is rendered helpless where the defense affirmatively elicits testimony which portrays the character of the accused in a false light. The testimony was not collateral and the means

by which the State answered it in rebuttal falls within the "wide discretion" of the trial court, which we will not reverse absent manifest abuse. *Shipman* v. *State,* 252 Ark. 285, 478 S.W. 2d 421 (1972); *City of Fayetteville* v. *Stone,* 194 Ark. 218, 106 S.W. 2d 158 (1937).

Supplemental Opinion on Denial
of Rehearing delivered April 19, 1982

DARRELL HICKMAN, Justice. The State in its petition for rehearing argues that the case of *Howell* v. *State,* 141 Ark. 487, 217 S.W. 2d 457 (1920), is directly in point and holds that the State can impeach testimony brought out on direct examination with contradictory testimony. In *Howell* the victim in a rape case stated on direct examination that she had never had sexual intercourse with any man except the defendant. The defense was not allowed to impeach this testimony by offering the testimony of another man. We held this was error, pointing out that the State brought up the issue on direct examination, and since it did, the defense ought to be allowed to impeach it with contradictory testimony. If the counterpoint of that situation existed in this case it would have been as follows: Kellensworth would have stated on direct examination that he had never mistreated his wife in any way by striking her or beating her. In *Howell* the testimony was not that the victim was chaste or had a reputation for chastity, an issue permitted to be raised in those days, but was that the victim herself had never had intercourse with anyone except the defendant. The statement was not made by a third party but by the victim herself. In this case the statement was a general statement

by Kellensworth's mother and at best could only have been a statement of opinion as to general character, not specific instances of good conduct. Furthermore, the State elicited from Kellensworth and his father on cross-examination testimony about how Kellensworth treated his wife; this subject was never raised by the defense during the direct examination of these witnesses. Due to these differences we deem *Howell* v. *State, supra,* distinguishable.

# HEBER SPRINGS LAWN AND GARDEN, INC., William L. BURGE and Hilda M. BURGE *v.* FMC CORPORATION

81-240 628 S.W. 2d 563

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Ronald J. Bruno & Associates,* for appellants.

*Thomas, House & Gardner,* for appellee.

JOHN I. PURTLE, Justice. William L. Burge and Hilda M. Burge, husband and wife, incorporated a business known as Heber Springs Lawn and Garden, Inc. The corporation became an agent and distributor for FMC Corporation during calendar year 1978. Both corporations are authorized to do business in Arkansas. A dispute arose between the parties and appellee filed a foreclosure petition in Cleburne County Chancery Court on September 22, 1980. The appellants resisted the action on the grounds that the Cleburne County Chancery Court did not have jurisdiction of the subject matter. Appellants argue the proper venue statutes are Ark. Stat. Ann. §§ 27-613, 615 and 616 (Repl. 1979). The subject matter of this action comes within the meaning of Ark. Stat. Ann. § 27-621 (Repl. 1979):

> An action on a debt, account, note, or for goods or services may be brought in the county where the defendant resided at the time the cause of action arose.

The relief apparently sought in appellants' motion dated February 13, 1981, was that the court dismiss the matter under the doctrine of forum non conveniens. The allegation was that Pulaski County would be the more convenient forum. The court overruled the motion and notice of appeal was filed by appellants.

We hold that the order appealed from was interlocutory in nature. We recently addressed the question of an appeal from a trial court's interlocutory order in the case of *Hyatt* v. *City of Bentonville,* 275 Ark. 210, 628 S.W. 2d 326 (1982). In that case we held that absent a final or appealable order, the appeal to us must be dismissed. In order to avoid piecemeal litigation or confusion in the lower court's handling of a matter, we must not interrupt the proceedings of a trial court. Denial of the motion did not dispose of any of the issues nor release any of the parties and was not final as to anything except that the trial would be held in Cleburne County. Once a final order has been entered, an appeal can be taken, and the question of venue and jurisdiction, once put in issue, is not lost by continuing through a trial of the matter. *Wilson* v. *Wilson,* 270 Ark. 485, 606 S.W. 2d 56 (1980). For the foregoing reasons, this appeal is dismissed.

Appeal dismissed.

Elaine Curtis BENNETT *v.* The Estate of Keith R. BENNETT, Deceased

81-216 628 S.W. 2d 565

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Gibson & Bearden* and *David E. Caywood,* Memphis, Tenn., by: *Michael R. Bearden,* for appellant.

*Mitchell D. Moore,* of *Moore, Moore & Barton* and *Branch & Thompson,* by: *Robert B. Branch, Sr.,* for appellee.

ROBERT H. DUDLEY, Justice. On February 23, 1981, we declared the then existing dower statutes unconstitutional because of gender-based discrimination. *Stokes* v. *Stokes,* 271 Ark. 300, 613 S.W. 2d 372 (1981); *Hess* v. *Wims,* 272 Ark. 43, 613 S.W. 2d 85 (1981). The new dower statutes, Ark. Stat. Ann. title 61, Chapter 2 (Supp. 1981) did not become effective until March 25, 1981. This is another, in a series of cases, involving an attempted claim of dower before the effective date of the new dower act. See *Huffman* v. *Dawkins,* 273 Ark. 520, 622 S.W. 2d 159 (1981) and *Hall* v. *Hall,* 274 Ark. 266, 623 S.W. 2d 833 (1981). The trial court denied the widow's right to take against the will and we affirm that decision.

Keith R. Bennett, appellant's husband, died in an automobile accident in California on December 19, 1980. At

the time decedent and appellant were separated and a divorce action was pending with the decedent having custody of their three minor children. The decedent executed a will on June 10, 1980, which was admitted to probate on January 2, 1981, which established a trust for the benefit of decedent's wife and children. The trustee was to pay $5,000 annually to appellant plus other enumerated sums for the children's welfare. Appellant filed an election to take against the will on April 15, 1981, and later filed an amended election. A demand for allocation of dower was filed by appellant on April 23, and the decedent's personal representative filed a response. The lower court denied the right to take against the will and this appeal ensued.

Appellant admits that the substantive right to dower became fixed on her husband's death, but she contends that the statute authorizing the election to take against the will, Ark. Stat. Ann. § 60-501 (Supp. 1981), which was effective before the date of her election on April 15, 1981, dealt exclusively with procedure, and not with the substantive rights of the person so taking. Appellant contends that cited statute, if procedural, may be applied retroactively to allow the statutory election and, since the substantive dower statutes have been declared unconstitutional we should exercise our inherent power and apply the substantive common law of dower. The appellee responds that such a holding would amount to the same discriminatory scheme being allowed under the guise of common law. To that response the appellant answers that the capacity of common law for growth and adaptation to new conditions is one of its most admirable features. It is constantly expanding and developing and whenever an old rule is found unsuited to the present conditions, or is unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice, which, in this case, requires extending dower to males by judicial fiat.

At the time we decided *Hess,* supra, and *Stokes,* supra, we considered and rejected the concept of extending to males, by judicial rule, dower, homestead and statutory allowances. In *Hess,* supra, we stated: "Under the facts in this case and the language of the statute, we can find no way

to extend the benefits to the disfavored class and accordingly, we find it necessary to deny the benefits to both widowers and widows by declaring the statute unconstitutional as applied." The overriding reason we decided not to attempt to extend the benefits to the disfavored class is that the legislature of a state has the power to give or withhold dower. The General Assembly could enact a new dower statute, as it did, or it could have withheld it altogether and it is properly a matter of statutory regulation to say what interest, if any, married persons shall have in the property of each other as an incident of the relation between them.

Affirmed.

Danna Ray DAVIS, a/k/a Danny Ray DAVIS
*v.* STATE of Arkansas

CR 81-108 630 S.W. 2d 1

Supreme Court of Arkansas
Opinion delivered March 8, 1982
[Rehearing denied April 12, 1982.]

*John M. Robinson, Jr.*, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant Danny Ray Davis was convicted of robbing the First National Bank of Fort Smith. The jury found that he was a habitual offender, having been convicted of eight previous felonies, and recommended a thirty-five year prison sentence and a $10,000 fine. We affirm.

The pertinent facts are that appellant started drinking heavily on December 3, 1980. During the morning and early afternoon of the 4th he continued to drink in several Fort Smith bars. He then went to a drive-in window of the bank and handed a note to the teller through a slide-out drawer. The note demanded either $500 or $5,000 and the teller gave him seven or eight ten-dollar bills and he departed. The teller and a parking lot attendant described appellant. In addition, a jacket matching the description of one which appellant had been wearing in the bars was found in the main bank building. Early the next morning Noel Harvey, a detective who knew appellant and his family, went to appellant's apartment. Appellant invited him in, offered him a cup of coffee and began to answer questions. Appellant admits that he was given a valid Miranda warning at home as well as after he was taken to the police station. At first, appellant said that if he robbed the bank he did not remember it but later he gave a confession which was admitted into evidence over his objection. He now makes a two-fold argument that the trial court erred in failing to suppress the confession because, one, he was arrested at his residence without a warrant in violation of the doctrine announced in *Payton* v. *New York,* 445 U.S. 573 (1980) and, two, the confession was signed pursuant to a promise of leniency and assurance of help in making bail.

*Payton,* supra, holds that the Fourth Amendment prohibits the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest. Here, there was no forcible entry into appellant's home. Instead, there was a consensual entry of the type that is not barred by *Payton. State* v. *Filiatreau,* 274 Ark. 430, 625 S.W. 2d 494 (1981).

The second prong of appellant's suppression argument

is one which, over the years, we have had to decide on a case-by-case basis by looking at the totality of the circumstances. The applicable law is simple. If a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly and intelligently made. In determining whether there has been a misleading promise of reward we look at the totality of the circumstances. The totality is subdivided into two main components, first, the statement of the officer and second, the vulnerability of the defendant. Because these two factors create such a multitude of variable facts, it has been impossible for us to draw bright lines of substantive distinction.

The procedural rules are clear. The State bears the burden of proving by a preponderance of the evidence the voluntariness of an in-custodial confession, Ark. Stat. Ann. § 43-2105 (Repl. 1977). Any conflict in the testimony of different witnesses is for the trial court to resolve. *Harvey* v. *State,* 272 Ark. 19, 611 S.W. 2d 762 (1981). While we do not reverse the trial court's finding unless it is clearly erroneous, we do make an independent determination based on the totality of circumstances, with all doubts resolved in favor of individual rights and safeguards, to determine whether the holding of the trial court was erroneous. *Giles* v. *State,* 261 Ark. 413, 549 S.W. 2d 479 (1977). A statement induced by fear or hope of reward is not voluntary. *Greenwood* v. *State,* 107 Ark. 568, 156 S.W. 427 (1913).

In determining the totality of the circumstances we first look at the statement of the officer. Some statements are so clearly promises of rewards that we do not find it necessary to look past the statement to decide the case. Examples are the case where a deputy prosecuting attorney told the prisoner who faced a possible death sentence that a confession "would not result in more than 21 years' incarceration." The prisoner confessed and received a life sentence. *Freeman* v. *State,* 258 Ark. 617, 527 S.W. 2d 909 (1975). Similarly, we reversed a conviction and the maximum sentence based on an inculpatory statement when the prisoner and his attorney were led to believe there was a mutual understanding that in

exchange for the giving of information the officials would, at the least, recommend leniency and perhaps even dismiss the case. *Teas* v. *State,* 266 Ark. 572, 587 S.W. 2d 28 (1979). In other cases the officer's statement, standing alone, does not provide sufficient information for us to decide the case. In the case at bar we do not have a clear promise of reward. Detective Harvey testified: "I told him that I didn't think it would be hard on him if he did make a statement. I told him that considering his record there might be a possibility [of probation]... I didn't guarantee anything. I made that clear, there was no guarantee . . . " (At this time Harvey did not know about appellant's prior convictions.) . . . "I told him I would attempt to help him get his bail set, which I did." This type of statement by the officer, standing alone, is not determinative. For example, "it would probably help if you go ahead and tell the truth" was approved. *Harvey* v. *State,* supra. "Things would go easier if you told the truth" was allowed to stand. *Wright* v. *State,* 267 Ark. 264, 590 S.W. 2d 15 (1979). On the other hand a confession was held improper when the officer said, "I'll help you any way that I can." *Tatum* v. *State,* 266 Ark. 506, 585 S.W. 2d 957 (1979), and we reversed a conviction when a deputy prosecutor said, "I'll help all that I can." *Shelton* v. *State,* 251 Ark. 890, 475 S.W. 2d 538 (1972). The real difference in these cases does not lie in the statements for they, alone, are neither simple admonitions to tell the truth nor are they clear promises of reward. They can be either. The true distinction lies in the second group of factors considered in the totality of circumstances — the vulnerability of the defendant. In the first two cases cited, *Harvey* v. *State,* supra, and *Wright* v. *State,* supra, where the statements were not suppressed, the record demonstrates that the prisoner was not misled. In *Harvey,* the prisoner, a habitual offender, testified he understood his rights. In *Wright,* the 30-year-old prisoner was a habitual criminal who had been arrested some twenty times and incarcerated six or seven times and was obviously educated in criminal procedure. Under these circumstances we labeled the officer's statement an admonition to tell the truth and not a promise of reward.

On the other hand, similar statements have been held to be promises of reward when the prisoner is vulnerable to

some innuendo. "I'll help you all I can" was the deputy prosecutor's statement but the fact of vulnerability which led us to suppress the confession was that the prisoner requested an attorney and he was furnished the deputy prosecutor who took the statement. *Shelton* v. *State,* supra. The same "I'll help you if I can" coupled with prisoner vulnerability caused us to suppress the confession in *Tatum* v. *State,* supra, where the prisoner was the first of three persons arrested. While he was a habitual offender and probably knew his rights, the police did not know the names of his accomplices. In reliance on "I'll help you if I can" he gave their names and a statement. The accomplices were then allowed to plead guilty on negotiated pleas and the accomplices and the statement were used against him for conviction. *Tatum* v. *State,* supra.

In the case before us the appellant was 40 years of age with a ninth grade education, was not questioned at length, admits that he was read his rights and, most importantly, stated he understood them. He was no stranger to the criminal justice system, having been previously convicted of eight felonies and having served time in Oklahoma. While appearing to be "hung over," he was not physically ill. The State's evidence was that he was lucid, understood his rights and did not rely on any promise. It was for the trial court to weigh the evidence and resolve the credibility of the witnesses. *Wright* v. *State,* supra. We hold that the trial court's ruling that the confession was voluntarily and knowingly given was not clearly against the preponderance of the evidence.

Appellant next contends that the court erred in allowing into evidence the testimony of Earl Collins, a latent fingerprint specialist with the Federal Bureau of Investigation, because there was a missing link in the chain of custody of the fingerprint card. Sergeant Arthur Langston of Fort Smith testified that he signed the fingerprint card, packaged it and mailed it, by certified mail, to the Federal Bureau of Investigation, Washington, D.C., attention Fraudulent Document Examiner and Latent Fingerprint Section. There some unknown person opened the evidence package and delivered the fingerprint card to Collins for

examination. The chain is complete from that time. Obviously there is one missing link in the chain of evidence, that is, the person who opened the package at the Federal Bureau of Investigation offices in Washington, D.C. There is little likelihood there has been any tampering with the exhibit and the trial court did not abuse its discretion in admitting the evidence. In establishing a chain of custody prior to the introduction of evidence, it is not necessary to eliminate every conceivable possibility that the evidence has been tampered with; it is only necessary that the trial judge be satisfied that the evidence is genuine and, with reasonable probability, it has not been tampered with. *Baughman* v. *State,* 265 Ark. 869, 582 S.W. 2d 4 (1979). See also *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978).

After the jury returned a verdict of guilty the trial proceeded to the sentencing phase and the court permitted the State to introduce into evidence photocopies of the judgment and sentence of appellant's prior convictions in the State of Oklahoma. These records were part of the "pen packet" from the Oklahoma Department of Correction and were certified by the proper Oklahoma authority. Appellant contends the court committed error in admitting the photocopies of the prior convictions, because, although they recite that he had an attorney, they do not contain the name of his attorney. This argument is without merit and was settled in *Clem & Gilbert* v. *State,* 254 Ark. 580, 495 S.W. 2d 517 (1973). The judgments reflect the court and its officers were present in open court along with the defendant and his attorney, that the defendant pleaded guilty and was sentenced. We are satisfied from the exhibits that appellant was represented by an attorney at each of his convictions. In addition, in his testimony, appellant referred to his attorney.

Finally, the appellant contends that the judgment is excessive. The sentence is within the range of sentences for a defendant convicted of a class B felony who has four or more previous convictions. Ark. Stat. Ann. §§ 41-1001 (2) (b) and 41-1101 (1) (a) (Repl. 1977).

Affirmed.

HICKMAN, PURTLE and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. I respectfully disagree with the view that this confession was not induced in the hope of gaining leniency. Detective Harvey's testimony provides all the support necessary: "Knowing Danny the way I did, I told him that I didn't think it would be hard on him if he did make a statement. Yes, sir, I did make that *promise* to him. I told him that considering his record there might be a possibility [of probation]." (My emphasis.) While Detective Harvey's testimony seems forthright enough, we can be sure he offered no *less* than he admits — which is surely enough to render this confession as coerced, not by intimidation but by enticement. Either way, the result is the same. See *Tatum* v. *State,* 266 Ark. 506, 585 S.W. 2d 957 (1979).

The corollary illustrates the wisdom of the rule: the officer's promised leniency, and appellant's misplaced hopes of leniency, were answered with a thirty-five year prison sentence for what can be aptly characterized as a strong-arm extortion of $80.00 by a drunken appellant.

HICKMAN and PURTLE, JJ., join.

W. D. GRAVES *v.* Jerry MOORE

81-219 628 S.W. 2d 564

Supreme Court of Arkansas
Opinion delivered March 8, 1982

*Alan Wooten* and *Toni Swift-Nolan* of *Warner & Smith,* and *Roderick H. Weaver,* for appellant.

*Turner & Mainard* and *Jones, Gilbreath & Jones,* for appellee.

STEELE HAYS, Justice. This appeal involves the effect of the Arkansas Guest Statute (§ 75-913 et seq.) where the driver and passenger are fellow employees.

Jerry Moore and Erby Daniels are employees of Dogpatch USA. With Daniels as passenger, Moore drove his pickup home to get a post hole digger and was struck by William Graves while en route. Daniels was injured and sued Graves, who counterclaimed. Moore's insurance carrier (MFA) intervened to assert subrogation rights against

Graves for its payment to Daniels of $10,000 under the uninsured motorist provision of its policy. Graves denied MFA's allegations and joined Moore and Dogpatch as third-party defendants, asking for judgment over in the event of a recovery by Daniels.

Jerry Moore's answer to Graves admitted that he and Daniels were acting within the scope of their employment but alleged that Daniels was a guest and so not entitled to recover against Moore except on proof of willful and wanton conduct.

Moore then moved for summary judgment alleging no genuine issue of material fact and attaching his affidavit stating he needed the post hole digger for work; that the company truck was out of gas so he used his own truck; that Daniels had not been asked to go but had gone simply for the ride. An affidavit from Daniels substantially tracked Moore's, adding that it became necessary for them to go pick up the post hole digger; that he exercised no control over Moore and had not been asked to go.

The trial court found no genuine issue of material fact and dismissed Graves's complaint. For reversal, Graves argues that it was error to grant summary judgment where reasonable men could differ in their interpretation of existing rights; that it was error to hold as a matter of law that Daniels was a guest in Moore's truck and error to hold as a matter of law that Moore was not guilty of willful and wanton conduct. As we agree with the first two arguments we do not reach the third.

Graves does not argue that if Daniels is found to be a guest within the meaning of the statute then he would not be entitled to indemnification or contribution from Moore unless wanton conduct is proven. *Troutman* v. *Modlin,* 353 F. 2d 382 (8th Cir. 1965). Thus, the only question we need decide is whether the trial court erred in finding as a matter of law that Daniels was a guest in the Moore vehicle.

We have frequently held the status of a passenger with respect to the guest statute is a fact question for the jury's

determination. *Austin* v. *Stricklin,* 240 Ark. 555, 400 S.W. 2d 671 (1966); *Hoffman* v. *Davis,* 239 Ark. 99, 387 S.W. 2d 388 (1965); *Buffington* v. *Wright,* 239 Ark. 138, 388 S.W. 2d 100 (1965); *Simms* v. *Tingle,* 232 Ark. 239, 335 S.W. 2d 449 (1962); *Ward* v. *George,* 195 Ark. 216, 112 S.W. 2d 30 (1937); *Carnes, Admx.* v. *Strait, Judge,* 223 Ark. 962, 270 S.W. 2d 920 (1954). Moreover, because the guest statute is in derogation of the common law, if for no other reason, we have held guest statutes are not to be extended beyond the correction of the evil which induced their enactment. *Ward* v. *George, supra.* Thus, a passenger's claimed status of guest will be closely scrutinized.

Here, the affidavits of Moore and Daniels do not render their relational status under the guest statute closed to genuine dispute. They are interested parties and their statements are open to challenge even where the underlying facts may appear undisputed. *Ball* v. *Hail,* 196 Ark. 491, 118 S.W. 2d 668 (1938). Graves is entitled to have the purposes and motives of their mission as co-employees serving their employer tested under cross-examination and to have the evidence, with the inferences to be drawn from it, decided by the jury as an issue of fact. Appellant points out that even Daniels' affidavit is subject to more than one interpretation, as it states, "*it became necessary* for Jerry Moore and I to drive into Harrison to pick up a post hole digger." (Emphasis added.) We conclude that ordinarily where two employees are on a mission for their employer during regular hours of employment the status of the passenger-employee under the guest statute is a question for the jury to decide. See *Ball* v. *Hail, supra.*

We also agree with appellant's argument that even when facts are uncontroverted, as can be said of these, if fair-minded men might honestly differ as to the conclusion to be drawn from those facts, then the question should go to the jury. *Harkrider* v. *Cox,* 230 Ark. 155, 321 S.W. 2d 226 (1959); *St. Louis I.M.& S. Ry.* v. *Fuqua,* 114 Ark. 112, 169 S.W. 786 (1914).

Summary judgment is an extreme remedy and not to be readily employed. Its object is to determine whether there is

an issue to be tried, not to determine the issue itself. *Ashley* v. *Eisele*, 247 Ark. 281, 445 S.W. 2d 76 (1969). Appellant Graves was entitled to have the issue of Daniels' status under the guest statute submitted to the jury.

Reversed and remanded.

Charles TILLMAN and Charles HUGGINS
*v.* STATE of Arkansas and
Leandrew BYRD, Jr. *v.* STATE of Arkansas

CR 81-47 630 S.W. 2d 5

Supreme Court of Arkansas
Opinion delivered March 8, 1982
[Rehearing denied April 12, 1982.*]

*HOLT, HICKMAN, and DUDLEY, JJ., would grant the petition.

*Brown & Kesl, P.A.*, by: *Marjorie M. Kesl,* for appellant Byrd.

*McArthur & Lassiter, P.A.*, by: *William C. McArthur,* for appellants Tillman and Huggins.

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

STEELE HAYS, Judge. Appellants were convicted of theft of property and burglary of a residence in Lonoke County, receiving concurrent ten year sentences on each charge. For reversal, they allege the trial court erred in not suppressing evidence seized without a warrant, in not permitting the introduction of statements elicited from them by the police, and in permitting a police officer to give opinion testimony. We find no error.

The facts given us are that shortly after noon on February 4, 1980, a private citizen followed the three appellants from North Little Rock to near Scott, a distance of about 15 miles, and watched them slow down and scrutinize residences along the way. He formed the belief that they were "casing" the residences for a burglary, particularly one at the intersection of Highway 130 and Walker's Corner Road. Leaving his own pursuits, he drove to the police station at England where he reported the information to Deputy Sheriff Alan Swint. Mr. Swint knew the location to be sparsely settled, to have been subjected to a rash of recent burglaries and knew the residence of George Brown to be at that point. Appellants' car, a bronze Cadillac, was unfamiliar to him. Swint went directly to the scene where he saw the Cadillac stopped, but positioned diagonally across the highway in such a manner as to suggest having just backed from the Brown driveway. Swint radioed another officer to investigate the residence as he followed the appellants. In North Little Rock he signalled another police vehicle to assist him and with that help he stopped the occupants and told them they were being held for suspicion of burglary. After handcuffing the appellants he received a radio report that the Brown residence had, in fact, been burglarized. With that information, he opened the trunk and observed two garment bags. One, he maintains, was partially opened, enabling him to see articles of silver service. On those facts appellants' motion to suppress was denied.

I.

Appellants maintain the initial stop and detention was an unlawful arrest and seizure and there was no probable cause for the search. We disagree.

Our Rule of Criminal Procedure 3.1 gives a police officer the right to stop and detain for up to 15 minutes[1] any person he reasonably suspects has committed a felony. Rule 2.1 defines the test as more than an imaginary or purely conjectural suspicion, but less than probable cause. Even the

[1]Time is not an issue here and presumably the stop had not exceeded 10 to 15 minutes when the suspected burglary was confirmed.

higher standard of probable cause requires much less than a certainty, as it is said to exist simply if the circumstances known to the officer would warrant a prudent man in believing a suspect had committed a crime. *Henry* v. *United States,* 361 U.S. 98 (1958); *Giordenello* v. *United States,* 357 U.S. 480 (1959). It does not depend on the same type of evidence as would be needed to support a conviction. *Draper* v. *United States,* 358 U.S. 307 (1959).

Hence, these considerations are relative, and can be compared to a ladder with four rungs: at the highest level is certain knowledge, as in the case of an eyewitness to a crime; next is probable cause, less than a certainty, but enough to satisfy a prudent man; lower yet is a reasonable suspicion; and at the lowest level, a bare or imaginary suspicion, founded on nothing more than a hunch. Applying that standard to this case, we regard the requirements of reasonable suspicion as having been fully satisfied.

To validate this conclusion one need look no farther than the landmark decision of the United States Supreme Court in *Terry* v. *Ohio,* 392 U.S. 1 (1968). The circumstances of that case provide a striking analogy to this case. Terry had appealed a conviction for carrying a concealed weapon. He was observed by a detective about 2:30 one afternoon. The officer's interest in Terry and two companions was aroused because they walked back and forth in a particular block peering in a store window and then conferring at the corner. The officer became suspicious and believed the men were "casing" the store for a robbery. He approached the men, identified himself as a police officer, and asked for their names; he was not acquainted with any of the three by name or sight and had received no information concerning them from any source. When the men "mumbled something" in response to his question the officer grabbed Terry, "spun him around" to frisk him and found a pistol in his overcoat pocket. The Supreme Court of the United States, whose sensitivity to Fourth Amendment constraints needs no defense, affirmed a decision of the Supreme Court of Ohio that the revolver was properly admitted in evidence, holding that the officer had reasonable grounds to believe that Terry was armed and dangerous and that his behavior justified an

investigative stop. The court noted that the suspects had gone through a series of acts, while innocent in themselves, when taken together warranted further investigation. And while the officer could not rely entirely on his intuition, he could draw on his experience in observing people under a variety of circumstances. The cases are rationally indistinguishable. A similar holding was reached in *Adams* v. *Williams,* 407 U.S. 143 (1972).

In *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), the court dealt with the problem of the United States Border Patrol's authority to stop automobiles near the Mexican border. Referring to *Terry* v. *Ohio,* the court said:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response . . . *A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.* (Emphasis supplied.)

In *Reid* v. *Georgia,* 448 U.S. 438 (1980), *Terry* v. *Ohio* was described as holding that conduct *lawful in itself* can be such as to arouse a reasonable suspicion when viewed by a trained police officer.

In *United States* v. *Cortez,* 449 U.S. 411 (1981), the court observed that while trained police officers are able to draw inferences and make deductions that might well elude others, in the final analysis investigatory stops must be justified by some objective manifestation that the person is engaged in criminal activity. Noting that *the whole picture* must be considered the court said:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated

> certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.* (Emphasis supplied.)

In this case the objective manifestations are found in the fact that the suspects were followed a considerable distance and observed to study residences along the way as if to be "casing" them; coupled to those circumstances are the knowledge and observations of Officer Swint that the area had been frequently burglarized, that the vehicle was unfamiliar to him, the occupants unknown to him and were thought to have just emerged from the Brown driveway 45 minutes to an hour after the informant observed them "casing" the residence. Singly, those circumstances indicate nothing; collectively, they add up to a reasonable suspicion. The case may be stronger than *Terry* v. *Ohio* — stores and store windows, unlike private homes, are intended to attract scrutiny. We conclude that the initial stop of the appellants was based on reasonable suspicion and hence not a violation of the Fourth Amendment.

The second phase of appellants' argument is that the warrantless search of the automobile was a violation of the Fourth Amendment. But we believe the search comes within the "automobile exception" announced in *Carroll* v. *United States,* 267 U.S. 132 (1925). The State does not contend the search was incidental to a lawful arrest (assuming appellants' detention amounted to an arrest), as such searches are restricted to the passenger compartment of the vehicle. *New York* v. *Belton,*[1] 450 U.S. 1028 (1981). What is claimed, correctly we think, is that when Officer Swint learned the Brown residence had been burglarized, at that point he had probable cause to believe the vehicle contained evidence of the crime and, hence, a search of the vehicle was

[2]Where it was held that "when a policeman has made a lawful custodial *arrest* of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

proper. Rule 14.1 (a), A. R. Crim. P., gives an officer the right to make a warrantless search of a vehicle detained on a public way if he has reasonable cause to believe the vehicle contains evidence subject to seizure, and exigent circumstances require immediate action to prevent removal or destruction of such evidence. Rule 14.1 is consistent with *Carroll* v. *United States,* in permitting search and seizure whenever "probable cause to believe that the area contains evidence of a crime conjoins with any exigency arising out of the mobility and imminent disappearance of that same constitutionally protected area."[3] See also *Chambers* v. *Maroney,* 399 U.S. 42 (1970).

Appellants cite *Burkett* v. *State,* 271 Ark. 150, 607 S.W. 2d 399 (1980), and *Scisney* v. *State,* 270 Ark. 610, 605 S.W. 2d 451 (1980). where we held a warrantless search of wrapped parcels and suitcases was improper. But the distinguishing aspect is that in those cases the initial arrest was due merely to a faulty tail light and there was a lack of probable cause to believe the vehicles contained marijuana.

Appellants also press the argument that the garment bags were closed and, hence, under the "suitcase doctrine" there was an expectation of privacy in such containers, as recognized in *Arkansas* v. *Sanders,* 442 U.S. 753 (1979), and *United States* v. *Chadwick,* 433 U.S. 1 (1977). But that fact issue was disputed and the trial court apparently relied on the officer's testimony that one of the garment bags was open and its contents clearly visible to him. Had the garment bags been closed, then the rationale of the suitcase doctrine might arguably apply on the theory that when the suspects and the containers are in custody, exigent circumstances disappear and a warrant can be sought at leisure. But even that is a debatable point, as the language of footnote 13, page 764, *Arkansas* v. *Sanders, supra,* suggests:

> Not all containers and packages found by police during the course of a search will deserve the full protection of

[3]"The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label" by Judge Charles Moylan, 27 Mercer Law Review 987 (1975).

> the Fourth Amendment. Thus, some containers (for example a kit of burglar rools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred by their outward appearance.

Appellants argue inferentially that exigent circumstances disappear when the suspects and the vehicle itself are in custody, but that is not the law and, if reason prevails, will not become the law. Containers the size of suitcases can be readily secured in police custody but the impracticality of securing an automobile is self-evident, as the United States Supreme Court noted in *Chambers* v. *Maroney, supra,* where the court reviewed the automobile exception:

> *Carroll* v. *U.S.* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. (Page 51.)

This is not to deny the existence of that school of cases which has barred a warrantless search of automobiles where both the suspect and the vehicle are in custody. (See *Jenkins* v. *State,* 253 Ark. 249, 485 S.W. 2d 541 (1972), *Steel* v. *State,* 248 Ark. 159, 450 S.W. 2d 545 (1970), *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), *Preston* v. *United States,* 376 U.S. 364 (1963).) But those decisions distinguish a search at the scene of arrest as opposed to a search remote in *time* and *distance* from the situs of the arrest, under circumstances more conducive to the securing of a search warrant. We think the trial court correctly denied the motion to suppress.

II.

Secondly, appellants ascribe error to the refusal to allow the introduction of statements elicited from them by the police. Although appellants declined to testify, they sought to introduce statements each had given the police after their arrest. The statements claimed they had bought the articles

(consisting of a mink coat and an estimated $20,000.00 worth of silver service) for $300.00 from two men they met that morning at a McDonald's restaurant and known to them only as Larry and Mike. The statements were offered as an admission against penal interest, under Rule 804 (b) (3), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), on the theory that the statements exposed them to a charge of receiving stolen property. Before statements against penal interest are admissible under Rule 804 the court must be satisfied that the corroborating circumstances clearly indicate the trustworthiness of the statement. See *Welch* v. *State,* 269 Ark. 208, 599 S.W. 2d 717, cert. den. 449 U.S. 996 (1980). The circumstances surrounding these statements fail decidedly to meet that test and the trial court was right to exclude them.

III.

Finally, appellants contend that the court erred in allowing the deputy to give an opinion that the Cadillac had backed from the Brown driveway just before he saw it. Rule 701, Uniform Rules of Evidence, allows a lay witness to state an opinion if it is rationally based on his perception and would be helpful to a clear understanding of his testimony or to the determination of a fact issue. Whether the car had backed from the Brown driveway was a relevant issue. But more, its diagonal position in the highway, relative to the driveway, and its movement as he observed it, provided a rational basis for the opinion he gave. The difficulty of verbalizing the movement of objects and physical events often requires some degree of opinion by the observer and the speed and movement of automobiles, as of people, illustrate the reason for the rule. See *Mathis* v. *State,* 267 Ark. App. 904, 591 S.W. 2d 279 (1979). The trial court did not err in allowing the testimony.

The judgments are affirmed.

HICKMAN, J., consurs.

HOLT, PURTLE, and DUDLEY, JJ., dissent.

DARRELL HICKMAN, Justice, concurring. I concur because of the views I expressed in my dissenting opinion in *Moore* v. *State,* 268 Ark. 171, 594 S.W. 2d 245 (1980).

ROBERT H. DUDLEY, Justice, dissenting. The plurality opinion affirms two seizures, one, a seizure of the defendants and two, a seizure of the evidence. Both violate the Fourth Amendment.

I

Seizure of the Defendants

Stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment. *Delaware* v. *Prouse,* 440 U.S. 648 (1979), A stop and arrest without a warrant is valid only when the arresting officer has reasonable grounds to believe that the arrested person has committed a crime. Ark. Stat. Ann. § 43-403 (Repl. 1977); *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409 (1970). Reasonable grounds under the Arkansas statute equate with the federal standard of probable cause for arrest. *Tweedy* v. *United States,* 435 F. 2d 702 (8th Cir. 1970). The majority opinion impliedly admits that at the time Deputy Swint stopped the appellants he did not know a crime had been committed and, at that moment, did not have probable cause for arrest. Yet, that is exactly what occurred as the appellants were arrested without probable cause. The testimony of Deputy Swint is clear:

> Q. Where were you located when you stopped the defendants?
> A. Just south of Superwood on Highway 130.
> Q. Did you turn on your lights?
> A. Yes, sir.
> Q. And did they promptly stop, or did you have to give chase?
> A. No, sir, they promptly stopped.
>
> . . .
>
> Q. When you stopped the vehicle, what did you do?

A. *Came out with my shotgun, advised the subjects to step out of the car, placed them on the trunk of the vehicle, patted them down, handcuffed them, and one at a time, placed them in my vehicle. I advised them they were being held on suspicion of burglary.*

. . .

Q. *So upon taking them out, you advised them they were under arrest for suspicion of burglary?*
A. *Right.*
Q. *And you restrained them, placed them physically under arrest in your vehicle in Pulaski County?*
A. *Yes, sir.*

. . .

Q. And what did you do with the three defendants and with the car at that time?
A. At that time, about that time, Officer Todd had arrived. I told him about everything and I think an England officer, England police officer had also arrived, and he advised to go ahead and take them to the Lonoke Sheriff's office and we would get the England officer to stand by the vehicle until the wrecker gets there. I did so.
Q. Did you then transport the three defendants to the jail?
A. Yes, sir.

To constitute an arrest, as opposed to an investigatory stop, there must be three simultaneous occurrences. One, there must be a seizure. Two, the seizure must be performed with the intent to make an arrest, rather than make a temporary investigation, and three, the prisoner must understand he is being arrested rather than merely being stopped for investigation. These three events occurred. The appellants were arrested without probable cause and as a result, the evidence seized should have been suppressed. Nothing more need be said on this point.

The plurality of my brothers on this bench deny that

there was an arrest, but insist there was only an investigatory stop, that relatively new dimension by which seizures based on less than probable cause can be made and still comply with the reasonableness standard of the Fourth Amendment. Rules 2 and 3 of the Rules of Criminal Procedure, Ark. Stat. Ann. Vol. 4A (Repl. 1977), labeled "Pre-Arrest Contacts" and "Detention Without Arrest," deal with investigatory stops.

Rule 3.1 provides that a law enforcement officer may detain, for up to fifteen minutes, any person who he reasonably suspects is committing, has committed, or is about to commit a felony. Reasonable suspicion is required for an investigatory stop as distinguished from the probable cause required for an arrest. This lesser standard is defined in Rule 2.1 as:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The Supreme Court of the United States has now recognized four situations where seizures based on less than probable cause, or reasonable suspicion, have complied with the reasonableness standard. See Erickson, *Pronouncements of the United States Supreme Court Relating to the Criminal Law Field 1980-81,* The National Journal of Criminal Defense, Vol. VII (1981).

First, in *Terry* v. *Ohio,* 392 U.S. 1 (1968) a limited stop and frisk was approved. Second, in *Adams* v. *Williams,* 407 U.S. 143 (1972) a stop was approved to investigate an informant's tip that the person stopped was armed and carrying narcotics. Third, in *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), the Court held that border patrol officers may make investigatory stops of vehicles near the country's borders if there are articulable facts that reasonably warrant a suspicion that the vehicle contains illegal

aliens. Fourth, in *United States* v. *Cortez,* 449 U.S. 411 (1981), a case involving an investigatory stop similar to the one before us, the Court held that objective facts and circumstantial evidence suggesting that a particular vehicle may be involved in criminal activity may provide a sufficient basis to justify an investigatory stop of that vehicle. Recognizing that investigatory stops are subject to restraints against unreasonable seizures imposed by the Fourth Amendment, the Court defined the factors that create an objective manifestation that the person is, or is about to be, engaged in criminal activity. The analysis of that objective manifestation may include articulation of objective observations, information from police reports, or consideration of modes or patterns of operation of criminals. It is from these data that a trained officer draws inferences and makes deductions that might elude an untrained person. *United States* v. *Cortez,* supra.

Our rule and the comparative statute authorize an investigatory stop, *Hill* v. *State,* 275 Ark. 71, 628 S.W. 2d 285 (1982); *Holmes* v. *State,* 262 Ark. 683, 561 S.W. 2d 56 (1978), and the Supreme Court of the United States has held that investigatory stops can be valid. *United States* v. *Cortez,* supra. The Fourth Amendment does not require probable cause or reasonable grounds for this type of stop. The required standard for an investigatory stop is a reasonable suspicion as shown by an objective manifestation that the suspect is, has been, or is about to be, engaged in criminal activity.

In the case at bar the arresting officer had a report that three men were reconnoitering residences. He knew there had been previous burglaries in the area. However, he did not know that a crime had been committed and he did not know one was about to be committed. He arguably did not think he had cause to stop the appellants when he first saw them because he did not stop them. He had no additonal articulable facts when he finally stopped appellants' car.

At the suppression hearing the deputy admitted that he only had the information from an unknown and unidentifiable informant, the knowledge there had been prior

burglaries in the area and appellants' car was near Brown's home. His testimony is clear.

> Q. So at the time you stopped them some distance down the road, you were, at that time, not aware of any crime that they had committed?
> A. I believed they had committed one.
> Q. I understand you believed that, even though you had no knowledge of that.
> A. No proof at that time, no, sir.
> Q. You did not even know whether a crime had been committed, is that correct?
> A. For sure, no, sir.
> Q. So you made a stop in Pulaski County out of your jurisdiction?
> A. Along with a Pulaski County Deputy.
> Q. They were not trying to evade you, no hot pursuit?
> A. No, sir.
> Q. And the only thing that you were basing that arrest on was the discussion that you had had with an unknown male?
> A. Yes, sir.
> Q. You had no knowledge of whether what he was telling you was truthful or untruthful, reliable or unreliable?
> A. At the time he was telling me, no, sir.
> Q. So you made the arrest, you had them in custody, placed them in your vehicle before you learned of any violation, if any, that they had committed?
> A. I had them in my vehicle before I was certain whether or not the residence had been burglarized.
> Q. Did they ever call on the radio and tell you these men had burglarized the place?
> A. No, sir.
> Q. Or did they give you any information concerning them burglarizing the home?
> A. No, sir, he advised me the residence had been burglarized.
> Q. So the only thing you knew at that time was you observed this vehicle on the road in front of or near this home, and had followed it?
> A. Yes, sir.

Q. That's the only thing you had to connect them with any crime in this area?
A. Yes, sir.

There was no testimony introduced to demonstrate the modes or patterns of the earlier burglaries. There was no testimony to show if the earlier burglaries had taken place in the daytime or at night; no testimony to demonstrate if the police suspected one or more burglars; no testimony about the method of transportation used; and no testimony about footprints or fingerprints from the earlier burglaries. Deputy Swint admitted he did not know appellants and he knew nothing about their backgrounds. The appellants' manner of dress was not unusual and there was nothing suspicious about their appearance. He quite simply did not articulate a reasonable suspicion.

Articulated objective facts or articulated circumstantial evidence suggesting that a particular vehicle may be involved in criminal activity can provide a sufficient basis to justify an investigative stop of a vehicle. The test is whether under the totality of the circumstances — the whole picture — the officers are able to articulate a particularized and objective basis for suspecting the particular person stopped of criminal activity. *The specificity in the information is the touchstone on which a legitimate investigative stop is made. United States* v. *Cortez,* supra. In the case before us the officer did not articulate specific facts to reasonably suspect appellants had committed a crime. An inarticulable hunch is not sufficient to justify an investigatory stop. The articulation of facts or data is the only testimony from which the trial court can determine whether a trained police officer has drawn inferences and made valid decisions or whether an officer just played a hunch with no real grounds. When an officer does not articulate a reasonable suspicion for the investigatory stop it should be declared unlawful.

A hypothetical example, using facts comparable to the case at bar, will demonstrate the reason. Suppose you, the reader of this opinion, own a puppy and it strays away from your home. You get in your car and drive a few blocks, across a county line, and begin carefully looking for your pup.

Some unknown and unidentifiable person sees you "casing" the neighborhood and calls the police. A policeman knows that there have been burglaries in the area and he sees your car in front of a house which had been burglarized some months ago. According to the plurality opinion those facts are sufficient for the officer to follow you back into your original county (under a doctrine, not discussed by the plurality of "hot pursuit to investigate") and stop you pursuant to Rule 3.1. There were no stronger facts articulated in the principal case. Just as you would have been stopped on an unarticulable hunch in the hypothetical case, these appellants were stopped. The reason for requiring the articulation of a reasonable suspicion is obvious.

Since the stop was not shown to be lawful the evidence should have been excluded. *Wong Sun* v. *United States,* 371 U.S. 471 (1963).

II

Seizure of the Evidence

On the proof before the trial court the evidence should have been suppressed for a second reason. The general rule is that a seizure of evidence without a warrant is, per se, unreasonable. *Katz* v. *United States,* 389 U.S. 347 (1967). Unless the warrantless seizure in this case fits into an exception the evidence seized must be suppressed. The facts determine whether this case fits into an exception.

After the appellants were handcuffed and in the patrol car Deputy Swint opened the trunk of their car which was parked on the highway. He saw two bags in the trunk, a flowered-type one on the bottom and a black one on top. The flowered-type bag was zipped shut but the black one was partially unzipped and the deputy saw some silver inside. He stated that he could not identify it as the silver belonging to the Browns and he admitted that for all he knew it could have belonged to appellants. He closed the trunk and called Fulmer's Wrecker Service to tow the car to some type of sheriff's compound at Lonoke. Miles and perhaps hours later, at some type of sheriff's compound, a warrantless

search of the car was conducted. Deputy Swint's testimony is emphatic that the car was not searched on the highway:

> Q. But your testimony is that you did not search the vehicle on the highway?
> A. No, sir.
> Q. Irrspective of how you wrote your report, Mr. Swint, did you search those suitcases on the highway?
> A. No, sir.
> Q. Were they searched at the Sheriff's office?
> A. They was inventoried at the Sheriff's office, yes, sir.
>
> MR. EDWARDS: That's all.
> THE COURT: Was anything removed from the automobile before it was returned to the Sheriff's office?
> A. Just the three people.
> THE COURT: Any property of any kind?
> A. No, sir.
>
> . . .
>
> Q. You had the vehicle under control, is that correct? You had the three men out of it?
> A. Yes, sir.
> Q. You had the keys to it?
> A. Yes, sir.
> Q. You had officers there guarding it?
> A. Yes, sir.
> Q. And it was returned to the Sheriff's office?
> A. Yes, sir.
> Q. And I assume once it got there, or wherever the Sheriff's office is located, that you had it under guard, or whatever it took to make it secure?
> A. Yes, sir.

Those facts do not allow this case to fit into an exception to the general rule. The Supreme Court of the United States has set forth only one narrowly drawn exception where a seizure of evidence can be based on less than probable cause. It is the protective search doctrine set out in *Terry* v. *Ohio,* supra,

and *Adams* v. *Williams,* supra. It authorizes a search of the clothing and that area which is immediately reachable by the arrested person. The basis of this exception is that the arresting officer has every right to assure himself that the person does not have within reach a weapon, although the weapon may be evidence. The rationale of this exception is applicable to an investigatory stop, an arrest, or any other seizure. This exception to the general rule against warrantless searches is not applicable because this was not a frisk for the officer's protection.

There is another exception that is not as severely limited as the first exception. It is based on probable cause and is the search incident to arrest doctrine, but it is not applicable. "Once an accused is under arrest and in custody, then a search made at another place without a warrant, is simply not incident to arrest." *Chambers* v. *Maroney,* 399 U.S. 42 (1970), quoted in *Jenkins* v. *State,* 253 Ark. 249, 485 S.W. 2d 541 (1972).

The "plain view" exception, *Chimel* v. *California,* 395 U.S. 752 (1969), is not applicable as Deputy Swint did not have a plain view of the inside of the trunk of the car.

The plurality opinion concedes that the most recent "automobile exception" case, *New York* v. *Belton,* 450 U.S. 1028 (1981), is not applicable but argues that the 1925 "automobile exception" case of *Carroll* v. *United States,* 267 U.S. 132 (1925) is applicable. The 1925 case states that a warrantless search is valid "where it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." In this case the car was in custody and could not be moved.

The plurality opinion states:

> What is claimed, correctly we think, is that when Officer Swint learned the Brown residence had been burglarized, at that point he had probable cause to believe the vehicle contained evidence of the crime and, hence, a search of the vehicle was proper.

The quoted statement is contrary to the law as announced by the Supreme Court of the United States and followed by the court in *Jenkins* v. *State,* supra at 252, where we stated:

> It is true that there is language in the *Chambers* case suggesting that probable cause alone is sufficient to sustain a warrantless search of an automobile, but that point of view seems to have been rejected in the later case of *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). There Justice Stewart speaking upon this point for the majority of the court, had this to say about a contrary position taken in Justice White's dissent in the *Coolidge* case: "If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution.

The plurality could validly contend that the case of *Colorado* v. *Bannister,* 449 U.S. 1 (per curiam 1980) stands for the proposition that when the police have probable cause to believe the vehicle contains evidence of a crime a warrantless search is permissible even when the car has been moved to the police station. Perhaps that leaves Arkansas with a higher standard than the United States for our cases, which are directly in point, hold that a warrantless search of a vehicle is invalid unless there is both probable cause and exigent circumstances. *Jenkins* v. *State,* supra; *Steel* v. *State,* 248 Ark. 159, 450 S.W. 2d 545 (1970). Arkansas cases directly in point should govern even if the plurality believe that our standard is a more stringent standard than the minimum required by the Constitution of the United States.

> We need not determine whether the rule is more restrictive than the principles to be distilled from various Supreme Court decisions, for, of course there is no constitutional objection to a rule of law which provides more protection to individual liberty than the

minimum required by the Constitution of the United States.

*Meadows* v. *State,* 269 Ark. 380, 602 S.W. 2d 636 (1980).

However, even if one discards all that has been written to this point as peripheral to the search of appellants' bags, the search of the bags still must fail. Both bags were completely closed, with the black one being zipped together completely and the flowered one being partially zipped. In the recent case of *Robbins* v. *California,* 450 U.S. 1039 (1981), the California Highway Patrol officers stopped the petitioner's car because he was driving erratically. One of the officesr asked petitioner for his license and registration, and when he opened the car door to get out the registration, the officers smelled marijuana smoke. One of the officers patted the petitioner down, and discovered a vial of liquid. The officers then searched the passenger compartment of the car and found marijuana as well as equipment for its use. After putting the petitioner in the patrol car, the officers opened the tailgate of the station wagon, uncovered a recessed luggage compartment, and found two oblong packages wrapped and sealed in green opaque plastic garbage bags. The officers unwrapped the packages and found 30 pounds of marijuana.

Petitioner, who was charged with various drug offenses, filed a pretrial motion to suppress the marijuana found in the two packages. The motion was denied and petitioner was convicted. The California Court of Appeals affirmed the judgment. Certiorari was granted and the case was remanded for further consideration in light of *Arkansas* v. *Sanders,* 442 U.S. 753 (1979). On remand, the court of appeals again found the warrantless opening of the packages constitutionally permissible, since the trial court reasonably could have concluded that the contents of the packages could have been inferred from their outward appearance. The Court again granted certiorari because of the continuing uncertainty as to whether closed containers found during lawful warrantless automobile searches may be searched without a warrant.

In a plurality decision written by Justice Stewart, the Court held that the contents of a closed container are fully protected by the Fourth Amendment's warrant requirement, unless the container is such that its contents are in plain view.

Relying on *United States* v. *Chadwick,* 433 U.S. 1 (1977) and *Arkansas* v. *Sanders,* supra, the Court rejected the contention that the "automobile exception" to the Fourth Amendment warrant requirement justifies the warrantless search of closed containers found inside the automobile. Justice Stewart stated that *Chadwick* and *Sanders* make it clear that a closed piece of luggage found in a lawful search of a car, is constitutionally protected to the same extent as closed pieces of luggage found anywhere else.

Respondent argued that the *nature* of the container may diminish the constitutional protection and that the Fourth Amendment protects only containers commonly used to transport personal effects. The Court rejected the argument for two reasons: (1) the Fourth Amendment protects people and their effects, whether the effects are personal or impersonal; and (2) it would be difficult if not impossible to perceive any objective criteria to determine what is commonly used to transport personal effects.

Justice Stewart stated that the wrapped marijuana did not fall under the exceptions announced in a footnote in *Arkansas* v. *Sanders,* supra. The footnote states that containers whose contents can be inferred from their outward appearance, for example a kit of burglary tools or a gun case, and containers whose contents are open to plain view, do not require a search warrant under the Fourth Amendment. These exceptions refer to items in a container that is not closed, or to containers which so clearly announce their contents, whether by their distinctive configuration, their transparency, or otherwise, that their contents are obvious to an observer. Justice Stewart concluded that the vague testimony of the police officer who said that he had heard that contraband was wrapped in a particular way did not establish that marijuana is ordinarily "packaged this way," and thus, did not cause the packages to fall within the

exceptions announced in *Sanders*. In a footnote, the Court stated that the prosecution did not argue that the search of the packages was incident to a lawful custodial arrest or that the petitioner consented to the search of the packages. See *New York* v. *Belton,* supra.

*Robbins,* supra, should not be ignored.

A second ground given by the plurality opinion for validating the search is:

> . . . Rule 14.1 (a), A. R. Crim. P., gives an officer the right to make a warrantless search of a vehicle detained on a public way if he has reasonable cause to believe the vehicle contains evidence subject to seizure, and exigent circumstances require immediate action to prevent removal or destruction of such evidence.

Rule 14.1 (a) simply is not applicable. The vehicle was not "detained on a public way" when searched; rather it was locked in a sheriff's compound. There was no testimony of "evidence" subject to seizure. No witness testified that even one piece of the Browns' property was identifiable. There were no exigent circumstances as the car was locked up in a compound and the appellants were in jail.

Perhaps, in this case, we have forgotten the proper role of the appellate court. It is nothing more and nothing less than to review the trial below and determine whether the appellants received a fair trial, not a perfect trial, but a fair trial. Precedent of this court as well as that of the Supreme Court of the United States hold that the evidence should have been suppressed. The trial court did not so hold and, as a consequence, the appellants did not receive a fair trial. I would grant apellants a new and fair trial. I dissent.

I am authorized to state that Mr. Justice HOLT and Mr. Justice PURTLE join in this opinion.

Larry ANDERSON *v.* STATE of Arkansas

CR 82-10 630 S.W. 2d 23

Supreme Court of Arkansas
Opinion delivered March 15, 1982
[Rehearing denied April 19, 1982.*]

*Paul E. Hopper* of *Coop & Hopper,* for appellant.

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

GEORGE ROSE SMITH, Justice. The information charged that Anderson delivered a quarter of a pound of marihuana to each of two undercover officers, for a consideration of $135 each. The jury's verdicts were "Guilty," with a five-year sentence on each count. For reversal Anderson argues that the State's proof was insufficient, because nothing of value was exchanged for the marihuana. We do not regard that exchange as being essential to the commission of the offense charged.

The undercover officers' testimony was that they had arranged to buy two quarter-pounds of marihuana from one Ronald Wills. When they went to Wills's house, Anderson answered the doorbell and accompanied them to their car to complete the purchase. They said that Anderson confirmed

*PURTLE, J., would grant the petition.

the agreed price of $135, said that the marihuana was of good quality, and handed each officer a plastic bag of marihuana. The officers, fearing that Anderson had seen their identification lying on the seat of the car, arrested him without first paying for the drugs. Anderson denied that there had been any discussion of marihuana or of a price. He said that as he was leaving the house Wills handed him a paper sack. He testified he accompanied the officers to their car because he wanted a ride, and he thought he was giving them a sack containing old clothes. The jury evidently believed the State's testimony.

Our statute is, with some amendments, the Uniform Controlled Substances Act, 9 U.L.A. 187 (1979). The Uniform Act does not require a sale of a controlled substance, only its delivery, the definition being:

> "Deliver" or "delivery" means the actual, constructive, or *attempted* transfer from one person to another of a controlled substance, whether or not there is an agency relationship. [Our italics.]

The Supreme Court of Mississippi reasoned that the word delivery was used "to relieve the state of the task, oftentimes difficult if not impossible, of proving the consideration paid for the contraband, its intentions being to thwart the exchange or transfer of the substance whether accompanied by consideration or not." *Wilkins* v. *State,* 273 So. 2d 177 (Miss., 1973).

Our legislature modified the Uniform Act's definition of delivery by inserting the further requirement that it be "in exchange for money or anything of value." Ark. Stat. Ann. § 82-2601 (f) (Repl. 1976). It is reasonable to believe that the added words were intended to make the comparatively severe penalty for delivery inapplicable to a gratuitous transfer, such as the action of two or more persons in smoking one marihuana cigarette by passing it around. Our legislature, however, left intact the Uniform Act's provision that a delivery includes an *attempted* transfer. Here the jury could find from substantial evidence that Anderson attempted to transfer the two bags of marihuana in exchange for an

agreed sum of money and had completed his part of the transaction. The proof therefore supports the convictions.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The only issue presented to the court is whether Ark. Stat. Ann. § 82-2601 (f) (Repl. 1976) requires proof of the delivery to be accompanied by receipt of money or anything of value in exchange for the controlled substance. To begin let us read the whole of Section (f) which states:

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance in exchange for money or anything of value, whether or not there is an agency relationship.

I have read this section several times and I cannot discover anything ambiguous about it. It simply states that a delivery is completed when the person delivering or attempting to deliver a controlled substance receives money or anything of value in exchange therefor.

Ark. Stat. Ann. § 82-2642 (Repl. 1976) reads as follows:

> For the purposes of this Act (§§ 82-2641 — 82-2643), the term "delivery" means the actual or attempted transfer from one person to another of a controlled substance included in Schedule I of Act 590 of 1971 (§ 82-2605), as amended, in exchange for money or anything of value, whether or not there is an agency relationship.

The two statutes are for all practical purposes identical. Both state that the delivery or attempted delivery must be in exchange for money or anything of value. There is nothing difficult about the words or the manner in which they are used. There has been no change of the definition of the word "delivery" since 1971, thus I believe the General Assembly is satisfied with the law as it is written. The Uniform Con-

trolled Substances Act was obviously intentionally changed by the General Assembly.

Ark. Stat. Ann. § 82-2617 (a) (Supp. 1981) reads as follows:

> Except as authorized by this Act (§§ 82-2601 — 82-2638) it is unlawful for any persons to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

From the above language it is quite clear that the General Assembly made it a violation of the law to "deliver" or possess with "intent to deliver" a controlled substance. The state of Arkansas very carefully changed the Uniform Controlled Substances Act by inserting the additional requirement that the "delivery" must be "in exchange for money or anything of value." The most logical conclusion to be reached by the addition of the words "in exchange for money or anything of value" is to distinguish the crime of "delivery" from that of "intent to deliver" which is included in the same sentence under Ark. Stat. Ann. § 82-2617 (a). Also, another logical reason is that it was the intention of the legislature to prevent a person who gives away a controlled substance from suffering the same harsh penalty as one who sells or deals in controlled substances.

The majority is quite misleading in quoting the Uniform Controlled Substances Act, seeing as how the section of the Uniform Act in question was never adopted in Arkansas. The Mississippi case cited also seems to interpret the Uniform Act, rather than the law as it reads in Arkansas. If the majority wishes to uphold the Uniform Controlled Substances Act rather than the applicable Arkansas statutes, they are in effect rewriting our laws. This is exactly what the majority's opinion has done. It is not our responsibility to change the charges to meet the results obtained at the trial. It is the state's responsibility to place and prove the proper charge against an accused. The results of the State's failure to do so is usually to try the case again in a proper manner.

We have interpreted part of this statute on numerous occasions. In *Curry* v. *State,* 258 Ark. 528, 527 S.W. 2d 902 (1975), we upheld the conviction for delivery of a controlled substance and stated:

> The act [of delivery] is condemned any time the transfer is "in exchange for money or anything of value."

In the case of *Ryan* v. *State,* 260 Ark. 270, 538 S.W. 2d 702 (1976), we upheld a conviction for "possession of a controlled substance (marijuana) with intent to deliver." In upholding this portion of the statute we stated:

> Of course, as to the second phase of the argument, the intent to deliver element is a legal presumption embodied in Ark. Stat. Ann. § 82-2617 (d) (Supp. 1975).

Our decisions clearly reveal that Ark. Stat. Ann. § 82-2617 provides penalties for "delivery" and also for "possession with intent to deliver." We have upheld convictions on both of these provisions but we have never before been called upon to ignore the provision of the law which requires the exchange of "money or anything of value."

I agree with the majority that "delivery" includes "attempted transfer." However, "attempted transfer" does not include "accepting money or anything of value." Such construction amounts to rewriting the statute. We are bound by the rule of strict construction in this case. *Austin* v. *State,* 259 Ark. 802, 536 S.W. 2d 699 (1976). It is pure semantics to argue that the word "attempted" modifies "transfer" but if it does, it certainly does not modify the phrase "in exchange for money or anything of value."

It is plain from the record that a charge of "attempted delivery" could have withstood scrutiny and still given the appellant a felony conviction. However, in view of the undisputed fact that no money or anything of value was given in exchange for the marijuana I would reverse rather than rewrite the law.

Thomas J. McMURTRAY *v.* Patricia McMURTRAY

81-215 629 S.W. 2d 285

Supreme Court of Arkansas
Opinion delivered March 15, 1982

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

*John C. Calhoun* of *Owens, McHaney & Calhoun*, for appellee.

FRANK HOLT, Justice. This appeal questions the chancellor's division of property in a divorce action. Appellant argues that the chancellor erred in holding that a nonfunded account, which appellant owned in a corporation, had vested and was marital property subject to equal division. Ark. Stat. Ann. § 34-1214 (Supp. 1981) (Act 705 of 1979).

Appellant was employed in 1973 by a corporation which was partly owned by appellee's father. In 1977, during the parties' first marriage of 15 years, the company gave him an incentive contract by the terms of which appellant would own the equivalent of 5% of the book value of the corporation's common stock at the end of each fiscal year. The stock was nontransferable. The account was distributable or payable to appellant or his estate upon his death, resignation, or termination of employment. His employer retained the option to make a distribution in a lump sum or pay 25% initially and the balance, without interest, within one year or purchase an annuity. The appellant argues his contractual right in the nonfunded account was acquired in 1977 as his sole and separate property, remained his property after his 1978 divorce and continued to be his separate property upon the parties' remarriage in 1979 notwithstanding their 1978 property settlement agreement by which appellee relinquished her interest in the stock. In other

words, appellant asserts that the stock he owned in the corporation was not marital property since it was acquired before and not during their second marriage.

Section 34-1214 (B) (5) provides:

> For the purpose of this statute, 'marital property' means all property acquired by either spouse subsequent to the marriage except:
>
> The increase in value of property acquired prior to the marriage.

In a property settlement at the time of their first divorce, the appellee relinquished any rights she had to any "stock" in the company in exchange for the equity in their home. We have said that a property settlement survives a reconciliation unless the court can find an intention or express agreement that it shall not survive. *Arnold* v. *Arnold,* 261 Ark. 734, 553 S.W. 2d 251 (1977). Here, the trial court held it was the parties' intentions to abrogate the property settlement when they remarried. He found that the property each possessed as a result of their first divorce was brought back into the second marriage and used as joint property with "intent to make it a family." It is undisputed that upon remarriage, after nine months, the appellee took $10,000, the balance of the $13,000 equity in their home which she had received pursuant to the property settlement, and used it as a down payment on another home for themselves. The property was titled in their joint names. Both signed a note and mortgage to her mother for additional funds to purchase a new home. The appellant placed his paycheck into a joint account, and appellee wrote checks to pay their expenses. They filed a 1979 joint income tax return.

The finding of a chancellor on a fact question will not be disturbed on appellate review unless the finding is clearly erroneous (clearly against the preponderance of the evidence). ARCP. Rule 52, Ark. Stat. Ann. Vol. 3A (Repl. 1979). *Ratliff* v. *Thompson,* 267 Ark. 349, 590 S.W. 2d 291 (1979). Here, we cannot say the chancellor's finding is clearly erroneous that the settlement was abrogated by the intention

and actions of the parties and that the corporate account was marital property subject to equal division.

In the alternative, the appellant argues the benefits he would receive under the incentive agreement with his employer were "retirement benefits" which should not be considered marital property inasmuch as the value of the benefits or balance due on the account is speculative, citing *Paulsen* v. *Paulsen,* 269 Ark. 523, 601 S.W. 2d 873 (1980); *Knopf* v. *Knopf,* 264 Ark. 946, 576 S.W. 2d 193 (1979); *Lowrey* v. *Lowrey,* 260 Ark. 128, 538 S.W. 2d 36 (1976); *Fenny* v. *Fenny,* 259 Ark. 858, 537 S.W. 2d 367 (1976). These cases are inapplicable. Here, appellant terminated his employment in July, 1980, during the parties' marriage or preceding the second divorce. At that time his employment agreement was modified whereby appellant would be paid immediately, as of August 15, 1980, 25% of his corporate fund for the preceding fiscal year, which ended September 30, 1979. According to appellant, his corporate fund on that date was worth about $82,000 ($22,000 in 1977, $40,000 in 1978). He was paid about $20,500 with the understanding that upon completion of the audit for the fiscal year 1980, he would be paid the reflected balance, without interest, within one year or by July 1981. The chancellor correctly held that his interest in the company stock was vested and fully distributable to him as of July, 1980, and, therefore, marital property subject to equal division on the date of their divorce in January, 1981. *Bachman* v. *Bachman,* 274 Ark. 23, 621 S.W. 2d 701 (1981).

Appellant next asserts that appellee is not entitled to one-half of the account before income taxes inasmuch as it would result in an unequal distribution of the property; i.e., appellant will be subject to payment of all the tax on this item of marital income, resulting in appellee's portion being tax free. Therefore, appellant argues the income tax on this marital property should be equally divided. Stated another way, there is no equal division of this item which the chancellor specifically held to be marital property with each being entitled to a one-half share. Appellee responds that this argument was not presented to the trial court and, therefore, should not be considered on appeal. Furthermore,

appellant's argument is based upon assumptions and speculations.

Following the rendition of the decree, the appellant, by present counsel who was retained following trial, filed a timely motion for a new trial based upon the issue of the division of the corporate funds received by him as marital property alleging that an excessive award was granted to appellee inasmuch as appellant would be required to pay all of the income tax and appellee's portion would be tax free thereby unduly enriching appellee. After argument of counsel, a special chancellor found that the requested new trial should be denied inasmuch as the "court considered all matters raised by defendant's motion."

A review of the chancellor's findings reflects that all property, including the corporate fund, is marital property and subject to equal division. § 34-1214 *supra*. In accordance with this finding the court directed that their home should be sold and the net proceeds divided equally; that repayment of $1,400, which they borrowed from appellee's mother to pay their joint 1979 income tax, should be shared equally and that all other personal property is marital property and, unless otherwise agreed, shall be sold with the net proceeds divided equally. Further, "the court finds that all debts, including medical, are joint debts of the marriage, and either party who paid on such indebtedness will be given credit for same." Appellant has paid most of the outstanding family indebtedness. As to the income tax indebtedness, appellant approximates that he would receive by July, 1981, a total of $112,000 for the corporate fund following completion of the 1980 audit. He then estimates that a total of $33,409 will be due and payable in income taxes which he must pay from his one-half portion. She should be required to pay one-half, $16,704.50, of this indebtedness; otherwise, he would realize only $22,591 net ($56,000 less $33,409) while appellee would receive $56,000 net.

As indicated, the chancellor held that all property, and specifically this corporate fund, is marital property; that upon a sale of any item of property the net proceeds should be divided equally; and, also, that all debts are joint debts of

the marriage with each party receiving credit for any payment thereon. In the circumstances, we feel a fair interpretation of the chancellor's findings requires that the appellee should share equally in whatever the income tax indebtedness is on this marital property. We agree that appellant's figures are based upon speculation and assumptions; however, if within 17 calendar days, appellee is willing to accept his figures as being sufficiently correct, her share should be reduced by $16,704.50 (one-half of $33,409). Otherwise, we must remand the cause for a determination of the amount of income tax indebtedness with each party paying one-half.

Affirmed as modified.

HICKMAN and DUDLEY, JJ., would affirm.

ARKANSAS ALCOHOLIC BEVERAGE CONTROL BOARD *v.* Edward William KING, d/b/a THE PIONEER CLUB, INC.

81-237 629 S.W. 2d 288

Supreme Court of Arkansas
Opinion delivered March 15, 1982

*Treeca J. Dyer,* for appellant.

*Sam Hilburn,* for appellee.

*William H. Sutton,* of *Friday, Eldredge & Clark,* for *amicus curiae* P.E.O.P.L.E.

FRANK HOLT, Justice. The appellee applied to the Director of the Arkansas Alcoholic Beverage Control Board (ABC) for a private club permit which permits on premises consumption of alcoholic beverages as provided in Ark. Stat. Ann. § 48-1410 (Repl. 1977). The application was denied. The appellant Board affirmed the decision of the Director. Appellee sought a review of the Board's decision pursuant to the Administrative Procedures Act, Ark. Stat. Ann. § 5-701 et seq. (Supp. 1981). The trial court reversed the Board's decision, stating "[t]he question to be decided by the Board is

whether the public convenience and advantage would not be hampered by the granting of the permit." The court also found that the Board did not make "its decision based upon public convenience or advantage and the decision is not supported by substantial evidence of record," relying upon *Snyder* v. *ABC,* 1 Ark. App. 92, 613 S.W. 2d 126 (1981). Hence this appeal. For reversal the Board contends that its decision was supported by substantial evidence, was not arbitrary or capricious nor was it an abuse of the power granted to it and the purpose of the club does not qualify it as a private club within the meaning of the statute. We agree with the appellant and reinstate the Board's decision denying the appellee a permit.

The burden is on the applicant to show that he is "qualified" to hold the permit and issuance of the permit is "in the public interest" whereupon the Board "may" issue the permit. § 48-1410 (b) (1). See *Gray's Butane* v. *Ark. Liq. Pet. Gas Bd.,* 250 Ark. 69, 463 S.W. 2d 639 (1971).

We feel that the trial court's reliance on *Snyder* is misplaced. In *Snyder,* the application was for a retail liquor license in a wet county permitting the sale of alcoholic beverages for off-premises consumption based on public "convenience and advantage." Ark. Stat. Ann. § 48-301 (Repl. 1977). The applicant already possessed a retail beer license. Here, we have an application for a private club permit in a dry county which would allow on-premises dispensing of mixed drinks as being "in the public interest." § 48-1410 (b) (1). In *Snyder* the applicant was found to be qualified by the Board. Here, the applicant was found not to be qualified. As indicated, there a different statute was under consideration than here.

Here, at the conclusion of the hearing, the Board made the following findings, *inter alia,* and denied the permit:

> 3. That the proposed club would be next door to a roller skating rink that is patronized chiefly by young children and the club would be a detrimental influence on large numbers of children in the area.

> 4. The proposed club is not organized for a charitable or non profit purpose as outlined by Arkansas Statutes Annotated § 48-1402 (j) and would have no other purpose other than the consumption of alcoholic beverages . . .

When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, or was there arbitrary and capricious action, or was it characterized by abuse of discretion. *Citizens Bank* v. *Ark. State Banking Board,* 271 Ark. 703, 610 S.W. 2d 257 (1981); *Ark. Real Estate Comm'n* v. *Harrison,* 266 Ark. 339, 585 S.W. 2d 34 (1979); *Arkadelphia Fed'l S&L* v. *Mid-South S&L,* 265 Ark. 860, 581 S.W. 2d 345 (1979); and Administrative Procedures Act, Ark. Stat. Ann. § 5-713 (h) (Supp. 1981).

As we stated in *Terrell Gordon* v. *Gordon L. Cummings et al,* 262 Ark. 737, 561 S.W. 2d 285 (1978):

> It is well settled that administrative agencies are better equipped than courts, by specialization, insight through experience and more flexible procedures to determine and analyze underlying legal issues; and this may be especially true where such issues may be wrought up in a contest between opposing forces in a highly charged atmosphere. This recognition has been asserted, as perhaps, the principal basis for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency.

Here, a recreational facility, a skating rink, is adjacent to appellee's restaurant which he seeks to convert, at least in part, into the proposed private club. According to the owner of the roller rink, it is patronized by a large number of children. On Friday and Saturday nights the roller rink attendance ranges from two to four hundred. Private parties for nursery school, kindergarten, and a boy's club are held at the rink. Attendance ranges from fifteen hundred to two thousand children per week from the first of the year until May. Although most of the children are picked up at the

premises by their parents, many of them walk home from the skating rink. "[T]here is still kids on the street, on the road crossing the front of [appellee's] establishment and it is a danger to them". "[P]eople leaving that club, who has had two or three drinks, would endanger the lives of these kids." We hold the Board's finding No. 3 was neither arbitrary, capricious or characterized by an abuse of discretion and is supported by substantial evidence.

With respect to the appellee being a qualified applicant for a permit, he testified that it would be operated on a nonprofit basis and the purpose of the club was:

> Well, over the period of 14 years I have been in the restaurant business, I've had many many hundreds of people at my restaurant that I might say complained because they didn't have the privilege . . . of having beer with their food, and so after a period of time I began to give it some consideration. I have tried to explore any way possible that I could serve drinks with my food. There was no way in a dry county. I eventually came up with the idea of a private club . . . Well you might say social gathering for people to come to, to enjoy food with a drink . . .

A witness testifying in support of appellee's application stated that there was only one private club in the dry county where one could "buy mixed drinks" and that many people could not afford a membership. However, the cost would be affordable in appellee's proposed private club. The private club charter, which appellee purchased from another source, recites the words of the statute (§ 48-1402 [j]) as to the required purpose. However, if we should hold that the mere compliance with the statute for the existence of the charter was sufficient to entitle the applicant to a mixed drink permit, then the Board has no discretionary powers and, therefore there is no need for the Board. We hold that the Board has not abused its discretion and its finding No. 4 is supported by substantial evidence.

Reversed and remanded with directions to reinstate the decision of the Board.

Reversed and remanded.

Billy Joe EDGEMON *v.* STATE of Arkansas

CR 81-110 630 S.W. 2d 26

Supreme Court of Arkansas
Opinion delivered March 15, 1982
[Rehearing denied April 19, 1982.]

*William C. McArthur,* for appellant.

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

DARRELL HICKMAN, Justice. Billy Joe Edgemon was convicted of first degree murder of Jimmy McCormick and sentenced to life imprisonment and a $10,000.00 fine.

His chief argument is that the court erroneously admitted evidence that Edgemon was involved in a stolen car ring. The State argued that the evidence was necessary to show that Edgemon had a motive to kill McCormick. We find that the trial court was correct in admitting the evidence because the State clearly demonstrated that evidence to be an inseparable part of the case, and probative of Edgemon's motive to kill McCormick.

The State's case was circumstantial, there being no eyewitness to the killing and no admission by Edgemon. Edgemon lived alone outside Altus in Franklin County on a farm where he raised hogs. During the summer and fall of 1979 Jimmy McCormick stayed with Edgemon and helped him on the farm. At that time Edgemon was in the process of divorcing his second wife and had no relatives living with him on a regular basis.

On the evening of the 14th of January, 1980, Edgemon and McCormick drove to nearby Coal Hill in a yellow 1979 International Scout to see two women: Suzie Johnson, who was McCormick's girl friend, and a woman named Rosetta Wilson. All four returned to Edgemon's place, stayed a few hours, and then McCormick and the two women left. McCormick dropped the women off at home. Several hours later he returned to Suzie Johnson's house and said he had wrecked the Scout. He spent the night. The focus of the case is on what happened the next day, the 15th of January.

Suzie Johnson testified that Edgemon came by her

house three times. The first time she did not answer the door. When Edgemon returned later, she gave him the keys to the Scout and said McCormick had wrecked it. McCormick did not come to the door. Edgemon left again and returned about six or seven p.m. Johnson said McCormick told Edgemon that he had hidden the tags to the Scout in the woods. Edgemon and McCormick left together and McCormick was not seen alive again by any witness.

Robert Dale Pyron, an acquaintance of Edgemon, testified he was with Edgemon on the 15th. Pyron said he had seen a Scout like Edgemon's being towed by a wrecker that morning. He found Edgemon and they went to the wrecker yard. They saw that the Scout was Edgemon's, but they did not retrieve it. Pyron said Edgemon expressed concern about whether his keys were in the Scout and whether the tags were still on it. They went to talk to Don Holloway, who said they had better get the keys and the tags. Edgemon and Pyron went to Suzie Johnson's where Edgemon got the keys. While en route to Edgemon's place Edgemon told Pyron to throw the key to the Scout out the window, which he did. According to Pyron Edgemon made several statements about McCormick, one of which was that he thought Suzie Johnson was hiding McCormick. He also said that ". . . it would be one less burden on the world if Jimmy weren't around." At another time he said, " . . . if Jimmy came back over to his house he'd kill him." Pyron said that Edgemon told him to deny any knowledge if he was questioned by the police about the Scout.

McCormick's body was found on the 23rd of January, in a culvert on a county road. He had been killed with a shotgun blast and had been dead seven or eight days. Across the road the officers found a piece of carpet and a bloody mattress which contained pellets from a shotgun. The mattress was covered with a design of bicentennial emblems. A calendar wristwatch on McCormick was stopped between the 15th and 16th of January.

The police questioned Edgemon that day about the killing. He said McCormick had left his home on the 15th and that he had not seen him since. He denied any other

knowledge and was released. The following day Edgemon drove a 1979 Cougar XR-7, which had been in his possession, into a mining pit that was filled with water.

On the 25th of January, the police searched Edgemon's home. They found what appeared to be blood stains on a piece of carpet, coffee table, and another piece of furniture. These items were all located in front of the fireplace. Two shotguns were seized, one of which was a twelve gauge Marlin loaded with Magnum western shells, number four shot. A North Carolina license plate was also seized.

The State recovered the Cougar and proved that it and the Scout were stolen. The license on the Scout was registered to Dorothy Reynolds, Edgemon's second wife, but the tag belonged on a 1980 Lincoln Continental. The North Carolina tags found at Edgemon's house belonged on the Cougar. A deputy sheriff testified that Edgemon had told him the Scout was his. There was testimony that the Cougar had been seen regularly parked at Edgemon's.

Two witnesses testified that the mattress found near McCormick's body was just like a mattress or mattresses that had been at Edgemon's. One witness, Charles Montgomery, who had stayed at Edgemon's for a month with McCormick, said he and McCormick had each slept on such a mattress in front of the fireplace.

Edgemon told the police that the blood on the carpet piece and furniture was from a cut on his foot. An expert testified, however, that the blood on those articles was type A positive. Edgemon had type B positive blood. Another expert testified that the shot and wadding taken from McCormick's body was consistent with that contained in the shotgun shells found in one of the shotguns seized at Edgemon's.

The testimony objected to on appeal which implicated Edgemon in several car thefts came from Charles Montgomery and a North Carolina police officer. Montgomery was serving a prison sentence for theft when he testified. He testified that he stayed at Edgemon's about a month in the

summer of 1979. He said that he, McCormick, Edgemon and Edgemon's son Mark, and Don Holloway planned to set up a car theft ring. He, McCormick, and Mark, working out of Edgemon's farm, would steal the vehicles and Don Holloway would provide the titles.

He said he first met Edgemon when he sold him a stolen 1979 Scout for $400.00; it was worth $8,900.00. Next he sold him a 1979 Chevrolet Caprice stolen in Louisiana for $400.00; it was worth $8,000.00. He stole a 1979 LTD station wagon worth $7,500.00, and said he gave it to Edgemon. Montgomery said he stole a 1979 Chevrolet pick-up truck in Kansas and used a title Edgemon had for a 1979 Chevrolet truck; he took the truck to North Carolina where he unwittingly sold it to a police "sting" operation. While there, he stole the 1979 Cougar XR-7 and drove it back to Arkansas. He said he gave the Cougar to Mark Edgemon to repay a debt of $135.00. He testified that Edgemon knew all these vehicles were stolen and it was their intention to set up a "ring."

The North Carolina policeman testified that he bought the 1979 truck from Montgomery in an undercover "sting" operation and the title was in Mark Edgemon's name.

Edgemon denied that he killed McCormick or actually knew that any of the vehicles were stolen. He admitted driving the Cougar into the mining pit but he said he did so because his son had driven the car and he did not want him implicated. He would never concede that he actually owned the Scout, but said he had merely loaned Montgomery $400.00 "on it." He admitted driving it and acknowledged that the license on it belonged to one of his former wives. He said this same former wife drove off with the LTD because her car had broken down. He said someone stole the title that was found in the truck sold in the "sting" operation. According to Edgemon, Montgomery told him that he "stole" the Cougar from his own wife, and thus Edgemon did not believe it was actually stolen.

He admitted telling Pyron to throw away the key to the Scout, and said he did so only because he no longer needed it.

He did not recall telling the deputy sheriff the Scout was his, or McCormick telling him he had hidden the tags to the Scout. He said McCormick brought the tags to the Scout home with him from Suzie Johnson's and that they were taken by his former wife. He said he did not know how the North Carolina tags from the Cougar got into his house.

The State's theory of the case was that Edgemon, deeply involved in these car thefts, became upset with McCormick when he wrecked the Scout because it had tags on it which could be traced to him and the key ring in the Scout contained his personal keys; that he killed McCormick to prevent discovery of his complicity in these crimes.

The defense's objection to the evidence of the car theft scheme is based on Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979), which reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Of course that is the general rule. *Moser* v. *State,* 266 Ark. 200, 583 S.W. 2d 15 (1979); *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971); *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954). But the rule itself says that such acts may be admissible for other purposes, and specifically mentions proving motive as one such purpose. 2 WEINSTEIN'S EVIDENCE, par. 404 [14].

In *Price* v. *State,* 268 Ark. 535, 597 S.W. 2d 598 (1980), we found that an accomplice's testimony that implicated the defendant in other car thefts was not prejudicial error because it went to intent and corroborated the accomplice's statement. In *Dillon* v. *United States,* 391 F. 2d 433 (10th Cir. 1968) evidence that the defendant was a part of an abortion ring was admissible to show motivation to commit bribery, the charge against the defendant. In *United States* v. *Haldeman,* 559 F. 2d 31 (D.C. Cir. 1979), evidence of

burglary of a psychiatrist's office was admissible to show a motivation for the "Watergate cover-up."

The State made a strong case that Edgemon and his family were inextricably involved with the stolen cars: Edgemon did not seek to recover the Scout after it was wrecked or notify anyone it was his; there is evidence he tried to conceal any link that existed between him and the Scout and the Cougar; he made several incriminating statements, one of which suggested that McCormick's death would be no great loss. The evidence of the stolen vehicles, and his involvement with them, was relevant to whether he had a reason to kill McCormick.

Edgemon's other arguments only merit mention. The day before the trial actually began an attempt was made to assassinate President Reagan. The defense made a motion the next day for a mistrial or a continuance because of the inflammatory nature of the incident and its effect on the jury. The appellant cites no direct authority for his position but argues that a defendant cannot get a fair trial in such an atmosphere. There was no evidence offered to support the motions, nor was the jury voir dired. There is no precedent that court proceedings must cease because of a tragic incident involving a national figure. We will not presume that juries will fail in their sworn duty. Prejudice will not be presumed. *Russell* v. *State,* 262 Ark. 447, 559 S.W. 2d 7 (1977). We cannot say the judge's decision to deny these motions was an abuse of discretion. *McCree* v. *State,* 266 Ark. 465, 585 S.W. 2d 938 (1979); *Mays* v. *State,* 264 Ark. 353, 571 S.W. 2d 429 (1978).

The appellant had a school superintendent, who was a frequent hunter, conduct a test by firing a shotgun at a small mattress. When the judge denied the admissibility of the evidence, Edgemon proffered the testimony of this witness to show that a shotgun fired at close range, would send the shot totally through the mattress. There was no evidence that any of the shot went completely through the mattress found near McCormick's body. Naturally, the results would have been different in a test where a shotgun was merely fired at a mattress and one where the shot went through a body on a

mattress. Also, the gun used in the test was not the same as the one the State claimed did the deed, nor was the distance verified to be the same. The admissibility of such evidence is a discretionary matter and we cannot say the court abused its discretion. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W. 2d 589 (1980); *Houston* v. *State,* 165 Ark. 294, 264 S.W. 869 (1924).

The argument that the evidence against the appellant is insufficient is essentially answered in our recitation of the facts. We have examined the transcript for other errors as we are required to do, and, finding none that would require reversal, affirm the judgment.

Affirmed.

Leon DILLARD *v.* STATE of Arkansas

CR 81-118 629 S.W. 2d 291

Supreme Court of Arkansas
Opinion delivered March 15, 1982

*Wayne R. Williams,* of *Williams & Williams,* for appellant.

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

DARRELL HICKMAN, Justice. The narrow issue in this case is whether the appellant waived his right to a lawyer before he gave an incriminating statement. Leon Dillard, the appellant and city treasurer of Glenwood, Arkansas, was suspected of stealing city funds. On February 28, 1980, several law enforcement officials met with Dillard and informed him that he was suspected of theft. He signed a form acknowledging that he had received the *Miranda* warnings and later signed a statement admitting, "I have taken some money, but I also believe that some money is missing in which I have had no part. . . Amount of money that I took that I remember is about $3,000.00."

Dillard was convicted and on appeal challenges the trial court's finding that his statement was admissible. He cites *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and *Edwards* v. *Arizona,* 451 U.S. 477 (1981) as controlling.

The prosecuting attorney's investigator, Joe White, and the sheriff were present when Dillard made his statement. They both conceded that Dillard said he wanted a lawyer when informed of his rights. But both insisted that Dillard continued the conversation, asking them questions, and, thus, waived his right to counsel. The exact testimony is important.

White testified:

> . . . I told him then that his rights statement that he signed was not a waiver of his rights. I had to ask him the question, 'Did he want to talk to us?' And he said, 'Well, I better get a lawyer.' I said, 'Fine. You need to go get a lawyer.' And he said, 'But I want to know what this is all about.' We told him there was some money missing at Glenwood, and he continued the conversation. *We told him then, again; in fact, he was told several times he shouldn't say any more if he was going to get a lawyer to leave, but he continued his conversation.* We didn't feel like that we were obligated to run off ourself. [Emphasis added.]
>
> Q. All right.
>
> A. But after he said he was going to get a lawyer, he himself waived again and said, 'Well, I will talk to you without one right now, and I can quit when I want to.'

The sheriff testified:

> Q. What was done by you and Mr. White and anybody else that might have been there at that time about that; what was said about that, if you remember?
>
> A. If I recall the conversation, I believe you were present at that time; and if I recall your statement that possibly he might ought to go ahead and get an attorney.
>
> Q. Did he choose to do it?

A. Well, he continued to ask questions of us, you know, at that time.

Q. Did he then proceed to make a voluntary statement without being interrogated any further?

A. Sure did.

Q. In other words, after he mentioned that he thought that he might should talk to an attorney, was there any interrogation as such continued — that continued?

A. There might have been some questions asked, but I don't recall if there was.

Q. Well, you already testified that after he indicated that he might should talk to a lawyer that he was told that he probably should?

A. I know that he had asked some questions, and we tried to provide answers for them, and we may have asked some questions, but I don't recall.

Q. At any rate, after he indicated that he thought maybe he should talk to a lawyer, he was given every opportunity to do so; is that correct?

A. Yes, sir.

*Edwards* v. *Arizona, supra,* held that once a suspect requests counsel, questioning must cease and cannot be reinitiated by the police. Therefore, the question is whether the police initiated the further questioning or was the conversation begun by Dillard; in other words, what action amounts to "interrogation" by the police after a suspect has requested counsel? *See Rhode Island* v. *McInnis,* 446 U.S. 291 (1980). Undoubtedly it is purely a fact question in some instances, as it is in this case. On appeal we review such matters independently, considering the totality of the circumstances and do not reverse the trial court unless the ruling was clearly erroneous. *Coble* v. *State,* 274 Ark. 134,

624 S.W. 2d 421 (1981). On the record in this case we cannot reverse the finding.

The appellant in passing argues that two other statements given by Dillard used to impeach him were tainted because they were a result of his first statement. Those two statements were given without a prior *Miranda* warning. *Harris* v. *New York,* 401 U.S. 222 (1971) held that statements which are given voluntarily but without a prior *Miranda* warning can be used to impeach the credibility of a defendant who testifies in his own behalf.

Affirmed.

FRANK A. ROGERS & COMPANY, INC. et al *v.* Honorable Perry V. WHITMORE, Judge, Pulaski County Circuit Court, Second Division

81-235 629 S.W. 2d 293

Supreme Court of Arkansas
Opinion delivered March 15, 1982

*Gill, Skokos, Simpson, Buford & Owen,* for petitioners.

*Steve Clark,* Atty. Gen., by: *Rodney E. Slater,* Asst. Atty.

Gen., and *Rose Law Firm,* for respondent.

JOHN I. PURTLE, Justice. This is an original action in this court for a writ of prohibition to the Circuit Court of Pulaski County (Second Division) to prohibit the court from trying Case No. 79-3815. Petitioners argue the respondent has neither jurisdiction nor venue to try this cause of action contending Ark. Stat. Ann. § 27-601 (Repl. 1979) requires the action to be brought in Crittenden County. We disagree and deny the writ.

Petitioners are all defendants in the Pulaski County Circuit Court, Case No. 79-3815. They were sued in Pulaski County in both tort and contract. The suit arose from contracts for construction and the alleged faulty construction of a parking lot in Crittenden County, Arkansas. Petitioner Rogers was the general contractor for the plaintiff, RA-RPM and RPM Realty Fund, in the suit presently pending in the Pulaski County Circuit Court. The other petitioners were subcontractors on the project. The shopping center parking lot was completed in Crittenden County in October 1974. Shortly thereafter, the plaintiffs allege that the lot began to deteriorate and that it was unfit for its intended use. The complaint for damages included negligent design, improper drainage, inadequate paving, failure to do the work in the proper manner and negligent supervision. The complaint was amended for the fourth time on August 17, 1981, and thereafter the petitioners challenged the jurisdiction of the court. The original complaint and the three amended complaints had been answered and no question of venue had been presented until the fourth amended complaint.

If this case involved primarily damage to real estate then venue would properly lie in Crittenden County pursuant to Ark. Stat. Ann. § 27-601. However, the allegation of damage and prayer for relief shows that the real action in the case is on contract. The plaintiff properly sued in Pulaski County because at least one of the defendants was a resident of Pulaski County. Ark. Stat. Ann. § 27-613 (Repl. 1979). We treated a question almost on all fours recently in *Atkins Pickle Co.* v. *Burrough-Uerling-Brasuell, Consulting*

*Engrs., Inc.*, 275 Ark. 135, 628 S.W. 2d 9 (1982). In *Atkins* the complaint alleged that the action arose out of damage to real estate and therefore was required to be brought in the county where the real estate was situated. We think the same reasoning as applied in *Atkins* applies here inasmuch as the object of the petitioners' defense is to defend against allegations of damages for breach of contract. In *Atkins* we stated:

> Under the allegations of the complaint the plaintiff cannot establish its right to recover except by proving a contract and the defendants' failure to perform their promises. That one of several consequences of that failure was a physical damage to land is merely an incident to the plaintiff's cause of action, not the basis for it. Thus the substance of the complaint states a transitory cause of action, not a local one.

We think the trial court was correct in ruling that Pulaski County was the proper venue for this cause of action. This action could have been brought in Pulaski county pursuant to our general venue statute, Ark. Stat. Ann. § 27-613 or under Ark. Stat. Ann. § 27-621 (Repl. 1979).

Writ denied.

HAYS, J., not participating.

# Al YOUNGER et al *v.* THOMAS INTERNATIONAL CORPORATION

81-247 629 S.W. 2d 294

Supreme Court of Arkansas
Opinion delivered March 15, 1982

*James D. Causey,* Memphis, Tenn., and *Frierson, Walker, Snellgrove & Laser,* by: *G. D. Walker,* for appellants.

*Sharpe & Morledge, P.A.,* by: *W. Frank Morledge;* and *Arnstein, Gluck & Lehr,* Chicago, Ill., by: *Arthur L. Klein, Richard K. Wray,* and *Philip J. Nathanson,* for appellee.

JOHN I. PURTLE, Justice. The trial court rejected the claim of certain former Warwick salaried employees in a class action for termination benefits pursuant to an agreement between Warwick and the salaried employees. On appeal the appellants argue the trial court erred because: (1) the severance pay policy of Warwick became a binding unilateral contract; (2) the ownership change amounted to the closing of an organizational unit for severance pay purposes; (3) subsequent positions offered to the appellants were not equivalent; (4) interpretations at a variance to written policy were invalid; (5) appellants were entitled to severance pay; (6) appellants were entitled to two weeks compensation in lieu of notice of termination; and, (7) appellants should be reimbursed for expenses caused by appellee's designation of unnecessary material in the transcript. The appellee replied to each point, and additionally argued that fundamental principles of fairness prohibited the appellants from reaping windfall benefits. We find that the trial court's judgment should be upheld.

The facts are generally undisputed and the appeal centers on the interpretation of the contract between Warwick and the salaried employees. The essence of the contract is as follows:

I. STATEMENT:

A. *Purpose.*

The purpose of termination allowance is to provide financial assistance for a short period of time

to allow for readjustment for salaried employees who are terminated through no fault of their own.

B. *Eligibility*

The following circumstances result in termination allowance eligibility for permanent full time employees:

1. Termination resulting from closing an organizational unit.
2. Termination resulting from job elimination or manpower reductions.
3. Terminations resulting from special circumstances, as determined by members of the President's staff and approved by the Director of Personnel.

Employees who have received formal notice of termination, and later resign voluntarily, are eligible for termination allowance, provided they give at least two weeks notice. Those who have *not* been given formal notice of termination are *not* eligible for termination allowance if they resign voluntarily.

C. * * *

D. *Pay in Lieu of Notice*

Every effort should be made to give the employee two weeks notice prior to termination. Where this is not possible, he will be granted two weeks pay in lieu of notice. This is in addition to termination allowance and accrued vacation.

E. * * *

F. * * *

G. *Effect of Job Placement Opportunities*

> Termination allowance will not be paid when an employee is offered an equivalent job opportunity.
>
> For purposes of this policy, an "equivalent job opportunity" must meet all of the following conditions:
>
> 1. No relocation required.
> 2. No significant reduction in status. A reduction of more than one salary grade will be considered significant, and in some instances a change from exempt to non-exempt status or from salaried to hourly status, will also be considered significant.
> 3. Reasonable use made of employee's background and experience.

Warwick had manufactured television sets at its Forrest City plant for a number of years but had fallen onto hard times financially. Employment had dwindled from a high of more than 2,500 to about 500 at the time the plant was sold to SMC. The effective date of the sale was December 29, 1976, during the Christmas holidays; when the employees returned to work on January 3, 1977, they were employees of SMC. All employees continued to work for SMC at the same or higher salaries than they had received from Warwick.

SMC did not have in force the same exact policies which existed at Warwick. However, approximately the same benefits were eventually adopted and made retroactive to the date of the transfer. In the meantime, Warwick changed its name to Thomas International Corporation. Thomas agreed to abide by the former Warwick policies for the benefit of any SMC employees who were terminated prior to implementation of equivalent policies by SMC. The record does not reveal whether any employees were actually paid by Thomas.

The trial court held the employees had not been terminated in accordance with the terms of Warwick's policy and were therefore not entitled to termination benefits. The court also held that those persons who had been transferred from other locations to the Forrest City SMC plant had been

assisted in doing so by Warwick and had accepted new employment, thus were not entitled to termination allowances. Under Section G of the Warwick policies this amounted to a non-equivalent job opportunity. Finally, the court held that the new benefits offered by SMC were in some respects greater than those offered by Warwick and in some respects they were less. The court was unable to determine which set of policies was over-all in the best interest of the employees.

Much of the trial centered around whether the Warwick policies were communicated to the appellants. There is no need to belabor this point because the evidence clearly indicated the policies were communicated and that the employees accepted them. It is obvious the trial court found the policies binding. The question of termination is crucial to the resolution of this matter. Unless the appellants were terminated they would be entitled to neither termination allowances, nor to benefits in lieu of notice of termination. We think the purpose of the Warwick policies is succinctly defined in the first part of the policy, Section A, entitled "Purpose":

> The purpose of termination allowance is to provide financial assistance for a short period of time to allow for readjustment for salaried employees who are terminated through no fault of their own.

In the present case all employees continued to work at the same plant, manufacturing the same product, and doing the same or similar job. Each of them received at least the salary which they were receiving prior to the transfer from Warwick to SMC. It is difficult to envision a termination under the circumstances of this case. So far as the appellants are concerned, the only change of any significance was the name of their employer. In fact, SMC had been organized as a spin-off corporation from Warwick several months before it became the property of the present owners.

This matter has not been previously addressed in Arkansas. We are not unmindful of the need to protect employees who are terminated through no fault of their

own. We are also aware of the fact that other jurisdictions have apparently treated this question in a different manner.

The appellants rely heavily upon the case of *Dahl* v. *Brunswick Corporation,* 277 Md. 471, 356 A. 2d 221 (1976). In the *Dahl* case the court held there was a termination when the business was taken over by a new owner and the employees continued working at the new plant. It does not appear that there was a purpose stated in the policies in the *Dahl* case, thus the Maryland court took the words of the policies at their literal meaning. We agree that the proper rule of construction in regard to ambiguous contracts is to construe them against the party that drafted them. In the *Dahl* case the policies did not define the meaning of termination. In the present case is it clear that the termination allowance was to provide financial assistance for former employees terminated through no fault of their own. There was no proof that any of the appellants needed the financial assistance for readjustment due to a period of unemployment.

The trial court held that the transfer from Warwick to SMC did not constitute the closing of an organizational unit within the meaning of the severance policy. Policy Provision B (1) states that closing an organizational unit amounts to termination. However, Section G of the policies states that termination will not be paid when an employee is offered an equivalent job opportunity. In determining whether this action constituted the closing of an organizational unit, the trial court considered both the policies as written and the history of the interpretation and implementation of the policies by those who had administered them. The testimony of Warwick officials was substantial and to the effect that when there had been merely a change in name and ownership, the policy had been interpreted to mean there was no termination and that the employees had been offered an equivalent job opportunity. We think the facts in this case substantiate the findings of the court on this issue. Warwick had recognized and implemented the termination and non-equivalent job opportunity policies when their plants at Covington, Tennessee, and Zion, Illinois, were closed. The transfer of ownership of the last

two mentioned plants included a change in production or a shut-down. It is obvious by all of the terms of the policy in question that the employees in those cases were entitled to termination or equivalent job opportunity allowances. Under the circumstances of the present case employees lost no time from work, received the same or higher wages after the change, and retained approximately the same fringe benefits; therefore they were not terminated.

Appellants argue that the jobs offered and accepted by the appellants were not equivalent job opportunities within the meaning of the policy. So far as the former employees of Warwick at the Forrest City plant are concerned, we do not consider the question of equivalent job opportunity because we have found they were not terminated and that there was no closing of an organizational unit. The only persons to be considered under the equivalent job opportunity portion of the policy would be those who transferred to Forrest City from other plants. The trial court held that employees in this category had the option of taking the new employment and not being terminated or accepting termination and receiving the allowance. Witnesses on both sides of the case testified that the application of the policy by Warwick in this respect had been consistent and longstanding. There was substantial evidence that the employees waived their rights under the equivalent job opportunity section by accepting the employment arranged for them by Warwick. It is true the court specifically found that these transferred employees were offered non-equivalent job opportunities. However, the court also found that the policy had been interpreted to mean that when a non-equivalent job opportunity situation existed and the employee accepted a new job offered by Warwick, the employee accepting it was not entitled to termination allowances.

The prior interpretations by Warwick of the foregoing provisions of the termination policy were properly applied in the present case, even if appellants are correct in stating that prior interpretations of the policy at other locations were unknown to them. We think the parol testimony offered in this case was admissible for two reasons. First, the matter was opened up by the appellants' inquiry into treatment of

employees at the Midwest Cabinet Facility which had previously been shut down. The second and most important reason for allowing this testimony is that such testimony was offered only to prove an independent collateral fact about which the written contract was silent. It was not offered to alter, vary, or contradict the written terms of the contract. *Loe* v. *McHargue,* 239 Ark. 793, 394 S.W. 2d 475 (1965); *Lane* v. *Pfeifer,* 264 Ark. 162, 568 S.W. 2d 212 (1978).

The argument that the appellants were entitled to severance pay under the terms of the policy has been discussed adequately along with the other points in question. Section D of the policy provided that employees should receive two weeks notice prior to termination. Failure to give two weeks notice would entitle the employees to termination allowances for these two weeks. However, since we have already held there were no terminations, there was no need for notice and the appellants are not entitled to benefits for lack of notice, nor to severance pay.

Appellants contend they are entitled to certain expenses by reason of the appellee designating additional parts of the record on appeal which were not necessary for the purpose of the appeal. In view of the long and complicated trial in this matter we are unable to say that the appellee clearly designated the additional material for the purpose of causing the appellants to expend more money. The matter of the costs of the action will be set out in the Mandate.

Appellee argues that fundamental principles of fairness prohibit appellants from reaping windfall benefits inconsistent with the purpose of Warwick's policy. We see no need to delve into this point in view of our holding on appellants' arguments.

Affirmed.

John Cecil CASH and Bobbie CASH, His Wife
*v.* Harvey H. CASH et al

81-20 629 S.W. 2d 298

Supreme Court of Arkansas
Opinion delivered March 15, 1982
[Rehearing denied April 12, 1982.]

*James W. Haddock,* for appellants.

*Charles S. Gibson,* of *Gibson Law Offices,* for appellees.

PER CURIAM. This appeal is brought from an order of the Desha Chancery Court granting the partition of land in Desha County (Case No. 80-19). The issue on appeal is whether the chancellor is barred from granting partition by the decree of an earlier suit (Case No. 76-61) denying partition of the same property.

A. C. Cash, a widower, owned the property in issue when he died testate in March, 1969, survived by ten children. From the record, we conclude that Cash's will made no specific devise and title was treated as having descended to the heirs rather than vesting under the will, each inheriting an undivided one-tenth interest in the property. A provision of the will reads:

> I hereby direct that my lands be held in tact for a period of twenty years after the date of my decease and that during such time said lands shall not be sold, pledged, or mortgaged; and CONDITIONED FURTHER, HOWEVER, should any of my said children desire to sell his or her share of my land at the end of twenty years, such child shall give each and every one of my other children a privilege to purchase said interest in said lands, for a period of 60 days at such bona fide price or offer as said child may recover for such undivided interest in my lands from such outside person.

In the earlier suit (76-61), brought by nine of the Cash heirs against the tenth (appellant), the chancellor denied partition. His denial was not based on the testamentary restraint against alienation but on a finding the heirs, by their conduct, had acquiesced in the alienation provision and, consequently, were estopped from partitioning the property.

In 1979 Verna Morrison, one of the nine petitioners in the original partition suit, died intestate leaving five children, each of whom became seized of an undivided one-fiftieth interest in the property in fee. The children of Verna Morrison were not parties to the earlier suit but are parties to the pending suit seeking partition.

Referring to the record, we find numerous opposing motions to vacate or modify the decree in 76-61. On July 2, 1980, the chancellor granted appellants' motion to dismiss appellees' suit to partition, holding that the decree in that case was binding on the heirs of Verna Morrison, not on the theory of *res judicata* as appellants contend, but on a finding that different parties and different issues were involved.

Appellees again moved the chancellor to amend or modify the July 2 order and after intervening orders the chancellor found on October 16, 1980, that he still had discretionary control over the issue of whether to dismiss the petition of the Morrison heirs and found the limitation on alienation contained in the will was repugnant, setting aside the order dismissing the petition for partition. Appellants

challenged this order by the chancellor by a motion to modify or vacate, but on November 5, 1980, the chancellor reaffirmed his order by dismissing the motion.

We have had to refer repeatedly to the record in an effort to comprehend the merits of this appeal. It contains a mass of pleadings, motions and orders, reflecting numerous collateral issues typical of inner-family disputes. Virtually all we have been able to learn of the proceedings below has been gleaned from appellees' brief or from the record itself and even that painstakingly acquired.

Where the appellants' abstract and brief fail to provide a sufficient and coherent explanation of the proceedings before the trial court, and of the pleadings and orders, including the decree relied on, it is impossible to determine whether error has occurred and we are left to presume the chancellor correctly interpreted his own orders. The burden is on the appellants to demonstrate wherein the trial court has committed reversible error. *Wallis* v. *Mrs. Smith's Pie Company,* 261 Ark. 622, 550 S.W. 2d 453 (1977); *Poindexter* v. *Cole,* 239 Ark. 471, 389 S.W. 2d 869 (1965); *Meyer* v. *Eichenbaum,* 197 Ark. 650, 124 S.W. 2d 830 (1939); *Southern National Insurance Company* v. *Williams,* 192 Ark. 1178, 95 S.W. 2d 91 (1936). That burden has not been met in this case; on the contrary, from what we can determine the chancellor was right. The order is affirmed.

Theodis LOCKETT *v.* STATE of Arkansas

CR 81-114 629 S.W. 2d 302

Supreme Court of Arkansas
Opinion delivered March 22, 1982

*Thurman Ragar, Jr.*, for appellant.

*Steve Clark*, Atty. Gen., by: *Matthew Wood Fleming*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury found appellant guilty of aggravated robbery and theft and assessed his punishment at 50 years and 19 years imprisonment respectively. Appellant's sole argument for reversal through court appointed counsel is that his written confession was involuntary and, therefore, inadmissible inasmuch as it was the result of threats and violence. We disagree and affirm.

At the *Denno* hearing the state adduced evidence that appellant was arrested about 10:40 p.m. on January 23, 1980, for the alleged offenses which had occurred two days earlier.

He was taken to the police station and advised of his *Miranda* rights within 20 minutes after his arrest. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). He then signed a standard "waiver of rights" form but refused to make a statement. The next evening the appellant requested to speak with the detectives. He voluntarily gave an oral statement as to his complicity and thereafter signed another or duplicate waiver of rights form at 11:15 p.m. He then accompanied the officers to the scene of the crime, which he reenacted. He directed them to the location of a considerable amount of money, the victim's pistol, and a crowbar with which he struck the victim. About 2 a.m., following the reenactment of the crime and recovery of these items, he signed another waiver of rights form and narrated in his own handwriting his participation in the robbery and theft.

The appellant testified that he was aware of his rights and had signed a waiver of rights form and the written confession. He maintained that his written confession was the result of the officers beating him and threatening to shoot him and then justifying it by saying he was trying to escape. He denied being involved in the robbery and theft. The officers denied that the appellant was ever beaten, mistreated or threatened with force or violence. Further, no promises were made to appellant, and his confession was freely and voluntarily given.

The burden is on the state to prove by a clear preponderance of the evidence that a custodial statement was voluntarily given. *Harvey* v. *State,* 272 Ark. 19, 611 S.W. 2d 762 (1981). On appeal we are required to make an independent determination, based on a review of the totality of the circumstances, and the trial court's finding on the issue of voluntariness will not be set aside unless it is clearly against the preponderance of the evidence. *Hunes* v. *State,* 274 Ark. 268, 623 S.W. 2d 835 (1981); and *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974).

Here, the appellant, 19 years old, is no stranger to the criminal justice system. He was on probation for a similar felony when the instant armed robbery occurred. Appellant's testimony and that of the police officers are in conflict.

It is for the trial judge to weigh the evidence and resolve the credibility of the witnesses. *Hunes* v. *State, supra;* and *Harvey* v. *State, supra.* Here, we hold that the trial court's ruling that the confession was freely and voluntarily given is not clearly against the preponderance of the evidence.

Affirmed.

Cass S. HOUGH, FORBING INVESTMENTS, INC., and TRANSPORTATION PROPERTIES, INC., d/b/a BEST WESTERN TOWN & COUNTRY MOTEL *v.* CONTINENTAL LEASING CORP. and Bill WEATHERFORD and Steve WEATHERFORD, d/b/a ACME TYPEWRITER EXCHANGE

81-253 630 S.W. 2d 19

Supreme Court of Arkansas
Opinion delivered March 22, 1982

*Slinkard & Lingle, P.A.,* by: *James G. Lingle,* for appellant and cross-appellee.

*Smith & Smith,* by: *Raymond C. Smith,* for appellee and cross-appellant.

ROBERT H. DUDLEY, Justice. Appellant Best Western Town and Country Motel in Rogers contacted Acme Typewriter Exchange in Fayetteville about acquiring two electronic cash registers. Both thought Victor brand machines should be installed and Acme contacted appellee Contin-

ental Leasing of Hattiesburg, Mississippi and asked if Continental would purchase the machines from Acme and then lease them to appellant. Continental Leasing, which had previously done no business in Arkansas and had no agents or employees in the state, sent Acme a credit application. Acme then forwarded the application to appellant. On the application appellant stated that it was a partnership composed of Cass S. Hough, R. A. Lile and Arnold L. Mayersohn. Continental Leasing investigated the partners and found that they had reputations as substantial businessmen. Continental then notified Acme that it would purchase the machines and lease them to appellant. Continental prepared an instrument with the following style:

CONTINENTAL LEASING CORPORATION
LESSOR
P. O. Box 333 / Forrest Towers / Hattiesburg, MS 39401

| Lessee No. | Rental Commencement Date |
|---|---|
| 1366-01 | May 15, 1978 |

Cass S. Hough executed the instrument for appellant and it was mailed back to Hattiesburg where it was accepted by Continental. Hough testified that he did not read the instrument and thought he signed a conditional sales agreement. He admitted, however, that he had his attorney examine the lease before executing it. The machines had been installed only a short period of time when appellant claimed they were not functioning properly and ceased to make the monthly rental payments. Continental filed suit for the entire unpaid balance, attorney's fees and possession of the property which, under the terms of the lease, could be sold with the proceeds to be applied to the judgment. Appellant contended that appellee was in violation of the Wingo Act and could not enforce its contract and, alternatively, the instrument was a usurious conditional sales agreement, rather than a true lease, and was void. A jury trial resulted in a judgment for appellee Continental but no attorney's fees were awarded. Both parties appeal and we affirm on appeal and cross-appeal.

The Wingo Act, Ark. Stat. Ann. § 64-1202 (Repl. 1980),

provides that a foreign corporation which does not file its articles of incorporation in this state cannot maintain a cause of action in this state. The act is not applicable to contracts in which the transaction is wholly in interstate commerce. *The W. T. Rawleigh Medical Co.* v. *Rose,* 133 Ark. 505, 202 S.W. 849 (1918); *Crenshaw* v. *Arkansas,* 227 U.S. 389 (1913). The trial court was correct in finding that the contract was made in Mississippi, where final acceptance occurred. As stated in *Goode* v. *Universal Plastics, Inc.,* 247 Ark. 442, 445 S.W. 2d 893 (1969):

> . . . The rule is stated in Leflar's *American Conflicts Law* (1969), § 144 at page 353:
>
> > The authorities are reasonably clear that, in this event, the contract is made at the time and place 'where the last act necessary to the completion of the contract was done — that is, where the contract first creates a legal obligation.'

The contract was therefore a Mississippi contract in interstate commerce and Continental may enforce it in the courts of Arkansas despite its status as a nonqualifying corporation. *Brown Broadcast, Inc.* v. *Pepper Sound Studio, Inc.,* 242 Ark. 701, 416 S.W. 2d 284 (1967).

The jury upheld the contract as a lease and appellant contends that the trial court erred in not granting the motion for a directed verdict on the issue of usury. A directed verdict is proper only when no fact issue exists and, on appeal, we determine whether a fact issue existed by examining the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. *Midwest Bus Lines, Inc.* v. *Williams,* 243 Ark. 854, 422 S.W. 2d 869 (1968); Rule 52, A. R. Civ. P. Here, there was substantial evidence that the instrument was a lease and not a disguised conditional sales contract and, accordingly, we affirm.

Appellant validly contends that the contract in issue, a five year lease, is in many respects similar to the ostensible leases found to be usurious in *Standard Leasing Corp.* v.

*Schmidt Aviation,* 264 Ark. 851, 576 S.W. 2d 181 (1979) and *Bell* v. *Itek Leasing Corp.,* 262 Ark. 22, 555 S.W. 2d 1 (1977). There are, however, significant differences upon which the jury could base its verdict. The lessee acquired no equity in the property as the lease expressly provided for the return of the equipment to the lessor at the end of the term, or that it be sold and the proceeds go to the lessor. There was no provision for an option to purchase. These facts are substantial evidence from which the jury could find that the intention of the parties was that at the expiration of the lease term the property would revert back to the lessor.

Appellant additionally contends that the trial court erred in refusing to give two instructions. The trial court was correct in its ruling. One of the proposed instructions is a slanted paraphrasing of the language in *Bell* v. *Itek Leasing Corp.,* supra, and *Standard Leasing Corp.* v. *Schmidt Aviation,* supra. An instruction must be unslanted. To be unslanted the instructions must be an objective statement of the law. AMI Introduction, p. X. The trial court refused the other because the court's own instruction covered the subject. A party is not entitled to his particular preference in the wording of the instructions and a trial judge is not required to say the same thing again in different words. *Sanders* v. *Neuman Drilling Co.,* 273 Ark. 416, 619 S.W. 2d 674 (1981). The appellant also contends that the trial court committed reversible error in not submitting the case to the jury upon appellant's requested 16 special interrogatories. Whether to submit or refuse to submit a case on special interrogatories to be answered along with a general verdict is discretionary with the trial court. *Missouri Pacific Transportation Co.* v. *Parker,* 200 Ark. 620, 140 S.W. 2d 997 (1940). We find no abuse of discretion for refusing the 16 special interrogatories submitted in this case.

On cross-appeal Continental Leasing contends that it should have been allowed attorney's fees. We affirm the trial court's denial of attorney's fees. In an early case we held void a penalty provision in a promissory note for payment of an attorney's fee, *Boozer* v. *Anderson,* 42 Ark. 167 (1883). We did not allow attorney's fees on promissory notes until a statute so provided. Ark. Stat. Ann. § 68-910 (Repl. 1979); *Hollaway*

v. *Pocahontas Federal Savings & Loan Ass'n.*, 230 Ark. 310, 323 S.W. 2d 204 (1959). We have consistently followed the concept that the allowance of attorney's fees as costs is in substance statutory. Light, *Taxability of Attorney's Fees as Costs,* 9 Ark. L. Rev. 70 (1955). No statute authorizes attorney's fees for default on a lease. Until the General Assembly provides otherwise, we will adhere to the sound common law concept of each litigant bearing the cost of his own counsel.

Affirmed on appeal and cross-appeal.

McILROY BANK & TRUST *v.* James ZUBER and Patricia L. ZUBER, Husband and Wife

81-254 629 S.W. 2d 304

Supreme Court of Arkansas
Opinion delivered March 22, 1982

*William Russell Gibson,* of *Pettus, Johnson & Gibson,* for appellant.

*James L. Carson,* for appellee.

STEELE HAYS, Justice. Appellant filed suit against appellees in the Chancery Court of Washington County on two promissory notes, secured by articles of personal prop-

erty, seeking foreclosure, sale and deficiency judgment. Appellees moved to dismiss the complaint under Rule 12H (3), A. R. Civ. P., on the ground the court lacked jurisdiction. Appellant responded that it could sue in equity to foreclose its security interest. The chancellor found he lacked subject matter jurisdiction and transferred the suit to circuit court. Appellant appeals.

We do not reach the merits of this appeal as the order appealed from is not final and therefore, not appealable. See Rule 2 (a) 2, Ark. Rules of Appellate Procedure. It is well established that before a judgment is final and appealable it must dismiss the parties from the court, discharge them from their action or conclude their rights to the subject matter in controversy. An order transferring a suit from law to equity, or the reverse, is not appealable. *Hyatt* v. *City of Bentonville,* 275 Ark. 210, 628 S.W. 2d 326 (1982); *Heber Springs Lawn and Garden, Inc.* v. *FMC Corp.,* 275 Ark. 260, 628 S.W. 2d 563 (1982).

Appeal dismissed.

Connie Louise LASCANO *v.* STATE of Arkansas

CR 81-112 631 S.W. 2d 258

Supreme Court of Arkansas
Opinion delivered March 22, 1982
[Rehearing denied May 3, 1982.*]

*ADKISSON, C.J., and PURTLE, J., would grant rehearing.

*Jeff Duty,* for appellant.

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

STEELE HAYS, Justice. Appellant was convicted of first degree murder and sentenced to 35 years in the Department of Correction. For reversal, she argues that the trial court erred in denying a motion to suppress tangible evidence, in admitting a confession and in refusing to declare a mistrial. We find no error and affirm the judgment.

On October 25, 1980, a Saturday, the body of Mrs. Jeannie Hunt was found in the kitchen of her Fayetteville home. She had been shot four times and death was thought to have occurred at about 8:30 or 9 the previous evening. Appellant, an acquaintance of Ben and Jeannie Hunt, was contacted by two deputies on Sunday evening and asked to come to the sheriff's office for questioning. Sergeant Doug

Fogley of the State Police began the interview by asking her name, address, phone number and when she had last seen Jeannie Hunt. Appellant said, "About 8:30 p.m. on Friday." He immediately explained her rights to her and obtained her signature on a waiver form. During the questioning appellant gave a non-incriminating account of her movements on Friday. Appellant was asked if she owned a handgun and said she did, which she kept in the glove compartment of her car. She agreed to a search of the vehicle and, when the pistol was not found, to a search of her apartment, which produced a partial box of Remington .22 caliber long-rifle cartridges containing 44 bullets, six less than the normal 50. The Remington cartridges had a yellow jacket, matching one recovered at the scene.

Appellant was told of these findings and that there was probable cause to charge her with murder. She remained in custody and at about 5 p.m. on Sunday she dictated and signed a confession. She gave an account of a turbulent love affair with Ben Hunt, the victim's husband, characterized by hostility and threats between the two women. In early October appellant purchased a pistol for protection, having some reason to think that Mrs. Hunt had a weapon. She said on Friday she saw Jeannie Hunt at a shopping center and decided to visit her; she wanted to find out where she stood with Ben and whether Ben and Jeannie planned to stay together. She took the pistol with her and arrived at about 8:30. They talked in the kitchen until Mrs. Hunt became angry. Shouting accusations she told appellant to get out of her house and pulled her toward the door. Appellant drew the pistol and fired four times at point blank range. She wiped her fingerprints from a drinking glass, drove home and changed clothes for work. After throwing the pistol from a bridge, she picked up her daughter and friends from a skating party and went to work. The pistol was later recovered by the police.

Appellant argues her Fourth and Fifth Amendment rights were violated by the trial court in admitting her confession and in refusing to grant her motion to suppress the physical evidence. She claims no attempt was made by the deputies to comply with Rule 2.3, A. R. Crim. P., by

informing her she was under no legal duty to accompany them to the sheriff's office. Further, before she was given the required Miranda warning she said she had seen Jeannie Hunt about 8:30 on Friday night. Appellant insists this admission that she had seen the victim near the time of death was fatal — that it opened the door to the whole case and everything obtained from her thereafter was tainted.

But the argument is not persuasive. No evidence at the scene implicated the appellant and there is no indication Sergeant Fogley regarded her as a specific suspect. Appellant had not been singled out as a suspect; all individuals acquainted with the victim were being contacted and under such circumstances it is not impermissible to ask some preliminary information questions without overstepping constitutional protectons. Here the interview had hardly begun and the questions asked were general. It seems entirely routine to ask when someone last saw the victim. Significantly, Sergeant Fogley immediately interrupted the questioning to give the Miranda warnings and there is nothing to suggest appellant was caught unawares by that single question. Her earlier steps to conceal the weapon and to wipe her fingerprints from the glass in the Hunt kitchen indicate she took deliberate precautions. Evidently she supplied a satisfactory explanation of her whereabouts on Friday and gave non-incriminating answers during the remainder of the interview. She had, in fact, seen Jeannie Hunt at a shopping center on Friday, but whether she was referring to that encounter is not revealed to us. However that may be, no other incriminating information appears to have been obtained from her. In short, in the absence of some indication of bad faith tactics by the officer or some particular vulnerability of the individual, we are not willing to say on the basis of that marginal question that everything the appellant later disclosed must be excluded. The constitutional protections against self-incrimination do not extend that far.

Procedures for custodial interrogation are prescribed by two well known decisions: *Escobedo* v. *Illinois,* 378 U.S. 478, decided in 1964 and *Miranda* v. *Arizona,* 384 U.S. 436, coming two years later. Neither case purports to dictate the

suppression of every statement or utterance given in the absence of the requested warnings, but rather of statements of those arrested or on whom suspicion has focused. Appellant suggests *Miranda* abolishes the distinction between the investigatory and accusative phases of crime detection. We disagree. The circumstances of this case and those present in *Escobedo* and *Miranda* invite comparison. Escobedo, with no warnings whatever, was confronted in custody with an alleged accomplice who accused him of murder. Escobedo said, "I didn't shoot Manuel, you did it." Handcuffed, Escobedo was questioned while standing up for four hours. Additionally, he was refused access to his retained counsel, who spent several hours at the detective bureau trying to confer with him. Somewhat similarly, Miranda was taken to police headquarters and identified by a rape victim; he was then questioned by two detectives for two hours without being told he had a right to counsel, nor was his right not to be compelled to incriminate himself effectively preserved.

By contrast, the testimony of witnesses, including appellant, show she was treated with deference. Sergeant Fogley said he repeatedly urged her to obtain counsel to no avail. Appellant, 33 years of age, is described as an articulate university student with a degree in education and completing requirements for a degree in marketing; the Miranda warnings were given her in writing no less than three times prior to her confession.

Appellant urges the point that Sheriff Marshall regarded her as a suspect. But that need not tarnish these proceedings. In many homicides an aura of suspicion initially touches spouses, lovers, rivals, even acquaintances, until attention can focus more clearly on one or more individuals. There is no evidence that appellant was more suspect than others in the beginning, as the sheriff's testimony reveals:

> A: I considered her as a suspect in a homicide case. We consider everyone a suspect until we sort them out.
>
> Q: So she was invited down to the police station at your

request and you considered her a suspect at that time?

A: She was no different in the case than numerous other people we had asked to come to the station to talk to us.

Q: They were all considered to be suspects?

A: That's correct. (p. 165.)

We cannot say the trial court's rulings on appellant's motions were against the preponderance of the evidence.

Appellant submits that no effort was made to comply with Rule 2.3, A. R. Crim. P., which requires that if a law enforcement officer asks a person to come to the police station he shall make it clear there is no obligation to comply. Whether the deputies observed the rule is not clear, as the question was never asked. It is clear that no objection was made to the trial court and, hence, it is not available to appellant on appeal. *Meyers* v. *State,* 271 Ark. 886, 611 S.W. 2d 514 (1981).

Appellant also urges that a mistrial should have been declared because appellant's counsel moved to withdraw during the course of trial. In chambers, with appellant present, defense counsel informed the court he felt a fraud was being perpetrated in that appellant revealed to him the principal purpose of her defense was to protect Ben Hunt and prove him innocent. Counsel represented to the court that he could not ethically defend appellant in light of that disclosure. The trial judge asked appellant if she and counsel had discussed the issue at length and she assured him she was fully satisfied with the representation she was receiving. In the end, and after a conference between appellant and counsel, the motion for a mistrial seems to have been withdrawn with Mr. Werner's comment, "Your Honor, we have reconsidered. We are going to call Dr. Finch to testify and also the defendant, if she wants to testify," and with that the trial continued. (See p. 715.) Under the circumstances we could hardly say the trial court abused its discretion.

The judgment is affirmed.

ADKISSON, C.J., and PURTLE, J., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. By direction of the Washington County Sheriff two deputies "picked up" the appellant at her home, took her to the sheriff's office, and questioned her about the murder. Appellant responded, incriminating herself; she was then advised of her right to remain silent as required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966); afterwards, she made other incriminating statements.

At the time she was "picked up" from her home, she was one of two prime suspects in the murder. Evidence that this "pick up" was, in effect, an arrest can be garnered from the failure of the deputies to advise her that she was not required to accompany them. Such a statement is required by Rule 2.3, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977).

It is clear from these facts that this was a custodial interrogation to which *Miranda* was intended to apply. *Miranda* warnings should have been given at the beginning of the interrogation rather than after an incriminating question had been asked and answered. The admission in evidence of this statement was prejudicial error. This case should be reversed and remanded.

JOHN I. PURTLE, Justice, dissenting. The majority correctly states the body of Mrs. Jeannie Hunt was found in the kitchen of her Fayetteville home on Saturday, October 25, 1980. It was determined that she died about 8:30 or 9:00 p.m. on the previous evening. Since appellant was not taken into custody until about 7:30 p.m. on October 26, it was already known by the officers that the death had occurred at the time stated above.

Sheriff Herb Marshall was in charge of the investigation, and he stated: "It had to be one of two people." The two people he referred to were the appellant and Ben Hunt, the husband of the deceased. The majority opinion at one point

states: "Appellant had not been singled out as a suspect." This is simply incorrect in light of Sheriff Marshall's testimony recalling a conversation with appellant in which he said, "It is either you or Ben Hunt."

With the background information the officers possessed there was no excuse for not giving the appellant her warnings prior to the commencement of interrogation. Instead, the officers very skillfully asked her a few perfunctory questions and then came down to the heart of the case. After they had determined that she had been at Jeannie Hunt's house about the time of the murder they then decided to give her her warnings. The only thing the officers needed to know to determine the identity of the murderer was who was present at the victim's home at about 8:30 p.m. on Friday night. Having found out the appellant was this person they then proceeded to warn her. This is shutting the barn door after the horse is out.

It is ironic that the majority cites but two sources of the law upon which to base its opinion in regard to the questions raised by the custodial interrogation; those being *Miranda* v. *Arizona,* 384 U.S. 436 (1966), *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Both *Miranda* and *Escobedo* have held that a person has certain rights originating in that source of highest authority, the United States Constitution and the Bill of Rights. There is no justifiable way that the appellant's rights under the Fourth and Fifth Amendments have been protected despite the majority's apologia to that effect.

The exclusionary rule was first articulated in the case of *Weeks* v. *United States,* 232 U.S. 383 (1914). The United States Supreme Court found that evidence was obtained through a warrantless search and thereby declared it illegal. The court stated that if the evidence were accepted it "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of prohibitions of the Constitution." The court reasoned that judicial integrity demanded that the courts not act as accomplices to violators of the constitution. The court developed this rule further in the case of *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). In *Silverthorne* the government had used an illegal search to

gain information upon which to base an indictment and to subpoena incriminating documents. In following the reasoning in the *Weeks* case Justice Holmes, speaking for the court, stated:

> . . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.

The doctrine culminated in the case of *Nardone* v. *United States,* 308 U.S. 338 (1939), wherein it was held that information acquired by such unconstitutional means were "fruits of the poisonous tree" and could not be used as evidence in a criminal prosecution. Justice Holmes stated in *Silverthorne* that without the exclusionary rule the Fourth Amendment becomes a mere form of words. Justice Brandeis stated in his dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928): " . . . If the court allows mistaken ideas of the requirements of the Constitution to pass muster, it will teach ignorance of the Constitution . . . " Therefore, if we allow illegal procedures, through ignorance or by design, to erode our processes, judicial integrity itself will be sacrificed in order to meet the needs of expediency. Justice Brandeis' *Olmstead* dissent was later afforded due deference by the court's specific overruling of *Olmstead* in *Katz* v. *United States,* 389 U.S. 347 (1967). Although the exclusionary rule originally applied only to the United States government, it was extended to the states through the Fourteenth Amendment to the United States Constitution in the case of *Mapp* v. *Ohio,* 367 U.S. 643 (1961). In *Mapp* the court stated that experience had determined that the exclusionary rule was the only effective means of deterring police misconduct in their zeal to apprehend criminals. It is abundantly clear in this case that the exclusionary rule, as previously discussed, would apply to violations of both Fourth and Fifth Amendment rights.

Regardless of the manner in which the majority sets forth the facts and the law in the present case, it is obvious that the appellant was one of only two suspects in this murder case. This was fully known by the officers when they

first questioned her. The warnings should have been given prior to the questioning. *Miranda* v. *Arizona,* supra. Therefore, all the talk about insisting upon her calling an attorney and reading her rights three or four times to her is an after the fact attempt to cover up the fatal error in this case. Even a guilty person is entitled to a fair trial. This is all the state or the defendant is entitled to.

In the case of *Hayes* v. *State,* 269 Ark. 47, 598 S.W. 2d 91 (1980), the facts show that the police went to Hayes' house as a starting point in their investigation of a murder that had occurred a short time previously. They knew that the deceased had been living with Hayes. He voluntarily accompanied them to the police department, then gave conflicting stories about when and where he last saw the victim. At that point the police decided he was a possible suspect and he was given his Miranda warnings. In the present case, it is abundantly clear that Connie Lascano was considered to be a suspect even before the officers came to get her.

Rule 2.3, A. R. Crim. P., states:

> If a law enforcement officer . . . requests any person to come to or remain at a police station, . . . he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

In the present case, two police officers appeared at appellant's home, advised her that they were police officers and asked her to come down to the sheriff's office, after which she was placed in the back seat of the police vehicle and transported to the sheriff's office. One of the officers, Sergeant Charles Rexford, testified in response to the question, "Did you tell her she was a possible suspect in the case?"; "No, I did not." Furthermore, the uncontradicted evidence is that the police officers made no attempt to comply with Rule 2.3. It is my opinion that this violation combined with the other, serious errors brought before us in this appeal should be grounds for reversal. There is no doubt in my mind but that there was ample legal evidence with which to convict the appellant. However, I would not

whittle away one word or one letter of the constitution in order to make the present conviction stand up.

I dissent.

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Robert J. WILLIAMS *v.* STATE of Arkansas

CR 81-137 629 S.W. 2d 302

Supreme Court of Arkansas
Opinion delivered March 22, 1982

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

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

PER CURIAM. Petitioner asks that we issue a Writ of Certiorari to the Clerk of the Circuit Court of Pulaski County, Fifth Division, ordering a supplementation of the record. Petitioner alleges that the complete closing arguments are not contained in the record, rather the record contains only objections raised during the argument. The petitioner does not allege that he requested that arguments be reported, nor is it alleged that the trial court ordered it reported, nor is it alleged that it was reported.

Ark. Stat. Ann. § 22-352 (Repl. 1962) sets out the duties of the court reporter:

> Duties — Contents of stenographic report. — The duty of the stenographer shall be to attend all terms of the circuit court held within and for the circuit for

> which he is appointed, and he shall, when so requested by either party, make a stenographic record of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, verbatim, the oral instructions of the court and any further proceedings or matter, when directed by the presiding judge or upon request of counsel to do so, and whenever during the progress of the cause any question arises as to the admissibility or rejection of evidence or any other matter causing an argument to the court, such argument shall not be recorded by the stenographer unless requested by the counsel in said cause, but he shall briefly note the objections made and the ruling thereon and any exception taken by either party or his counsel to such ruling.

See also, the last four full paragraphs of *McCain* v. *State,* 132 Ark. 497, 201 S.W. 840 (1918).

Unless the reporting of the arguments was requested or was ordered reported, we will not issue a writ of certiorari to complete the record.

Jacquetta ALEXANDER, Circuit Clerk of Pulaski County, Arkansas *v.* W. E. BEAUMONT, County Judge of Pulaski County, Arkansas

82-27 629 S.W. 2d 300

Supreme Court of Arkansas
Opinion delivered March 22, 1982

*John Wesley Hall, Jr.,* for appellant.

*House, Holmes & Jewell, P.A.,* by: *David Hargis,* for appellee.

PER CURIAM. On February 9, 1982, petitoner filed a petition for a Writ of Certiorari to complete the record. After fully considering the petition we denied it on February 22, 1982. Petitioner, by her attorney John Wesley Hall, Jr., has now filed a motion asking us to reconsider, and states:

> If the Court refuses to reconsider the Petition, whether this is the result the Court desires or not, the Court should enter a per curiam order for publication that explains to the rest of the Arkansas bar and public that, henceforth, circumstances beyond the control of parties to an appeal can preclude the use of a transcript of testimony. The public needs to know that their rights to effectively pursue appeals can be lost by the conduct of others. This is a novel and unprecedented reversal of this Court's prior holdings and is erroneous.

Because petitioner has requested that we publish our reasons we shall do so.

The notice of appeal, given on August 10, 1981, does not contain a statement that the transcript had been ordered as required by Rule 3 (e), Rules of Appellate Procedure, Ark. Stat. Ann. Vol. 3A (Repl. 1979). On October 21, 1981, petitioner obtained an extension of time to docket the appeal. This extension was in violation of Rule 5 (b), Rules

of Appellate Procedure, which provides that an extension of time for filing the record may be given upon the trial court "finding that a reporter's transcript . . . has been ordered . . ." We have issued a clear warning that the provision must be followed. *Gallman* v. *Carnes,* 254 Ark. 155, 492 S.W. 2d 255 (1973) and appendix. This warning was repeated in *Perry* v. *Perry,* 257 Ark. 237, 515 S.W. 2d 640 (1974). We stated that the purpose of the rule (a statute at that time) was to eliminate unnecessary delay in the docketing of appeals and "We expect compliance with the spirit of the statute, to the end that lawsuits may progress as expeditiously as justice requires." In *Owens* v. *Bill and Tony's Liquor Store,* 258 Ark. 887, 529 S.W. 2d 354 (1975), we pointed out that the rule "furnishes ground for such action as we deem appropriate." In *Canal Insurance Co.* v. *Arney,* 258 Ark. 893, 530 S.W. 2d 178 (1975), we dismissed a case under this rule. We reiterated the necessity for ordering a transcript and conducting a hearing on the necessity for an extension in *Harper* v. *Pearson,* 262 Ark. 294, 556 S.W. 2d 142 (1977).

Petitioner's attorney, John Wesley Hall, Jr., still without ordering a transcript and again without a hearing, obtained from the trial court a second extension of time for the filing of the record. One day before expiration of the second extension of time Mr. Hall filed a petition for a Writ of Certiorari with this court stating that the court reporter had been paid and that 60 days' additional time was needed. The petition implied that the transcript had been ordered for some time.

Both court reporters involved have now executed affidavits to this court stating that Mr. Hall had not ordered transcripts when the extensions of time were granted. They affirm that Mr. Hall did not order the record until sometime after January 7, or approximately 30 days before the second extension expired. Quite naturally, the transcript and record were not then timely filed.

The rules for timely ordering of the record have been flagrantly violated. As previously stated, we expect compliance with our rules in order that unnecessary delays may be eliminated and so that lawsuits may proceed as expeditiously as possible.

The petition for reconsideration is refused.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the per curiam issued this date because I think there were very special circumstances involved in this matter which could be used to mitigate the failure of the petitioner to comply with the standard rules of the court.

All parties were advised from the beginning that the transcript had not been ordered although the notice of appeal had been given. It was petitioner's intention to try to raise the money to pay for the appeal in time to meet these deadlines. As I understand the record, the court reporters led the petitioner's attorney to believe they could complete the records in the limited amount of time which was given. The money was advanced to the reporters, as is required by them, before they started typing.

From a reading of the record it appears to me that both reporters led the petitioner to believe they could complete the transcripts in the amount of time allocated from the date of receipt of payment. They would not or could not complete their end of the bargain. It is not infrequent that we have to delay the whole process of court to wait on a court reporter. This seems to be the standard rather than the exception. In this case the reporters should have been fully aware that they could not complete the transcript in the time allowed after taking petitioner's money. In reviewing the record, it seems to me that the attorney for petitioner did, indeed, make a good faith effort to comply with our rules, and did, in effect, substantially comply with them. There is absolutely no evidence that a fraud was perpetrated on or even attempted to be perpetrated against this court.

Therefore, in view of the special circumstances I would make an exception to our rule and I would allow the appeal to be filed in this case.

# Martha C. SEXTON, Executrix of the Estate of Walter Allen SEXTON, Deceased *v.* ST. PAUL FIRE & MARINE INSURANCE CO.

81-242 631 S.W. 2d 270

Supreme Court of Arkansas
Opinion delivered March 29, 1982
[Rehearing denied May 3, 1982.*]

*Charles M. Walker,* of *Wilson, Gunter & Walker, P.A.,* for appellant.

*Victor Hlavinka,* of *Atchley, Russell, Waldrop & Hlavinka,* for appellee.

RICHARD B. ADKISSON, Chief Justice. The Nevada County Circuit Court granted a motion for a directed verdict in favor of appellee after finding that appellant had failed to meet the burden of proof for "medical injury" as required by Act 709 of 1979 (Ark. Stat. Ann. § 34-2613 — 2620 [Supp. 1981]). On appeal we affirm.

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PURTLE, J., would grant rehearing.

Appellant's husband, Walter Sexton, was admitted to the Nevada County Hospital on May 29, 1979, after being diagnosed as suffering from diabetes, generalized arteriosclerosis, and a kidney infection. He was 81 years old and was mentally confused during much of his stay in the hospital. The nurses' notes reflect that on May 31, he fell in the bathroom but was not seriously injured and that on June 2 he nearly fell and was put to bed. Nurses found him attempting to climb out of bed on numerous occasions. On June 2 one of the nurses called Sexton's doctor to ask if he would authorize a Posey vest. A Posey vest is a type of safety restraint that fits around a patient's chest and is tied under the bed to keep the patient from getting out of bed. The doctor authorized the restraint "as needed for safety" but allowed the nurses to make the final decision as to whether to use the vest. No Posey vest was given to Sexton, and on June 3 he fell again, fracturing his hip and shoulder. Sexton died several months later. His wife, as executrix of his estate, brought suit alleging that the hospital was negligent in failing to place the vest on her husband.

The trial court based the granting of the directed verdict for appellee on Ark. Stat. Ann. § 34-2614 (Supp. 1981), which provides:

> Burden of proof. — (A) In any action for medical injury, the plaintiff shall have the burden of proving:
>
> (1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality; and
>
> (2) That the medical care provider failed to act in accordance with such standard; and
>
> (3) That as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred. . . .

Appellant did not introduce any evidence of the degree of

skill used by other hospitals in the same or similar locality as required by this statute.

Appellant correctly argues that this Act is only applicable to professional services. Ark. Stat. Ann. § 34-2613 (Supp. 1981) provides:

> (C) 'Medical injury or injury' means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

However, appellant incorrectly argues that the use of a Posey vest is not a professional service. Testimony revealed that only the doctor could authorize its use, although its actual placement on the patient was left to the discretion of the nurse.

A hospital is required to consider the patient's capacity to care for himself and to protect the patient from dangers created by his weakened condition. Providing a safe environment for patients is within the scope of the professional services by a hospital. *Murillo* v. *Good Samaritan Hospital of Anaheim,* 99 Cal. App. 3d 50, 160 Cal. Rptr. 33 (1979).

Analogous are decisions holding that whether to raise bedrails involves the expert judgment of the health care provider and is, therefore, beyond the common knowledge of the jury and a matter as to which expert testimony is required. *See Carrigan* v. *Sacred Heart Hospital,* 104 N.H. 73, 178 A. 2d 502 (1962); *Mossman* v. *Albany Medical Center,* 311 N.Y.S. 2d 131 (1970).

Affirmed.

HICKMAN, PURTLE, and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The majority has given the statute in question a most liberal interpretation. It is my judgment that we should strictly construe the statute.

The facts are fairly set out by the majority and the question is whether Walter Sexton, an elderly man, suffered a "medical injury" when he fell out of bed fracturing his hip and shoulder. For at least two days prior to this time, the medical records indicated that he had been falling, was in danger, and needed special care and attention. A physician gave permission, if necessary, to put the patient in a posey vest for his protection. The nurse in charge failed to put him in that vest and the majority finds that her decision was a professional one. I seriously disagree with that judgment. It does not take any special knowledge or skill to know that in a case like this the patient needed restraint. It was a common sense judgment that any mature adult could have made. If there was a professional decision involved, it had already been made by the doctor. Expert testimony should not have been required of the plaintiff.

At issue here is what advantage is to be granted to a special segment of our society; in this particular case, a hospital. The Act in question places a burden on a plaintiff that does not exist in other negligence cases; that is, an expert witness must be called by the plaintiff to show the degree of skill ordinarily possessed by a hospital in the locality regarding the care of patients.

The majority bases its decision on cases from California and New York; those decisions in my judgment severely limit one's right to sue a hospital or member of the medical profession for any injury that occurs in the hospital. For example, in the case of *Carrigan* v. *Sacred Heart Hospital,* 104 N.H. 73, 178 A. 2d 502 (1962), it was determined that it was a "professional" judgment whether to raise the bedrails

on a bed. I would hardly call that a decision requiring special knowledge or skill.

The reason I would strictly construe this Act is because I consider such legislation to be in the same category as that in derogation of common law, or that of a special grant, privilege or immunity, or an exemption from taxation. In all of these instances we strictly construe the legislation. In *Hackney* v. *Southwest Hotels, Inc.*, 210 Ark. 234, 195 S.W. 2d 55 (1946), we strictly construed a statute that limited the liability of a hotel keeper. Sutherland in his work on statutory construction recognizes as an established principle of law that legislative grants of rights, powers, privileges, immunities or benefits should be strictly construed against the claims of the grantees. In a significant observation he says:

> In a manner of speaking, all legislation which undertakes to change the existing law must have an effect to redetermine legal relationships between and among people, and can therefore be said to grant rights, powers, privileges or immunities to the advantaged parties as against the disadvantaged ones who are subjected to corelative duties, disabilities or liabilities. SUTHERLAND, STATUTORY CONSTRUCTION, Vol. 3, § 63.02 (4th ed. 1974).

We routinely hold that one claiming an exception from taxation because of a statutory grant has the burden of clearly establishing the exception beyond a reasonable doubt, and the statute will be strictly construed against the exception, and "to doubt is to deny the exemption." *S. H. & J. Drilling Corp.* v. *Qualls,* 268 Ark. 1, 593 S.W. 2d 178 (1980). Should not liability for a life be at least as important as accountability for a tax?

Furthermore, we should consider the actual intent of the legislature. I cannot believe the legislature meant that an injury caused by such a negligent act as that in this case would be considered a "medical injury." After all, we are expected to use common sense in construing legislation. *Shinn* v. *Heath,* 259 Ark. 577, 535 S.W. 2d 57 (1976).

I am afraid the majority decision means that any injury occurring in a hospital will be deemed a "medical injury" and, therefore, shielded to a degree from liability.

There are already enough restrictions that make an injured person's recovery difficult in a medical malpractice case. For example, the medical profession enjoys a special statute of limitations of two years, whereas other defendants in negligence cases are liable to suit for three years. Ark. Stat. Ann. § 34-2616 (Supp. 1981); Ark. Stat. Ann. § 37-206 (Repl. 1962); *Midwest Mutual Ins. Co.* v. *Ark. Nat'l Co.*, 260 Ark. 352, 538 S.W. 2d 574 (1976). The Act in question requires a plaintiff to provide testimony that the treatment given was not the kind customarily afforded a patient by medical care providers with similar training in the locality. Ark. Stat. Ann. § 34-2614 (Supp. 1981). Such testimony would necessarily have to come from one qualified as an expert. Furthermore, the plaintiff is required by this same Act to give two months notice to a defendant before suit is filed, Ark. Stat. Ann. § 34-2617 (Supp. 1981), for what reason I cannot imagine.

If there is one basic principle that runs throughout our law it is that equality of treatment is to be the rule. Art. 2, Sec. 18 of the Arkansas Constitution states:

> The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

Art. 2, Sec. 13 reads:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformable to the laws.

Art. 2, Sec. 3 reads:

> The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen

> ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

By an initiative petition the people amended the Arkansas Constitution to prohibit the legislature from passing any local or special act. Amend. 14, Ark. CONST. And the list could go on of the attitude of the law regarding grants of special privileges. These principles alone are enough to warrant strict construction of the statute in question.

The medical profession no doubt deserves some privileges because of its service to mankind. But it does not deserve a form of immunity from accountability for its negligent acts which are not caused by any lapse of professional, technical or skilled judgment. That profession should be accountable for its ordinary acts of negligence just like the rest of us.

The issue is not before us as to whether the legislature has the authority to decide procedural matters.

PURTLE, J., and HAYS, J., join in this dissent.

Betty VERMILLION and Ken VERMILLION *v.* Roger PETERSON d/b/a PETERSON CONCRETE CO. et al

82-18 630 S.W. 2d 30

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*Gordon & Gordon, P.A.*, by: *Allen Gordon*, for appellants.

*Laser, Sharp & Huckabay, P.A.*, for appellant, Michael M. Pinson.

*Matthews & Sanders*, by: *Roy Gene Sanders*, for appellee, Mickey E. Glover.

RICHARD B. ADKISSON, Chief Justice. Appellant, Betty Vermillion, was injured on April 9, 1979, in a multi-vehicle collision in Faulkner County. She and her husband brought suit, alleging negligence by the drivers of the other two automobiles involved in the collision. At trial, appellants introduced into evidence a packet of medical bills, one of which had "Prudential" typed in the space designated for "hospitalization insurance company." During closing arguments the attorney for two of the appellees, Peterson Concrete Company and its driver, Michael M. Pinson, stated that Betty Vermillion's medical bills had apparently already been paid under Prudential policy no. 361-20-8469, but that she had not informed the jury of that fact and would have them pay her again for those same expenses. Appellants moved for a mistrial or, in the alternative, an admonition directing the jury to disregard this statement. The trial court denied both motions. On appeal we reverse.

We have frequently held that the unnecessary injection of the existence of insurance into a case is reversible error, unless it is relevant to some issue in the case. *Pickard* v. *Stewart*, 253 Ark. 1063, 491 S.W. 2d 46 (1973). Here, the fact that Prudential may have paid appellant's medical bills is not relevant to any issue being litigated.

Also, we cannot say that appellant put insurance into issue by the mere fact that "Prudential" was typed on one of the bills. This bill was only one of several in a packet of bills introduced by appellant, and appellant did nothing to call the jury's attention to the space or the word "Prudential." Even if the jury did see "Prudential" while examining the bills, there was nothing on the bill or in the testimony to indicate that Prudential had paid it.

Appellees argue that the error was harmless since the jury found that the accident was not caused by the negligence of the appellees. This argument overlooks the fact that the jury could have concluded there was no need to find appellees negligent and assess damages when appellant's bills had already been paid. We stated in *Amos* v. *Stroud,* 252 Ark. 1100, 482 S.W. 2d 592 (1972) that recoveries from collateral sources do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result.

When, as here, there has been an intentional and deliberate reference to insurance when it was not an issue in the case and when the opposing party had not opened the door for its admission, the declaration of a mistrial is the proper remedy. *Pickard* v. *Stewart, supra.*

Even though the attorney for appellee, Glover, was blameless, a reversal as to Glover is unavoidable because the positions of the appellants are inseparable under the circumstances of this case. And, the prejudicial remark did accrue to Glover's benefit.

Reversed and remanded.

Earl A. GIVENS and his wife *v.* Robert HIXSON

81-243 631 S.W. 2d 263

Supreme Court of Arkansas
Opinion delivered March 29, 1982
[Rehearing denied May 3, 1982.]

*Jay W. Dickey, Jr.,* for appellants.

*Laser, Sharp & Huckabay,* for appellee.

GEORGE ROSE SMITH, Justice. In January, 1980, the plaintiff Hixson employed the defendant Givens to manage

Hixson's 800-acre farm property for one year. Givens went to work on February 1, but Hixson discharged him on March 19. When Hixson brought this action in unlawful detainer to recover possession of the house that Givens was occupying on the farm, Givens and his wife filed a counterclaim in which Givens sought damages for breach of contract and both he and his wife sought damages in tort for severe emotional distress and bodily harm caused by the alleged outrageous manner in which Givens was discharged. On the basis of the discovery depositions of both Hixson and Givens, Hixson moved for a summary judgment with respect to the tort claim only. This appeal from the partial summary judgment granting that motion comes to us as a tort case. Rule 29 (1) (o). The order is appealable. *Findley* v. *Time Ins. Co.,* 264 Ark. 647, 573 S.W. 2d 908 (1978).

When, as here, the movant makes a prima facie case for a summary judgment, the other party must discard the cloak of formal allegations and meet proof with proof by showing that an issue of fact exists. *Cummings, Inc.* v. *Beardsley,* 271 Ark. 596, 609 S.W. 2d 66 (1980). We therefore disregard arguments based on the pleadings, such as the assertion that Hixson enticed Givens away from his former employer, and state the actual pertinent proof in its light most favorable to Givens.

Givens testified on discovery that in January, 1980, after having managed J. P. Walt's farm, then 1,600 acres, for 21 years, he had trouble finding the necessary workers for that sized farm and decided to seek a job on a smaller place. His inquiries led him to apply to Hixson for the managership of Hixson's 800-acre place. After the two men had agreed upon a one-year contract Givens for the first time told Walt that he was changing jobs.

On March 17 Hixson told Givens that he was dissatisfied with his work. On March 19 Hixson discharged Givens while the two men were outside a John Deere store, where Hixson thought Givens had been spending too much time idling. No one else was present. Givens's total testimony about the firing amounted to this: Hixson's face was red, and he talked "like he wanted to jump all over me. Said, 'We're

through. You don't work for me anymore.' Told me to carry the truck and park it, and said: 'I'll put you in the road.' Just like that." In somewhat different language Givens also described the incident in these words: "[H]e said, 'We're through.' I asked him what he meant. He said, 'You don't work for me anymore.' He said, 'You haven't been doing a thing all morning, but sitting down there on that stool around that fire.'"

Givens also testified that after the firing he was depressed, could not sleep or eat, lost weight, and entered a hospital a month later (apparently owing to a heart condition). He testified, however, that he had been hospitalized for angina pains in 1977 and had been taking medicine every day, that he had told Hixson that he was in pretty good health, and that Hixson knew nothing special about Givens's condition and had not been told that Givens was easily upset.

The new and still developing tort of outrage is not easily established. It requires clear-cut proof. "Liability has been found *only* [our italics] where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement of Torts (2d), § 46, Comment *d* (1965); *M.B.M. Co.* v. *Counce,* 268 Ark. 269, 596 S.W. 2d 681 (1980). It is for the trial court to determine, in the first instance, whether the conduct may reasonably be regarded as so outrageous as to permit recovery. Restatement, *id.,* Comment *h.* Merely describing conduct as outrageous does not make it so. If Givens's testimony presents an issue of fact, then any employee who is abruptly discharged by an angry boss is entitled to have the asserted tort submitted to a jury. That is not the law. The trial judge was unquestionably right in granting the partial summary judgment. The action for breach of contract is still pending in the trial court and is not involved on this appeal.

Affirmed.

HAYS, J., dissents.

STEELE HAYS, Justice. I wholly disagree with the view that appellant's cause of action should be summarily dismissed. I believe a tortious wrong has been alleged in his pleadings and supported in his deposition sufficient for submission to the jury.

I see no rational distinction between appellant's claim and that of Shirley Ann Counce, reported in *M.B.M. Co.* v. *Counce,* 268 Ark. 269, 596 S.W. 2d 681 (1980), where we unanimously upheld the Court of Appeals in reversing the granting of summary judgment by the trial court. In fact, this case seems stronger. Ms. Counce was accused only indirectly of dishonesty, whereas appellant was accused directly (and falsely) of laziness and neglect, qualities equally repugnant to employment. Ms. Counce's employment was terminable at will, whereas appellant was hired for a year. The time, the manner and the aftermath of appellant's firing was insensitive, if not abusive.

In sum, appellant contends he gave up a job he had held for 22 years as farm manager to accept appellee's offer of a higher salary plus other benefits. He was hired to work from February 1 to December 31 and was told that appellee knew nothing about farming and that he was expected to manage the farm without interference. He was promised a new home, a truck, bonus and vacation. Six weeks later (too late to find comparable employment) he was fired, not for incompetence or neglect, but on the false accusation that he was loafing. Appellant described the firing, outside a John Deere dealership, as follows: "[appellee] said, 'We're through. You don't work for me anymore.' Told me to carry the truck back and park it and said, 'I'll put you in the road.' Just like that." Two weeks later eviction proceedings were brought against appellant and his family, not from a need of the dwelling, which remained vacant, and executed while appellant was hospitalized for mental and emotional disturbances which he attributes to the alleged mistreatment.

Viewing these circumstances as a whole, and giving them the fullest import required by our cases, I am unwilling to say as a matter of law appellant has no recourse in tort. I believe reasonable minds could reach different con-

clusions as to whether appellee's conduct meets the test of tortious outrage. I would reverse and remand the case for trial.

## ARKANSAS EMPLOYMENT SECURITY DIVISION *v.* NATIONAL BAPTIST CONVENTION U.S.A., INC.; NATIONAL BAPTIST HOTEL AND BATH HOUSE

81-248 630 S.W. 2d 31

Supreme Court of Arkansas
Opinion delivered March 29, 1982
[Rehearing denied April 19, 1982.*]

*PURTLE, J., would grant the petition.

*Herrn Northcutt,* for petitioner.

*Campbell & Campbell,* by: *R. Scott Campbell,* for respondent.

GEORGE ROSE SMITH, Justice. The question is whether the respondent, National Baptist Convention U.S.A., Inc., is required to pay the state employment security tax upon the payroll of employees at the Convention's combined hotel and bathhouse in Hot Springs.

The Convention is an association of some 7,000 Baptist churches throughout the United States. It owns the hotel-bathhouse. That establishment is run for profit and is open to the public except for a week every January when the Convention holds its midwinter meeting there. In this proceeding the Convention applied to the Employment Security Division for an exemption from the payroll tax. The Board of Review denied the exemption, finding that "the employees of the hotel and bathhouse are not employed by nor paid by the National Baptist Convention. Rather they are paid from a bank account carried in the name of the National Baptist Hotel and Bath House maintained in Hot Springs." The decision of the Board of Review was affirmed by the circuit court, but reversed by the Court of Appeals. *National Baptist Convention* v. *Ark. Employment Security Division,* 3 Ark. App. 189, 623 S.W. 2d 852 (1981). We granted certiorari to review a tax question of significant public interest and a point of statutory construction.

The issue is one of law, there being no dispute in the facts. The Convention's governing board appoints a three-member commission to supervise the Hot Springs estab-

lishment. When the case was presented below, one commissioner lived in Little Rock and another in New Orleans, the third position being vacant. The commissioners had employed E. L. Puckett as manager of the facility, and he in turn employed the persons working there. Net profits belong to the Convention.

The exemption now claimed by the Convention rests upon a subsection of our Employment Security Act (copied verbatim from the federal statute, 26 U.S.C. § 3309 [b]), which provides that the term "employment" does not apply to service performed:

> (i) in the employ of (I) a church or convention or association of churches, or (II) *an organization* [our italics] which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches. [Ark. Stat. Ann. § 81-1103 (i) (1) (D) (Repl. 1976).]

Thus the Convention is exempt under Clause I if the hotel and bathhouse staff are its employees. On the other hand, since the facility is not operated primarily for religious purposes, there is no tax exemption if the workers are employed by some subordinate organization controlled by the Convention.

The pivotal question, then, is: What is an organization under Clause II?

The Employment Security Act, owing to its many subsections, special provisions, and exceptions, appears at first blush to be complicated, but the statutory scheme as it applies to this case is actually simple. The taxes now in controversy, called contributions, are levied upon employers as payroll taxes. § 81-1108 (a) and (b). Such contributions are defined as the money to be paid by an "employing unit" having individuals in its employ. § 81-1103 (d). The legislative definition of an employing unit is decisive of this dispute:

> "Employing unit" means any individual or *type of organization* [our italics], including any partnership, association, trust, estate, joint-stock company, insurance company or corporation . . . which has . . . one or more individuals performing services for it within this State. [§ 81-1103 (g).]

Thereafter, in this same Section 81-1103, the word *organization* is repeatedly used by itself, unquestionably as a shorthand reference back to the earlier definition that includes a partnership, association, trust, and so on. Thus what the section does is simply to define an employing unit (employer) as either an individual or an organization. As far as this case is concerned, the language of the statute contemplates no other form of employing unit.

The exemption now in question applies under Clause I to an "association of churches," which precisely describes the Baptist Convention, or applies under Clause II to some subordinate organization qualifying as an employing unit. No such entity exists in this case. The three-member commission does not have title to the property, has no funds of its own, is not a partnership or other form of organization, and merely employs Puckett to manage the facility. Thus there is wholly lacking the intermediate employing unit that would be required to pay the taxes if the Convention's own exemption is not applicable.

If there were any remaining doubt about the legislative intention to make subordinate personnel the direct employees of the first higher organization qualifying as an employing unit, that doubt would be completely dispelled by the following explicit subparagraph in the definition of an employing unit:

> Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit [here the Convention] shall be deemed to be engaged by such employing unit for all the purposes of this act, *whether such individual was hired or paid directly by such employing unit or by such person,* provided the employing unit had actual

> or constructive knowledge of the work. [Our italics.] § 81-1103 (g) (2).

Hence neither the supervisory commission nor the manager of the establishment supplants the Convention as the employing unit. The Convention is therefore exempt under Clause I, the alternative Clause II being inapplicable.

We mention two minor aspects of the case. The Board of Review referred to our constitutional exemption of churches from property taxes, Ark. Const., Art. 16, § 5, pointing out that the hotel-bathhouse is not used for church purposes. This case, however, involves an excise tax, not a property tax. Second, counsel for the Employment Security Division quotes this observation from a tax-service publication: "Thus, the service of the janitor of a church is excluded, but the service of a janitor for a separately incorporated college, although it may be church related, is covered." CCH Unemployment Insurance Reports, § 1356, p. 4349 (1981). Of course the controlling difference is that in the example given the incorporated college would be a taxable organization, but there is no such taxable entity to be interposed in the case before us.

Affirmed.

ADKISSON, C.J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent because I believe the majority has misinterpreted the employment security act. The part of the act in question is properly stated by the majority but, nevertheless, I wish to repeat it at this point:

> . . . the term "employment" does not apply to service performed:
>
> (i) in the employ of (I) a church or convention or association of churches, or (II) an organization which is *operated primarily for religious purposes* [my italics]

> and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches . . . (Ark. Stat. Ann. § 81-1103 (i) (1) (D) (Repl. 1976).)

It seems to me the majority holds that Clauses I and II are exactly the same in application. In other words, the majority's holding is that Clause II means any organization which is operated, supervised, controlled or principally supported by a church, convention or association of churches is exempt. This renders useless the words " . . . which is operated principally for religious purposes . . . " The majority has emphasized the two words "an organization" which is merely a descriptive phrase and has nothing to do with the intent involved. This section is designed to exempt the classifications stated in Clause I above and those in Clause II so long as they are operated principally for religious purposes.

Under the holding of the majority it is quite possible that a church could own a hog farm, furniture factory, ammunition supply depot, or chain of grocery stores and still be exempt from paying employment security taxes. I cannot bring myself to believe that such was the legislative intention when this was enacted. Theoretically, the churches, conventions, associations and other religious organizations could monopolize the employment market and entirely defeat the purposes of unemployment benefits.

The National Baptist Convention U.S.A., Inc. has its headquarters in Chicago, Illinois. It consists of 7,000 churches. One of the churches is not the Hot Springs Hotel and Bath House. In fact, the convention owns the bath house in Hot Springs which is in direct competition with other bath houses at least 90% of the time. If there is any religious purpose connected with the National Baptist Hotel and Bath House, other than the occasional meetings attended by church members, it is not revealed in the record. Admittedly, the religious use of the bath house amounts to less than 10% of the total use of the facility. None of the funds received from the operation of this business is deposited to the credit of the National Baptist Convention U.S.A., Inc. To the

contrary, the funds are deposited either to the account of the National Baptist Sanitarium or National Baptist Hotel. It is from these last mentioned funds that the employees are paid. No employees are paid by the National Baptist Convention U.S.A., Inc. The funds from which they are paid are generated by a business operated in head-to-head competition with other commercial businesses in Hot Springs, Arkansas.

In my opinion, when a church ventures outside its religious purposes and enters into the private business sector it should be guided by and subject to the same laws as others engaged in the same type business. If one person was employed by the National Baptist Bath House and another person by a neighboring bath house, each performing the same type of work until discharged through no fault of their own, the one could draw unemployment benefits but the one who had been employed by the Baptist Bath House could not draw benefits. This cannot conform to the intent of the legislative enactments as embodied in the plain language of the employment security act.

I cannot find any evidence in the record that the bath house is "operated principally for religious purposes," which is what it would take to convince me that the enterprise should be exempted. Therefore, I would reverse the holding of the Court of Appeals and reinstate the circuit court's judgment affirming the Employment Security Division.

Wardell WILLIAMS and TG&Y STORES
*v.* Kinerd GATES et ux

81-245 630 S.W. 2d 34

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*Rose Law Firm* and *Wright, Lindsey & Jennings,* for appellants.

*David Hodges* and *Henry Hodges,* for appellees.

FRANK HOLT, Justice. This appeal results from a jury's finding that the appellants were liable for injuries received by appellees as a result of a traffic accident. Appellee Kinerd Gates was awarded $25,000 damages and his wife, appellee Christine Gates, was awarded $5,000 for loss of consortium. Appellants first contend that the court erred in excluding the proffered testimony of the investigating officer regarding

similar automobile accidents in the near vicinity within the general time frame.

According to Gates, on January 19, 1979, he was driving his pickup truck when a vehicle ahead of him slowed and stopped to avoid a dog crossing the highway. Gates, driving about 50 m.p.h., stopped about 15′ behind the vehicle either to avoid striking the dog, the forward vehicle, or both. Although the weather was foggy, it was no real problem. It was not such that "you couldn't see your hand in front of you . . . . " "You could see pretty good out there." According to appellant Williams, an employee of appellant TG&Y Stores, he had followed Gates about a half mile and was approximately seven car lengths behind him traveling about 35 m.p.h. Upon seeing Gates' brake lights about 140′ away, he applied his brakes but his vehicle "hydroplaned," causing him to strike the rear of the Gates vehicle. He described the weather conditions as being very foggy, misting rain, and "visibility was very low." The weather conditions were such that it "would have been impossible to have avoided running into the rear of his vehicle . . . Well, the weather conditions played a major part, because it was very foggy. And visibility was very low."

Appellants proffered the investigating officer's testimony that he had received numerous reports of similar accidents in the vicinity which had occurred in the area about the same time as the accident here. When he arrived at the scene of this accident some ten minutes afterwards, a tractor trailer rig had hit appellant Williams' vehicle, which was near the highway shoulder. A Trailways bus had gone into the median near the scene. The officer subsequently investigated two other accidents within the hour and two or three miles of this one. The officer testified he was not present when any of the accidents occurred and did not know what the weather conditions were from noon until 1 p.m. when he came to this accident scene. Appellants argue that this proffered testimony of these other accidents was "relevant evidence," Rules 401 and 402, Uniform Rules of Evidence, that the weather conditions contributed to the accident. Further, its probative value was for the jury. The court refused the proffer.

Appellants cite *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S.W. 885 (1915); and *Ark. Power & Light Co.* v. *Johnson,* 260 Ark. 237, 538 S.W. 2d 541 (1976), as authority for the admissibility of the proffered testimony. We first observe that the facts in these cases are quite dissimilar to those in the instant case. In *Coppedge,* the condition presented as being similar was that the gas pressure was improperly maintained in a pipe that supplied the Coppedge house as well as other customers in the area. The Coppedge stoves and those of other customers were essentially the same. In *Johnson* it appears that the parties there agreed that the physical conditions existing at the time of the subsequent accident were identical. Here the facts are obviously dissimilar. Furthermore, in *Coppedge* and *Johnson* the court allowed proof of similarity of conditions and we upheld the rulings on the basis that it was not an abuse of discretion. Here, the court refused the proffer. In *Johnson,* we said:

> Admission of evidence of subsequent incidents, like that of prior incidents poses the question of relevancy, even though the admission of the former must be approached with greater caution than the latter. Questions of relevancy address themselves to the sound judicial discretion of the trial judge. The exercise of that discretion should not be reversed on appeal except for manifest abuse.

Here, suffice it to say that appellants have not demonstrated there was a manifest abuse of discretion by the trial court.

Appellants next contend that the trial court erred in instructing the jury (AMI 2201 and 2204) that future medical expenses are a proper element of damages. They argue that these expenses are based entirely on speculation and conjecture. We cannot agree. The appellee Gates, 62 years of age, testified that he cannot turn his head very well; his nerves are "shot" since the accident, and he cannot sleep at night; he is often stiff all over; he cannot help with chores around the house; he has had to discontinue his outdoor recreational activities, such as fishing and hunting, as a result of the accident. His injury has required hospitaliza-

tion, medication and rehabilitative treatments. He is currently on medication and treatments which provide only temporary relief. As of the date of trial appellee's medical expenses were $5,599.32.

Gates produced medical testimony that as a result of the accident he suffered severely from a cervical sprain syndrome or a neck injury. He was hospitalized on four occasions: January 20-February 2, 1979; March 10-20, 1979; May 14-16, 1979; and September 16-22, 1979. He has been continuously on medication and some therapy. There is damage to the soft tissue in the neck which will cause intermittent difficulty for the rest of his life and will require future medication. An examination one month prior to trial, which was two years and three months after the accident, indicated the residual presence of chronic pain syndrome; and an arthritic condition, which became symptomatic after the accident, is irreversible and would progressively worsen. X-rays indicate some disc protrusion exists. Gates would suffer "from now on a chronic pain in the cervical area." Gates was regarded as being in good health before the accident.

We have held that it is not speculation and conjecture to calculate future medical expenses that have accrued as of the date of trial. *Belford* v. *Humphrey,* 244 Ark. 211, 424 S.W. 2d 526 (1968); *Haney* v. *Noble,* 250 Ark. 557, 466 S.W. 2d 467 (1971); and *Ark. Power & Light Co.* v. *Heyligers,* 188 Ark. 815, 67 S.W. 2d 1021 (1934). Here, in addition to the history of the medical expenses which had accrued and the seriousness of the injury, there is also a degree of medical certainty as to the need for future medication. We hold there is sufficient evidence from which the jury could fairly infer that future expenses for medicine and medical attention will be necessary.

Affirmed.

Ron HAMBY *v.* Waltrand Amelia HASKINS

81-241 630 S.W. 2d 37

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*Rex M. Terry,* of *Hardin, Jesson & Dawson,* for appellant.

*Robert R. Cloar,* for appellee.

ROBERT H. DUDLEY, Justice. Appellee Waltrand Amelia Haskins and her sister were driving in rural Sebastian County one afternoon in June of 1976 looking for a garage sale. After they were unsuccessful in finding its location, they stopped at appellant Ron Hamby's house to ask directions. The yard was not fenced and there was a large dog on the ground near the porch. Appellee got out of the car, walked up on the porch and knocked on the door. No one answered so appellee stepped off the porch and started walking back to the car when the dog bit her on the left calf and subsequently began barking. Appellee got back in the car and her sister drove to the police station in nearby Hackett. The Hackett police officers went back to appel-

lant's residence and found it necessary to subdue the snarling dog with mace. An ambulance was called and appellee was transported to a hospital where she was treated and released. Because of gangrene and other complications, appellee was admitted to the hospital on two later occasions. Her medical bills totaled $1,734.45 and her loss of wages over a two-month period equaled $800. Appellee's complaint alleged strict liability and negligence on appellant's part as owner of a vicious dog and sought $20,000 in damages. Appellant responded that appellee was a trespasser on his property and that he had no knowledge of the vicious nature of the dog. Trial by jury resulted in a verdict of $12,000. We affirm.

Appellant argues that the evidence is insufficient to support a jury verdict because the appellee did not prove that the dog had a propensity to injure and that the owner had knowledge of those vicious tendencies. In *Bradley* v. *Hendricks,* 251 Ark. 733, 474 S.W. 2d 677 (1972) this court said:

> . . . It is well settled in Arkansas that when a person is injured by a domestic animal legally permitted to run at large by its owner, in order for the injured person to recover damages from the owner without the necessity of proving the owner's negligence, it must be shown that the animal has vicious tendencies or dangerous propensities and that the owner knew, or should have known, of such tendencies or propensities . . . The evidence as to the owner's knowledge boils down to a question of credibility and this too, is a question for the jury.

The jury found that appellant knew that the dog had vicious tendencies and there was substantial evidence for that finding. There was testimony that appellant knew the dog had been penned up by its prior owner. There was testimony that when police officers went back to appellant's residence to investigate, the dog began barking and snarling and attempted to bite both officers and they found it necessary to subdue the dog by the use of two cans of mace. The dog was then tied up for ten days in order to test it for rabies and appellant subsequently allowed the dog to roam free, even

though he knew it had bitten appellee. Subsequent conduct is admissible to prove the particular animal's dangerous nature. *Finley* v. *Smith,* 240 Ark. 323, 399 S.W. 2d 271 (1966). And language in *Reeves* v. *John A. Cooper Co.,* 304 F. Supp. 828 (W.D. Ark. 1964) is dispositive of appellant's claim that he did not have knowledge of the dangerous propensity of his dog.

> The rule of ascertaining scienter is that the knowledge need not necessarily be actual, in the ordinary acceptation of that term, either constructive or imputed notice being sufficient, and if in the exercise of reasonable diligence and common prudence the owner ought to have known that his animal was dangerously inclined and might, if unrestrained, inflict injury upon the person or property of another, he is chargeable with actual notice of vicious acts committed by it.

In determining the sufficiency of the evidence, we review the evidence and all of its reasonable inferences in the light most favorable to the appellee and affirm if there is any substantial evidence to support the finding of the jury. *Thrifty Rent-A-Car* v. *Jeffrey,* 257 Ark. 904, 520 S.W. 2d 304 (1975). Viewing the evidence and its inferences in the light most favorable to appellee there is substantial circumstantial evidence from which the jury could find that the appellant knew or ought to have known, of the vicious nature of the dog. Appellant continues this argument by contending that since he testified that he did not have actual knowledge of the dog's vicious tendencies the evidence is undisputed. But a party's testimony cannot be considered undisputed or uncontradicted. *Roberts* v. *Simpson,* 275 Ark. 181, 628 S.W. 2d 308 (1982); *Old Republic Insurance Co.* v. *Alexander,* 245 Ark. 1029, 436 S.W. 2d 829 (1969).

Appellant's second point for reversal is that the verdict was not supported by any substantial evidence of willful and wanton misconduct on his part. He urges this standard applies because appellee was classified as a trespasser in the instructions given to the jury and the only duty owed to a trespasser is not to willfully or wantonly injure him after his presence is known. *Southwestern Bell Telephone Co.* v.

*Davis,* 247 Ark. 381, 445 S.W. 2d 505 (1969); AMI 1102. [There were no objections to the instructions and we do not consider unargued issues. However, we do note that the doctrine of strict liability is the law in Arkansas with regard to an animal known to be vicious. *Strange* v. *Stovall,* 261 Ark. 53, 546 S.W. 2d 421 (1977)]. Appellant asserts that because neither he nor any of his family were at home when the incident took place then he could not be guilty of this type of gross negligence. The jury obviously found that the appellant was guilty of willful or wanton conduct by not having the dog penned up. The testimony showed that the dog's prior owner kept it penned up and this evidence, coupled with evidence that appellant allowed the dog to continue to roam free even after it bit appellee, was sufficient evidence on which to base the verdict.

The instruction may have been more favorable than necessary as the Restatement (Second) of Torts, § 330, p. 174, referring to a "license created otherwise than by words" is as follows:

> . . . "The well-established usages of a civilized and Christian community" entitle everyone to assume that the possessor of land is willing to permit him to enter for certain purposes until a particular possessor expresses unwillingness to admit him. Thus a traveler who is overtaken by a violent storm or who has lost his way, is entitled to assume that there is no objection to his going to a neighboring house for shelter or direction . . . .

This common sense statement is applicable to the case before us.

Appellant next contends that the matter of insurance was improperly included in voir dire. Counsel for appellee asked the jury panel if any of them, their spouses or close relatives were employed by an insurance carrier. One prospective juror mentioned that his wife had been employed by the company which he thought to be appellant's insurance company until a short time ago. A few others also mentioned connections with specific insurance carriers.

Appellant objected to the fact that the panel had been placed on notice that insurance was involved. The rule in Arkansas as to this point seems clear. In *Dedmon* v. *Thalheimer,* 226 Ark. 402, 290 S.W. 2d 16 (1956), this court said, "The test of whether counsel may ask questions of veniremen in regard to insurance is whether the questions are propounded in good faith." Since insurance was involved here, the question of good faith is settled. This issue was also discussed in *King* v. *Westlake,* 264 Ark. 555, 572 S.W. 2d 841 (1978) where this court said:

> . . . the purpose of voir dire examination is to enable counsel to ascertain whether there is ground for a challenge of a juror for cause, or for a peremptory challenge and that so long as counsel acts in good faith, he may in one form or another, question prospective jurors respecting their interest in or connection with liability insurance companies.

The general questions asked by appellee did not violate this rule. *DeLong* v. *Green,* 229 Ark. 100, 313 S.W. 2d 370 (1958).

Appellant's last point for reversal is that the damages awarded were excessive. Appellee's medical bills and lost wages totaled $2,534.55 and she was awarded $12,000. There was evidence as to pain and suffering by the appellee as she endured two subsequent hospitalizations, one for the removal of gangrenous tissue and the other for skin grafting. Appellee also spent two months recuperating at her parents' home with her leg elevated most of this time. Appellee now has two three-inch square scars which are clearly visible five years after the accident. There is no definite and satisfactory rule to measure compensation for pain and suffering and the amount of damages must depend on the circumstances of each particular case. *Morrison* v. *Lowe,* 274 Ark. 358, 625 S.W. 2d 452 (1981). Compensation for pain and suffering must be left largely to the sound discretion of a trial jury and the conclusion reached by it should not be disturbed unless the award is clearly excessive. *Missouri Pacific Railroad Co.* v. *Hendrix,* 169 Ark. 825, 277 S.W. 337 (1925). We do not find the award of damages so shocking that we will order a remittitur.

Affirmed.

ADKISSON, C.J., concurs.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. The facts and the law are equally significant in this case. Only an in-depth examination of both will reveal whether we have arrived at the right decision.

The appellee, Mrs. Haskins, was bitten by a dog at the rural residence of the appellant, Ron Hamby. She and her sister were in the vicinity of the appellant's farm looking for a yard sale. They stopped at the appellant's house to seek directions. They saw no vehicles nor anyone about the place. The appellee went to the door and, as she was returning to her vehicle, she said a "black and white dog" about the size of a collie bit her. They reported the matter to the local police in Hackett. The sister, two police officers, and the employer of the appellee's sister, returned to the appellant's house. Apparently both officers got out, saw a dog which growled and snarled at them, and then one of the officers "maced" the animal. The appellant was told of the incident and he put the animal up for the required number of days. Although the appellee sought medical treatment, gangrene set in and she suffered real injury. Later, the son of the appellant said he shot the dog because it was limping and he thought it had been struck by a vehicle.

The legal duty of an owner of a domestic animal is fairly well established. The owner has a duty to the public to either pen up that animal or warn the public of its presence. But there is no such duty unless an owner knows or clearly should have known the animal is vicious. *Bradley* v. *Hendricks,* 251 Ark. 733, 474 S.W. 2d 677 (1972). Of course the animal's location at the time of the injury is significant. In every case that we have decided, the animal has either been off the premises of the owner or in a public place. Furthermore, in every case we have decided, the evidence was substantial that the owner knew or clearly should have

known the animal was vicious or had a propensity to harm people.

In *Holt* v. *Leslie,* 116 Ark. 433, 173 S.W. 191 (1915), the Missouri & North Arkansas Railroad was sued when a bull dog bit the plaintiff. The dog had been shipped to Leslie, Arkansas from Missouri. It arrived in a crate, chained. The crate was marked, "Be careful. Hands off." There was an abundance of other credible evidence that the station master knew the dog was dangerous. Even so, he removed the dog from its crate and allowed his son to walk it about the station. (Evidently the man to whom the dog was shipped did not want it and delayed acceptance.) We upheld a verdict against the railroad and recognized the general doctrine regarding the liability of owners of domestic animals:

> If one knowingly keeps a vicious or dangerous animal, one accustomed to bite mankind, he is liable for injuries done by such animal, without proof of negligence as to the manner in which the animal was kept or handled. The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (*except as to trespassers*) and renders him liable in damages to one injured by such animal. [Emphasis added.]

The *Holt* decision is significant for several reasons: (1) It was at a public place, a railroad depot; and, (2) The agent had direct knowledge the animal was dangerous before it bit the plaintiff.

In *Field* v. *Viraldo,* 141 Ark. 32, 216 S.W. 8 (1919), we dealt with a vicious bull. *It attacked the appellee one night at her home immediately in front of her house.* There was considerable evidence the bull had violent propensities when loose, as it had been on two prior occasions. We held the rule to be:

> . . . that the owner is liable for a *trespassing* animal whether he knows of the vicious propensities or not, and is liable for injuries inflicted by a vicious animal, not trespassing, *only in case of knowledge on the part*

> *of the owner of such propensities of the animal.* The liability in one case rests on the fact that the animal is trespassing, and in the other on the *known* vicious propensities of the animal, the law placing on the owner the duty of restraining the animal of *known* vicious propensities. . . . [Emphasis added.]

*McIntyre* v. *Prater,* 189 Ark. 596, 74 S.W. 2d 639 (1934) is another vicious bull case. This bull attacked the plaintiff *while she was in her yard picking up wood.* It had broken out of its pasture. The plaintiff testified that the owner of the bull told her, " . . . the bull was vicious; and that it had been necessary to remove the bull from the farm operated by his brother to prevent the animal from injuring the children." Needless to say, we reversed a verdict in favor of the owner of the bull, holding it was for the jury to decide whether the owner knew the animal was vicious.

In *Bradley* v. *Hendricks, supra,* we considered a case of a dog biting a child. The incident occurred in the City of Morrilton, at the house next door to the child's residence. It did not occur at the residence of the owner of the dog. In *Bradley,* for the first time, we stated that an owner of a domestic animal could be held liable because the owner "*should have known* of such tendencies or propensities." But we were careful in applying that statement. We prefaced our decision in *Bradley* with the statement that " . . . The evidence in this case presents a close and difficult question" on substantial evidence. The evidence the dog had vicious propensities came from three witnesses. A Mr. Hendricks said the dog growled at him on more than one occasion as he went to work, and growled at his daughter and nipped at her heels when she passed in front of the owner's house. Two other witnesses said the dog had growled at them. We found this to be substantial evidence.

In *Strange* v. *Stovall,* 261 Ark. 53, 546 S.W. 2d 421 (1977), a child was bitten by a dog known to be vicious. The incident occurred at the child's grandparents' home. The dog belonged to relatives visiting the grandparents. The owner admitted to two witnesses the animal was mean and had bitten him several times.

How does this case square with our prior decisions? The most obvious difference, of course, is the fact that in this case the appellee was a trespasser. And the incident occurred at the owner's residence, a rural farm. Equally important, there is no evidence at all the owner knew the dog was vicious *before* this incident.

The owner in this case had a right to keep a dog at his farm and a right to expect people not to trespass. The appellee was an admitted trespasser on his property and the only duty owed her was not to injure her by a willful and wanton act. *Southwestern Bell Telephone Co.* v. *Davis,* 247 Ark. 381, 445 S.W. 2d 505 (1969). That legal relationship places the appellee in a position of having to meet a heavy burden of proof, much heavier than that of one who is an invitee, as was the case of the bull dog at the railroad depot, or, in every other case cited, where the incident occurred *off* the premises of the owner.

The jury was instructed in this case that the appellee was a trespasser and that the owner of the property owed the trespasser no duty until he *knew* of the presence of the trespasser on his property. And, most significantly, the jury was instructed, "An owner or person having custody of a domestic animal which he *knows* has a tendency to injure other persons keeps custody of that animal at his own risk and is liable for injury and damage caused by the animal. If, however, the damage occurs upon the defendant's premises and plaintiff is a trespasser, then the owner or keeper of the dog is only liable for injuries if he acted with willful and wanton misconduct which was the proximate cause of plaintiff's injury."

Of course if the owner in this case knew the dog was vicious, or even if he clearly should have known the dog was vicious, he should have either penned up the animal or posted a warning. But where is the substantial evidence the owner knew or should have known that in this case? And there is no evidence he knew of the presence of the trespasser.

The majority recites three facts to support its conclusions. I submit that two of them cannot stand examination

and the third, while more credible, cannot alone support a verdict.

The first fact cited is the bare statement the owner knew the dog had been penned up by its prior owner. The majority implies that the owner knew the dog had been penned up by its owner *because* it was vicious or had vicious propensities. I respectfully suggest the majority has inaccurately characterized the evidence. Only the record can settle my disagreement with the majority opinion.

The son of the appellant got this dog from a neighbor farmer about two weeks before the incident. The son had been with the dog when he fed the livestock of the neighbor who was absent from time to time. The son testified:

> Q. He kept the dog penned up there did he not?
>
> A. I let it run out some, but when I wasn't there I penned it up.
>
> . . .
>
> Q. Did Hardwick [the previous owner] keep the dog penned up or tied up?
>
> A. No, Don didn't tie him — just when nobody was there.

There is no evidence that the son knew the dog was vicious before it was given to him or knew it had been penned up because it was vicious.

The second fact's import eludes me entirely. The majority finds that since the owner penned up the dog, for the required number of days after the biting, and *then* let the dog loose, that is evidence the owner knew the dog was vicious. How this bears on the issue that the owner should have known the dog would bite before it did, escapes me. If anything, it simply shows the owner did not consider the dog vicious at all. In fact the owner in this case seriously questioned whether his dog actually bit the appellee.

Evidence was offered that a German shepherd ran loose in the neighborhood which was known to have violent propensities.

The third fact used by the majority is the incident with the two policemen, which occurred *after* the appellee was bitten. Neither the appellant nor his son was there. The two policemen got out of their vehicle and when the dog snarled and growled at them, they "maced" it.

The relevant testimony from the officer reads:

Q. You said Mr. Miner [a policeman] used mace on him?

A. Yes.

Q. Did he attempt to bite Miner?

A. We were under the impression he was going to bite. Like I say, he showed his teeth and snarled at Miner and all of this. He was kind of a strange looking dog. He just stood there and looked at you eye to eye. He just stood there and looked at you when you turned your back on him. He was on the offensive.

Q. When you turned your back on him he would then get offensive?

A. Yes, sir. That was the situation we got in to. When Miner first got out and he was standing there looking at him, he was expecting the dog to do something and he didn't; he just stood there and looked at him. And when he started to turn around and turned his back it was when the dog started snarling and growling. Of course at that time, he just unloaded the mace on him.

Q. When he turned his back on him, did the dog approach him from the back?

A. It seems like he did.

. . .

A. Refreshing my memory from the report, the dog did attempt to bite both of the officers while we were there.

Q. Did you do anything to provoke the dog?

A. No, sir.

. . .

Q. When you had this impression that you testified about, you had the impression that the dog was going to bite, was that before or after Officer Miner sprayed him with mace?

A. At that point Officer Miner's weapons were still in the holster and so were mine.

Viewing the testimony of the officers favorably, as we must, they were afraid the dog was going to bite them, but I cannot concede that the evidence was conclusive the dog "attempted to bite" both officers.

There was no evidence offered which showed this particular dog had violent propensities; that anyone knew the dog was vicious; or that anyone knew at any time, any place, or anywhere, that this particular dog had ever growled at, snarled at, or bitten anyone *before* this incident. And that is the issue: What the owner knew before the incident.

With all due respect, the precedent set by the majority opinion in this case is bad for two reasons: First, it completely ignores the duty of an owner of a domestic animal to a trespasser. In all of our cases similar incidents have either occurred off the premises of the owner, or at a public place — not on the private property of the owner. There is no evidence at all that the owner in this case knew that the dog was vicious before the incident. Second, it uses facts to support its conclusions that would not support a verdict against the owner of a domestic animal if our prior

cases control. The majority has not been as careful as we were in the *Bradley* case or its predecessors.

Where is the substantial evidence that this owner should have known of the propensities of this dog *before* the incident? Is an owner strictly liable to a trespasser in such cases based on facts which occur after the fact? That is contrary to AMI 1602 as amended by 1603. *See Strange* v. *Stovall, supra; Finley* v. *Smith,* 240 Ark. 323, 399 S.W. 2d 271 (1966); *Vangilder* v. *Faulk,* 244 Ark. 688, 426 S.W. 2d 821 (1938). Is an owner of a domestic animal to be held liable for an animal's act when there is no evidence at all that he should have known the dog would bite strangers? On his own farm?

I would reverse the judgment and dismiss the case.

Ella Mae THOMAS *v.* Modean GERTSCH, Emmette D. THOMAS, Eula Faye THOMAS, His Wife, and Dewey THOMAS

81-257 630 S.W. 2d 43

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*W. B. Guthrie, Jr., Ltd.,* by: *Robert M. Abney,* for appellant.

*Homer Tanner,* for appellees.

ROBERT H. DUDLEY, Justice. Appellant Ella Mae Thomas filed suit in chancery court alleging that she had been unduly influenced and coerced into relinquishing her dower interest in a 220 acre tract of land previously owned by her late husband and conveyed to their children, the appellees. The warranty deed to this tract was executed on May 21, 1976, and reflects the relinquishment of appellant's dower interest. Appellant alleged in her complaint that at the time of the execution of the deed she was on medication, suffering from mental and physical problems. Her husband died on October 31, 1979, and appellant's complaint was filed on December 3, 1980. Appellees moved for dismissal of appellant's complaint alleging that the appellant had no cause of action because the statute granting her an inchoate right of dower had been declared unconstitutional in *Stokes* v. *Stokes,* 271 Ark. 300, 613 S.W. 2d 372 (1981) and *Hess* v. *Wims,* 272 Ark. 43, 613 S.W. 2d 85 (1981) handed down on February 23, 1981. Appellant responded to this motion by stating that Act 714 of 1981 which was passed in March of 1981 to cure the defects in the dower statutes should be applied in this case. The trial court sustained the motion to dismiss finding that the appellant had no vested right of dower, basing the decision on *Stokes* and *Hess.* We affirm.

Appellant admits that Act 714 of 1981, which was passed to cure the defects in our dower laws and related statutes, is not applied retroactively. *Huffman* v. *Dawkins & Holbrooks,* 273 Ark. 520, 622 S.W. 2d 159 (1981); *Bennett* v. *Bennett,* 275 Ark. 262, 628 S.W. 2d 565 (1982). However, the appellant contends that the trial court erroneously gave *Stokes* and *Hess* a retroactive application. The trial court was correct because the appellees raised the issue of the invalidity of our dower statute before any dower rights were vested in appellant, just as was done in *Stokes*

and *Hess*. The appellant did not have a vested right in lands formerly owned by her husband on the date of his death. "Thus the present appellant . . . is in precisely the same position as were Mrs. Stokes and Mrs. Wims in the earlier cases. Those decisions are not being applied retroactively when we treat her exactly as they were treated." *Hall* v. *Hall, Ex'r,* 274 Ark. 266, 623 S.W. 2d 833 (1981).

Affirmed.

William E. BAXTER *v.* GROBMYER BROTHERS CONSTRUCTION COMPANY et al

81-181 631 S.W. 2d 265

Supreme Court of Arkansas
Opinion delivered March 29, 1982
[Rehearing denied May 3, 1982.*]

*PURTLE, J., would grant rehearing.

*McMath & Leatherman,* by: *Junius Bracy Cross, Jr.,* for appellant.

*Wright, Lindsey & Jennings,* for appellees.

STEELE HAYS, Justice. William E. Baxter, a steel worker for Barg Steel Company, Inc., sustained serious injuries when he fell from a building he was helping to erect. He sued the owner-contractor, Grobmyer Brothers Construction Company, which joined Barg Steel and Carl Nash, d/b/a Nash Masonry Company, as third-party defendants. Both Nash and Barg were subsequently dismissed from the case. Following a jury trial, a verdict in favor of Grobmyer was returned and Baxter appeals, contending that the trial court erroneously instructed the jury by giving AMI 612 on assumption of the risk and in refusing to give AMI 1204 on the standard of care required of a contractor. We believe the jury was correctly instructed.

On June 9, 1977, Baxter, as foreman, and other employees of Barg Steel were installing the structural support

for the roof of a building being constructed by Grobmyer on its property in North Little Rock. The four walls, of concrete block construction, had been completed by Nash Masonry Company. Barg Steel employees were engaged in placing steel beams or "joists," some 32 feet long, lengthwise on the top of the walls to support the decking of the roof. Baxter and another employee were standing opposite each other on the east and west walls receiving the steel joists as they were being lowered by a crane. One joist had been placed in position, parallel to the south wall and one foot away, its ends resting on the east and west walls. Baxter had walked to the center of the south wall to detach the crane's cable from the joist and was returning to his original position to receive another joist; in so doing he lost his balance and fell, resulting in seriously disabling injuries.

The parties have sharply differing views of the cause of Baxter's fall: Baxter contends that one or more of the concrete blocks on the top of the south wall were improperly cemented and shifted under his weight causing him to lose his balance; that in attempting to break his fall, or prevent it, he grabbed the bar joist as he fell. Grobmyer contends that there were no loose blocks and that Baxter fell because he was walking with one foot on the south wall and the other on the unsecured bar joist, which twisted or bowed under his weight, causing him to fall.

Baxter argues first that the court erred in instructing the jury on the defense of assumption of the risk. AMI 612 told the jury that to establish the defense of assumption of the risk Grobmyer must prove: (1) that a dangerous situation existed inconsistent with Baxter's safety; (2) that Baxter knew the danger existed and realized the risk of injury, taking into consideration whether the danger was open and obvious; and (3) that Baxter voluntarily exposed himself to the danger.

Baxter argues, correctly, that the defense of assumption of the risk requires proof that he knew the danger existed and realized the risk he was assuming. He says, also correctly, that Grobmyer produced no proof that he was aware of the

existence of any loose blocks, in fact, Grobmyer denied the existence of loose blocks as a cause of Baxter's fall.

The fallacy of the argument is that it was not the risk of loose blocks which Grobmyer contends Baxter assumed, but rather, the risk of walking with one foot on the wall and one foot on an unsecured bar joist. Baxter does not deny there was evidence to support Grobmyer's theory, in fact, his brief candidly concedes Grobmyer's defense was based on statements filed with the Workers' Compensation Commission to the effect that the fall occurred while Baxter was walking with one foot on the top of the wall and one foot on the joist. We believe there was sufficient evidence presented to submit this issue to the jury.

An employee assumes the ordinary risks incident to his job, which are both open and obvious. *Phillips* v. *Morton Frozen Foods, Inc.,* 313 F. Supp. 228 (E.D. Ark. 1970); *Hudgens* v. *Maze,* 246 Ark. 21, 437 S.W. 2d 467 (1969); *Hall* v. *Patterson,* 205 Ark. 10, 166 S.W. 2d 667 (1942). Furthermore, the application of the rule is particularly sound where, as here, the employee has discretion as to how or where the work is to be done. *Phillips* v. *Morton Frozen Foods, Inc., supra.*

Baxter argues that the defense is not appropriate unless the dangerous condition is the result of negligence or reckless conduct of the defendant; that under Arkansas case law assumption of the risk covers only the defendant's conduct and not dangerous situations generally. He cites *Price* v. *Daugherty,* 253 Ark. 421, 486 S.W. 2d 528 (1972), but we do not find this proposition supported by either the holding or the dictum of *Price,* where we reversed the trial court for giving AMI 612. In *Price,* plaintiffs brought suit for the wrongful death of their son (a farm worker) against his employer and a welding shop owner who had produced a defective stump grinder. There was evidence that stump grinders are highly dangerous machines, but we held that such evidence had relevance to the normal operation of a non-defective machine, and not to one defectively built, as was true of the machine in that case. The danger there was latent and there was no proof the decedent had any aware-

ness of the defect or realized the danger he was alleged to have assumed. We held that knowledge of the risk was essential, and in the absence of proof to that effect the instruction should not have been given.

It is true that in many cases it is the negligence of the defendant that creates the danger the plaintiff is said to have assumed, but not invariably so, and though appellant's brief and our own research have not produced a case which answers the exact point appellant argues, the cases which touch on the issue uphold the defense of assumption of the risk in situations where the risk assumed was not caused by the defendant. See *Hass* v. *Kessell,* 245 Ark. 361, 432 S.W. 2d 842 (1968); *Bugh* v. *Webb,* 231 Ark. 27, 328 S.W. 2d 379 (1959); and *Lee* v. *Pate,* 198 Ark. 723, 131 S.W. 2d 8 (1939), where we held the defense applicable to an injury incurred when a worker slipped on a metal pipe, there being no evidence the defendant had created the risk assumed.

*Corpus Juris Secundum,* in its discussion of assumption of the risk under the title "Master and Servant," describes the risks assumed:

> The ordinary risks of an employment are those which are normally and necessarily incident thereto, without negligence on the part of the master. They are such as are to be expected from the particular character of the service in which the employee is engaged and as cannot be obviated or avoided by the exercise of due care on the part of the master, or in other words, they are the risks which remain after the master, or one rightly exercising the authority of the master, has exercised due care to prevent or avoid them. 56 C.J.S., Master and Servant § 371, p. 1172.

It suffices to say that if appellant's argument is correct then AMI 612 is defective on its face, as it fails to tell the jury that it must also find the dangerous situation was caused by, or the result of, the negligence of the defendant. Yet AMI 612 was approved by an imposing panel of lawyers and judges as a correct statement of the law and has stood the test of usage before the trial courts and on appeal for nearly 20 years.

Baxter points out that the jury may have been confused by the instruction — uncertain as to which risk was being assumed. But the instruction makes it abundantly clear that it applies only to *known* risks. If there was any uncertainty on that issue, presumably it was dealt with in closing argument, but regardless of that, Baxter could have called it to the court's attention, or offered an instruction tailored to that circumstance. The failure to do so precludes the argument on appeal. *Bussell* v. *Missouri Railroad Co.*, 237 Ark. 812, 376 S.W. 2d 545 (1964).

Second, Baxter argues the trial court erred in refusing to give his requested instruction AMI 1204, which would have told the jury in determining whether Grobmyer was negligent it could consider the degree of skill and care ordinarily possessed and used by other contractors doing work similar to that shown by the evidence. In lieu of 1204 the trial court gave 1104 over Grobmyer's objection and at Baxter's request. AMI 1104 deals with the standard of care imposed upon an occupier of land and told the jury Baxter was a business invitee and Grobmyer owed him a duty to use ordinary care to maintain the premises in a reasonably safe condition.

Baxter insists he was entitled to both instructions, as the jury could have found liability under either theory. He relies on *DeVazier* v. *Whit Davis Lumber Company*, 257 Ark. 371, 516 S.W. 2d 610 (1974), where we held, on the strength of Restatement of Torts, 2d, § 384, that a contractor who erects a structure or creates a condition on land is subject to the same liability, and enjoys the same freedom from liability as though he were the possessor of the land while the work is in his charge. But *DeVazier* v. *Whit Davis Lumber Company, supra,* does not hold that the claimant is entitled to instructions under a two-fold theory of negligence, it simply holds that a contractor temporarily in possession of the premises has the liability defined in AMI 1104. The record discloses very little concerning the denial of 1204, but evidently the trial court offered to give one instruction, but not both and appellant chose 1104 (p. 115), arguably the more favorable, as it imposes the higher standard of care due invitees. See W. Prosser, The Law of Torts, § 61 (4th ed. 1971). We cannot say that the evidence was such that the trial

court was bound to give both instructions. In addition to 1104, the court gave AMI 301 and 303 which should accompany 1204 (See AMI Note to use, p. 158). AMI 301 defined negligence and 303 told the jury that the failure to exercise ordinary care was negligence, including the appropriate definition of the care required of a reasonably careful person. We believe that 301, 303 and 1104, read together, gave the jury a sufficient explanation of the law applicable to Baxter's theory of the case. We have held the refusal to give an instruction that is substantially covered by another instruction is not prejudicial. *Harris* v. *Ashdown Potato Curing Assn.*, 171 Ark. 399, 284 S.W. 755 (1926). See also *Myers* v. *Ravenna Motors Inc.*, 468 P. 2d 1012 (C.A. Wash. 1970).

Furthermore, AMI 1204, unlike 1104, does not inform the jury of an essential principle of law, it tells them what evidence they may consider in determining whether Grobmyer was negligent. The courts take a skeptical view of such instructions and their use has been subject to disapproval, within our own opinions and elsewhere, as singling out certain evidence and emphasizing it in the minds of the jurors. In *Rutland* v. *P. H. Ruebel & Company*, 202 Ark. 987, 154 S.W. 2d 578 (1941), we said:

> The other objection to the instruction is that it singles out this circumstance and unduly emphasizes it. The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, *is not commendable*, and it has been held by this court in several decisions that it is not error to refuse such instructions. (Our italics.)

See *Minnis* v. *Friend*, 360 Illinois 328, 196 N.E. 191; *Hogue* v. *State*, 93 Ark. 316, 124 S.W. 783 (1910); *Ince* v. *State*, 77 Ark. 418, 88 S.W. 818 (1905); *Carpenter* v. *State*, 62 Ark. 286, 36 S.W. 900 (1896). We do not suggest it would have been error to give 1204, only that it was not error to refuse it, considering the instructions given and the fact the evidence of improper masonry construction was, at best, marginal.

Baxter cites *Cain* v. *Songer*, 176 Ark. 551, 3 S.W. 2d 315

(1928), and *Life and Casualty Insurance Co. of Tenn.* v. *Gilkey,* 255 Ark. 1060, 505 S.W. 2d 200 (1974). Both cases are distinguishable in that the instructions refused in those cases were not covered by other instructions and, hence, the jury was left wholly uninstructed as to the appellants' theory of the case. That did not occur here.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I must dissent because I feel that neither the trial court nor the majority in this opinion fully appreciated the difference in the two types of assumption of risk involved here. At least, they did not give due deference to appellant's theory of the case. I would first point out that it has always been the position of the appellee that no loose blocks existed on the building under construction. On the other hand, appellant's whole theory is is predicated upon a loose block or blocks being present on the top of the wall where appellant was working at the time of his injury. He claims his injuries and subsequent damages resulted from a loose block tilting thereby causing him to fall.

It was inconsistent with both appellant's and appellees' theories of the case for the court to give AMI 612. This instruction informed the jury that they must find that a dangerous situation existed; that appellant knew the dangerous situation existed and realized the risk he was taking. The instruction further told the jury that in determining whether appellant knew of the dangerous situation and realized the risk of injury they could take into consideration whether the danger was open and obvious. Finally, the instruction required them to find that Baxter voluntarily exposed himself to the dangerous situation which proximately caused his injury. Since the appellees maintained throughout the trial that there were no loose blocks on the wall, they had no right to request this instruction. The appellant was under no duty to offer an instruction to replace an erroneous one.

The risk alleged to have been assumed by the appellant was the risk of working on the top of a wall. This type of risk asumption applies to a situation where he would simply fall off the wall or some other similar accident. The obvious danger and assumption of risk involved in working on top of a wall is entirely different from the hidden danger and assumption of risk involved in working on top of a wall which contains loose blocks. It was impossible for appellant to assume the risk of working atop a loose block because he did not know the hidden danger existed and the appellee insists it never did exist. The fact of whether or not a loose block existed would, of course, be a matter for the jury to determine. In the case of *Price* v. *Daugherty,* 253 Ark. 421, 486 S.W. 2d 528 (1972), the defendant persuaded the court to give AMI 612. This case also involved assumption of risk. We reversed the trial court in *Price* because AMI 612 was given. The assumption of risk in *Price* involved the operation of a stump grinding machine which exploded in an attempt to operate it. It seems to me that a portion of the language used in *Price* is absolutely descriptive of the situation here:

> There is no proof that Price was aware of the defects in the machine. Yet that is the precise hazard that he had to be aware of in order to assume its risk.

I think the trial court also erred in refusing to give AMI 1204 relating to a contractor's duty, which states:

> In determining whether _____ was negligent, you may consider the degree of skill and care ordinarily possessed and used by contractors doing work of a nature similar to that shown by the evidence in this case.

The note following this instruction indicates that it should follow AMI 301 and 303 which were both given in this case. The court decided to give AMI 1104 rather than 1204. AMI 1104 is the duty of an owner owed to an invitee, the duty being that of ordinary care to maintain the premises in a reasonably safe condition. This duty probably was owed to the appellant. However, it is designed more for the slip and

fall type case which we frequently hear about. Certainly, there is no relationship between a slip and fall case and the one presently before us. If both instructions are proper, then both should be given because they are not repetitious. There is a very striking difference in the two instructions.

The situation here is very similar to that of a tort action involving an automobile accident wherein both AMI 901 and 903 are given. These last two instructions are certainly closer to being repetitive than are the two instructions in question here, yet both are frequently given in the same case. The appellant had the right to have the jury instructed on his theory of the case. *Life and Casualty Insurance Co. of Tennessee* v. *Gilkey*, 255 Ark. 1060, 505 S.W. 2d 200 (1974). The majority states that knowledge of the risk alleged to have been assumed is essential before it may be used as a defense. I submit that there is not one scintilla of evidence in the entire record which indicates that the appellant knew the blocks were loose until after his injury.

I also disagree with the majority's statement that if appellant's argument is correct then AMI 612 is defective on its face. Although I admit it could be defective on its face, the error of using it in the present situation is that it simply was an improper instruction in regard to the arguments presented by either side in this case. The appellant had no duty to change this instruction because he did not want it given in the first place and thought it was improper under the facts which had been presented to the jury.

I would reverse and remand the case for a new trial.

Paul RUIZ & Earl DENTON *v.* STATE of Arkansas

CR 80-147 630 S.W. 2d 44

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*Sandra Trawick Berry,* for appellants.

*Steve Clark,* Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., and *Dennis R. Molock,* Deputy Atty. Gen., for appellee.

PER CURIAM. Petitioners Paul Ruiz and Earl Denton were convicted of capital murder in the Circuit Court of Logan County and sentenced to death. On appeal, we reversed the trial court's denial of a change of venue. *Ruiz & Denton* v. *State,* 265 Ark. 875, 582 S.W. 2d 915 (1979). On remand, the case was transferred to the Circuit Court of Conway County where verdicts of guilt were again returned and sentences of death imposed. We affirmed. *Ruiz & Denton* v. *State,* 273 Ark. 94, 617 S.W. 2d 6 (1981).

There is no need to recite the facts of this case since they are fully set out in the two previous decisions of this Court. Ruiz and Denton have now filed a petition for permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. The petition was amended on February 16, 1982.

Rule 37 affords a remedy when the sentence in a case was imposed in violation of the constitution of the United States or of this State or "is otherwise subject to collateral attack." Rule 37.1; *Swisher* v. *State,* 257 Ark. 24, 514 S.W. 2d 218 (1974); *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W. 2d 553 (1969); *Clark* v. *State,* 242 Ark. 584, 414 S.W. 2d 601 (1967). Rule 37 was not intended to provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Swindler* v. *State,* 272 Ark. 340, 617

S.W. 2d 1 (1981); *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657 (1973). Even questions of constitutional dimension are not preserved beyond the direct appeal unless they present questions of such fundamental nature that the judgment is rendered void. *Swindler,* supra; *Hulsey* v. *State,* 268 Ark. 312, 595 S.W. 2d 934, reh. denied, 268 Ark. 315, 599 S.W. 2d 729 (1980). See also *Collins* v. *State,* 271 Ark. 825, 611 S.W. 2d 182 (1981) and *Rogers* v. *State,* 265 Ark. 945, 582 S.W. 2d 7 (1979). The grounds for relief presented by petitioners are alleged to raise issues so fundamental as to render the judgment void and open to collateral attack, but the issues were not raised in accordance with controlling rules of procedure and must be considered waived. See *Moore* v. *Illinois,* 408 U.S. 786 (1972); *Stembridge* v. *Georgia,* 343 U.S. 541 (1952); *Hulsey,* supra; *Williams* v. *Edmondson,* 257 Ark. 837, 250 S.W. 2d 260 (1975); *Orman* v. *Bishop,* 245 Ark. 887, 435 S.W. 2d 440 (1968).

Even though we find no ground for relief sufficient to render the judgment void, we will discuss the issues raised by petitioners since their first argument has never been raised before this Court. Petitioners allege that the Arkansas death penalty statute is "facially unconstitutional since it discourages assertion of the Fifth Amendment right not to plead guilty and penalizes exericse of the Sixth Amendment right to trial by jury." Petitioners argue that under Ark. Stat. Ann. § 41-1302 (1) (Repl. 1977) only the jury may impose the death penalty, thus creating a situation whereby a defendant can be assured of escaping execution only by waiving his right to a jury trial. As authority for their assertion that the statute places a chilling effect on a defendant's constitutional right to trial by jury, petitioners cite *United States* v. *Jackson,* 390 U.S. 570, 88 S. Ct. 1209 (1968). *Jackson,* however, is not controlling.

The statute under attack in *Johnson* was the Federal Kidnapping Act which provided that interstate kidnappers "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the dath penalty is not imposed." The District Court held the death penalty clause of the act

unconstitutional because it made the death penalty applicable only to those defendants who asserted their right to a trial by jury. The United States Supreme Court upheld the District Court but the holding in *Jackson* has been eroded in recent decisions. Furthermore, we find that Ark. Stat. Ann. §§ 41-1301 — 1304 (Repl. 1977), which sets forth the procedures governing jury trials for persons charged with capital murder, does not place an impermissible burden on the exercise of the constitutional right to trial by jury. § 41-1302 provides that the jury shall impose a sentence of death if it returns certain written findings, but, unlike the court in *Jackson,* the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106 (1977).

Arkansas Criminal Procedure Rule 31.4, Ark. Stat. Ann. Vol. 4A (Repl. 1977), provides:

> No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:
> (a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and
> (b) the prosecuting attorney, with the permission of the court, *has waived the death penalty;* and
> (c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

Petitioners assert that this statutory scheme causes a defendant to abandon his right to a jury trial in return for the assurance that he will not receive the death penalty. Petitioners ignore, however, the fact that the prosecutor must waive the death penalty with the permission of the court before the defendant may waive either trial by jury on the issue of guilt or his right to have sentence determined by a jury. There is no right to plead guilty or right to trial to the court, and petitioners are in error when they suggest that anything which may encourage a defendant to plead guilty is automatically suspect. Although petitioners do not men-

tion plea bargaining, plea bargaining clearly encourages a defendant to waive a jury trial, but it is well settled that a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. *Brady* v. *United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The United States Supreme Court stated in *Corbitt* v. *New Jersey,* 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) (Stevens, Brennan and Marshall, JJ., dissenting):

> The cases in this court since *Jackson* have clearly established that not every burden on the exericse of a constitutional right and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. *Corbitt,* at 218.

The fact that a defendant agrees to waive trial by jury on the issue of guilt or the right to have guilt determined by a jury because the court and state will waive the death penalty does not chill an accused's right to a jury trial. Rule 31.4 offers a protection for the accused who wishes to avoid a jury trial. It is difficult to see how petitioners were prejudiced by the procedural guidelines of which they complain. They do not claim that they wished to waive a jury trial but did not seek to do so because of the provisions which give the state the discretion to waive the death penalty with approval of the court. Indeed, such an argument would suggest that the petitioners wished to have the right to be sentenced to death without a jury. The death penalty under Arkansas statutes has been consistently held constitutional, *Hulsey* v. *State,* 261 Ark. 449, 549 S.W. 2d 73 (1977); *Neal* v. *State,* 261 Ark. 336, 548 S.W. 2d 135 (1977); *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106, cert. den., 434 U.S. 977 (1977), and petitioners have not presented a valid attack to its constitutionality in their petition.

Petitioners' second allegation is ineffective assistance of counsel stemming from their joint representation by the

same counsel during the penalty phase of trial. The record indicates that the petitioners were specifically questioned as to whether counsel had discussed a possible conflict of interest in joint representation. They each answered that they were so informed and had no objection to joint representation. Petitioners have offered no facts to support their allegation that their acquiescence was not intelligently and voluntarily given.

Petitioners argue that they were prejudiced by being co-defendants during the penalty phase because the jury was unable to discern the distinctions made between the two men and thus found no mitigating circumstances. No specific evidence of prejudice is provided. The jury was given separate verdict forms and instructed to decide separately as to each defendant. Petitioners have not demonstrated that the jury did not follow that instruction.

Petitioners cite the standard of review of the Eighth Circuit Court of Appeals on the issue of ineffective assistance of counsel. This Court, however, has adopted a somewhat different standard. We hold that there is a presumption of effective assistance of counsel and that a petitioner must overcome that presumption and show he was prejudiced by the conduct of counsel. A petitioner must also show by clear and convincing evidence that the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W. 2d 184 (1981). Petitioners have not demonstrated that they were denied a fair trial.

Petition denied.

Gardner SMITH, Jr. *v.* STATE of Arkansas

630 S.W. 2d 22

Supreme Court of Arkansas
Opinion delivered March 29, 1982

*Charles Allen,* for appellant.

*Steve Clark,* Atty. Gen., for appellee.

PER CURIAM. Gardner Smith, Jr., by his attorney, has filed a motion for a rule on the clerk.

The motion admits that the record was not timely filed and states the reason for the delay is:

> That subsequent to the filing of the Notice of Appeal the Circuit Court on a Petition filed by the Defendant entered an order extending the time for filing and docketing the Appeal to and including March 12, 1982.
>
> That the Defendant has been advised by the Supreme Court Clerk that the time in which to file the Transcript expired during the later part of February, 1982 and refuses to file the Transcript with the Court.

> That the Defendant states that the error committed herein is a harmless error and based entirely on miscalculation on the final date. That, in addition, the Defendant would rely on the Order Extending Time for filing and docketing the appeal to March 12, 1982 signed by the Honorable John L. Anderson, Circuit Judge.

An extension of time to file a record cannot extend the time for filing the transcript by more than seven months from the date judgment was entered. Rule 5 (b), Rules of Appellate Procedure, Ark. Stat. Ann. Vol. 3A (Repl. 1979). It is the duty of the attorney to see that the record is timely filed. No good reason is shown for the delay and we will deny the motion as it is filed.

If the affidavit attached to the motion had stated that the attorney made an error or had been careless in the computation of time, or gave any good cause, the motion could be granted. In a per curiam opinion regarding belated appeals rendered February 5, 1979, 265 Ark. 964, we discussed the problem of an untimely tender of a record *caused by the attorney*. We decided that we have no alternative but to grant the motion for relief in such a case. However, we pointed out that a copy of the opinion would be forwarded to the Committee on Professional Conduct as is our practice.

This denial of a belated appeal is without prejudice. If good cause is shown later, we can grant the motion.

# IDEAL MUTUAL INSURANCE CO. *v.* David McMILLIAN and Dana McMILLIAN, His Wife

82-5 631 S.W. 2d 274

Supreme Court of Arkansas
Opinion delivered April 5, 1982
[Rehearing denied May 10, 1982.]

*Hubbard, Patton, Peek, Haltom & Roberts,* by: *William G. Bullock,* for appellant.

*House, Holmes & Jewell, P.A.,* by: *Robert L. Robinson, Jr.* and *Terry C. Paulsen,* for appellees.

RICHARD B. ADKISSON, Chief Justice. An airplane, insured by appellant, Ideal Mutual Insurance Company, crashed near Dierks, Arkansas, in 1978. The pilot was killed, and the appellee, McMillian, was injured. After the pilot's estate was closed, appellee filed a negligence suit against the estate pursuant to Ark. Stat. Ann. § 62-2601 (f) (Repl. 1971). Sheriff David Goodwin was appointed special administrator to receive service of process.

The sheriff, as special administrator, attempted to give notice of the suit to appellant by mailing a letter to the attorney for the owner of the plane and to appellant's local issuing agent. The attorney received the letter addressed to him. However, the letter to appellant's issuing agent was incorrectly addressed to the post office box of appellant's adjustment bureau and its receipt was denied by both the issuing agent and the adjustment bureau.

The trial court found the notice given by the sheriff was sufficient and because the complaint was never answered, entered a default judgment against the estate of the pilot. After appellant learned of the default judgment, it filed a motion to intervene under Rule 24 (a), A. R. Civ. P., Vol. 3a (Repl. 1979) which was denied. This rule provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Appellant then filed a motion to set aside the default judgment alleging insufficient notice of the proceedings. The trial court also denied this motion.

Ark. Stat. Ann. § 62-2601 (f) (Repl. 1971), upon which appellee's suit was based, provides:

> f. Certain Tort Claims Not Affected. Notwithstanding the foregoing provisions relating to the time of filing claims against an estate, or any other provisions of this Probate Code, a tort claim or tort action against the estate of a deceased tortfeasor, to the extent of any recovery which will be satisfied from liability insurance or from Uninsured Motorist insurance coverage and which will not use, consume or deplete

> any assets of the decedent's estate, may be brought within the limitation period otherwise provided for such tort action. No recovery against the tortfeasor's estate shall use, consume, diminish, or deplete the assets of the decedent's estate, and any such recovery shall not affect the distribution of the assets of the estate to the heirs, next of kin, legatees, or devisees of the decreased tortfeasor unless a claim is filed in the manner and within the time provided by the Probate Code for filing claims against the estate.

Under the provisions of this statute the insurance company is the only party financially interested in the outcome of the case. Although the estate is the named defendant, it is not financially liable under the statute. Therefore, because of the peculiar nature of the statute, it in effect confers an unconditional right to intervene on the insurance carrier under Rule 24 (a).

Again, due to the unique provisions of this statute, the insurance carrier, appellant, is entitled to notice of the proceedings. Due process requires that the method of giving this notice shall be reasonably calculated, under all the circumstances, to apprise the insurance company of the pendency of the action. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Here, attempted notice by a letter mailed to the wrong address is not calculated to appropriately notify appellant of the suit.

Since sufficient notice of the suit was not given to the appellant, the motion to set aside the default judgment must be granted, and appellant must be allowed to intervene.

Reversed and remanded.

Ernest Eugene SPICKES and Frances SPICKES
*v.* MEDTRONIC, INC. et al

82-10 631 S.W. 2d 5

Supreme Court of Arkansas
Opinion delivered April 5, 1982

*John Wesley Hall, Jr.,* for appellants.

*Wright, Lindsey & Jennings,* for appellees.

GEORGE ROSE SMITH, Justice. This products liability case is within our jurisdiction under Rule 29 (1) (m). In 1975 a cardiac pacemaker, manufactured by the appellee Medtronic, was inserted in the body of the principal plaintiff, Ernest Eugene Spickes. In 1977 the device proved to be defective, causing Spickes's heartbeat to acclerate. On October 5, 1977, the device was surgically removed and a substitute pacemaker, also made by Medtronic, was inserted in its place. There is no complaint about the performance of the replacement.

On October 28, 1980, more than three years after the

surgery, Spickes and his wife brought this action for personal injuries, loss of consortium, and punitive damages resulting from the defective pacemaker. The defendants, Medtronic and the hospital through which the device was sold, pleaded the three-year statute of limitations, Ark. Stat. Ann. § 34-2803 (Supp. 1981), and moved for summary judgment, with supporting affidavits. The trial judge granted the motion. The appellants' principal assignment of error is that there is a genuine issue of fact as to whether Medtronic is estopped to plead limitations.

The plea of estoppel is based on correspondence and telephone conversations between Spickes's original attorney, David H. Williams, and Medtronic's attorney, Reed A. Duthler, who practiced in Minnesota. The motion for summary judgment was supported by Duthler's affidavit, to which were attached copies of all the correspondence. The statute of limitations was never mentioned in the letters. Duthler stated in his affidavit that the statute was not referred to in the telephone conversations until after the time had run. He said he first mentioned the three-year statute in a conversation on October 24, but Williams insisted that the period was five years. In a few minutes Williams called back and admitted that the three-year period was correct, but said he did not think the plea would be successful. This suit was filed four days later.

In response to the plea of limitations the plaintiffs filed an amended complaint asserting that Duthler had stated that there was no question about liability, that the only issue was the amount of money that would adequately compensate Spickes for his damages, and that there was no necessity for Spickes to bring a lawsuit. Duthler's affidavit also denied those assertions. He stated that the possibility of a settlement was discussed, but he did not admit or deny liability, did not promise a settlement, and did not request that a lawsuit be delayed or forgone. On the issue of estoppel no affidavits were filed on behalf of the plaintiffs in response to the motion for summary judgment.

On the basis of Duthler's undisputed statements under oath, the trial court was right in entering the summary

judgment. It is now argued that Duthler's assertions were denied in the pleadings and were to some extent questioned by counsel at the hearing on the motion for summary judgment. We have repeatedly held, however, that when a party makes a prima facie showing in support of a motion for summary judgment, the opposing party must discard the shield of formal allegations and meet proof with proof to show a genuine issue of fact. *Hughes Western World* v. *Westmoor Mfg. Co.,* 269 Ark. 300, 601 S.W. 2d 826 (1980), citing earlier cases. Here the movants' proof is uncontradicted by affidavit.

A second point for reversal is that the trial court should have held that Spickes's cause of action really arose on March 20, 1980, when he learned that back in 1977 Medtronic had sent a letter to physicians cautioning them about a different defect in the pacemaker, one that would cause the device to stop functioning (which did not happen in this instance). In response to the motion for summary judgment Spickes alleged, with a supporting affidavit, that he had suffered mental anguish in March 1980 upon discovering that he had not been notified about the earlier defect, causing him to fear that he might also not be notified if the replacement should prove defective.

This contention is meritless. Medtronic committed no tortious act in 1980; Spickes simply found out more about what had been done three years earlier. The statute of limitations begins to run when the negligent damage occurs, not from the time the full extent of the injury is ascertained. *Field* v. *Gazette Publishing Co.,* 187 Ark. 253, 59 S.W. 2d 19 (1933). Moreover, for the reasons given in *Lisenby* v. *Farm Bureau Mut. Ins. Co.,* 245 Ark. 144, 431 S.W. 2d 484 (1968), a single cause of action cannot be split. Spickes knew in 1977 that the first pacemaker was faulty; he cannot manufacture a second cause of action on the basis of additional information he learned three years later.

Third, it is argued that the trial court was wrong in refusing to permit Spickes to testify, at the summary judgment hearing, about the exact date on which he suffered mental anguish upon learning in 1980 that Medtronic had

sent out the cautionary letter to physicians in 1977. It is argued that our holding in *Sikes* v. *Segers,* 263 Ark. 164, 563 S.W. 2d 441 (1978), to the effect that oral testimony is not permitted with respect to a motion for summary judgment, has been changed by ARCP, Rule 43 (c), which allows a court to hear oral testimony with respect to motions. Our ruling on the second point for reversal makes this question academic, for the exact date on which Spickes learned the full extent of his injury from the original wrong is immaterial.

Affirmed.

Marguerite TURNER *v.* BAPTIST MEDICAL CENTER et al

82-19 631 S.W. 2d 275

Supreme Court of Arkansas
Opinion delivered April 5, 1982
[Rehearing denied May 10, 1982.]

*Ernie Witt,* of *Witt & Donovan,* for appellant.

*Friday, Eldredge & Clark,* by: *Phillip Malcom* and *Laura A. Hensley,* and *Barber, McCaskill, Amsler, Jones & Hale,* for appellees.

GEORGE ROSE SMITH, Justice. Marguerite Turner brought this tort action against Baptist Medical Center, a non-profit institution, alleging false imprisonment and assault and battery in that the defendant had illegally confined Mrs. Turner to its hospital from May 15 to May 31, 1978, and had mistreated her. Later on Mrs. Turner joined as defendants the Medical Center's liability insurer and Dr. Charles S. Betts, the psychiatrist who had requested that Mrs. Turner be admitted to the Medical Center for observation and treatment. On motion for summary judgment the trial court found no genuine issue of fact to exist and entered summary judgment in favor of the Medical Center and its insurer. The court also sustained Dr. Betts' motion to dismiss the complaint as being barred by the statute of limitations. The appeal comes to us under Rule 29 (1) (o).

We consider first the judgment in favor of Dr. Betts, on the basis of limitations. Dr. Betts was first brought into the case on May 12, 1980, by an amended complaint asserting false imprisonment, assault and battery, and "intentional infliction of mental and emotional distress." That pleading was filed almost two years after Mrs. Turner's asserted

confinement and physical mistreatment; so it was barred by the one-year statute of limitations applicable to actions for false imprisonment and for assault and battery. Ark. Stat. Ann. § 37-201 (Repl. 1962). No facts were alleged that would make the assertion of mental and emotional distress anything more than an element of damage flowing from the imprisonment and mistreatment; so the same one-year statute would apply. More than three years after Mrs. Turner's release from the Medical Center she filed a second amended complaint alleging for the first time negligence on Dr. Betts' part, but by then any cause of action for negligence was barred either by the two-year statute applicable to medical malpractice, § 37-205, or by the three-year statute applicable to actions for personal injuries. § 37-206. It is also argued that Dr. Betts is estopped to plead limitations, but that argument is based on facts assertedly in the record but not abstracted by the appellant. Dr. Betts has elected not to supplement the appellant's deficient abstract; so Rule 9 precludes us from considering this estoppel argument on its merits.

With respect to the Medical Center and its insurer, they have chosen to abstract all the affidavits supporting their motion for summary judgment. We need not detail this proof. It sets forth specific facts to show that Mrs. Turner, then age 58, was properly admitted to the Medical Center pursuant to Ark. Stat. Ann. § 59-408 (B) and (C) (Repl. 1971), on the certification of Dr. Betts; that Dr. Betts is a qualified psychiatrist who diagnosed Mrs. Turner as being psychotic, under delusions, a threat to herself and others, and in need of observation and treatment at the Medical Center; that Dr. Betts' diagnosis is confirmed by Dr. Kolb, a disinterested expert witness; that Mrs. Turner's nephew took the initiative in putting her in the hospital; and that the Medical Center did not subject Mrs. Turner to false imprisonment or assault and battery. Various supporting hospital records were also attached to the motion.

The proof in support of the summary judgment made a prima facie showing that no genuine issue of fact exists. In response, Mrs. Turner filed only her own affidavit, stating in conclusory language that the defendants' affidavits were not

true, that she had not been a danger to herself, and that the hospital records were not correct. Her affidavit does not indicate that she is qualified as an expert to testify about her mental condition.

Our summary judgment procedure, ARCP Rule 56 (e), which follows the parallel federal rule, requires that proof offered to meet a properly supported motion for summary judgment "must set forth *specific facts* [our italics] showing that there is a genuine issue for trial." The affidavits must set forth facts that would be admissible in evidence. Rule 56 (e). Affidavits that consist merely of general denials, without any statement of specific facts, are insufficient. *Stevens* v. *Barnard,* 512 F. 2d 876 (10th Cir., 1975); *Liberty Leasing Co.* v. *Hillsum Sales Corp.,* 380 F. 2d 1013 (5th Cir., 1967); *Robin Construction Co.* v. *United States,* 345 F. 2d 610 (3rd Cir., 1965). Indeed, that must be the rule, else every motion for summary judgment, however strongly supported by the proof, could be defeated by an affidavit merely stating: "The statements in the movant's affidavits are not true." In substance, that is all this appellant's responsive affidavit amounts to. The trial judge correctly granted the motion for summary judgment.

Affirmed.

Lloyd C. FOSTER *v.* STATE of Arkansas

CR 81-115 631 S.W. 2d 7

Supreme Court of Arkansas
Opinion delivered April 5, 1982

*Bill F. Jennings,* for appellant.

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

DARRELL HICKMAN, Justice. This appeal arises from Lloyd Foster's convictions of aggravated robbery and first and second degree battery. He was sentenced by a jury to consecutive terms of fifty years, thirty-five years, and twenty years.

The State's evidence was that on March 2, 1981, Lloyd Foster, Ray Smith and Stanley Young set out from Little Rock to rob a bank in Emerson, Arkansas, in Columbia County, which was Stanley Young's hometown. Once in Emerson they stopped at Wise's general merchandise store. Smith and Young went in, looked at gloves and bought cigarettes. The appellant joined them and while there stole a pair of the gloves. The men then drove to the bank. There were too many potential witnesses in the area, so they circled the block several times. By the time they stopped, the bank had closed. Unable to get the doors open, their robbery attempt was thwarted. The men left, bought a six pack of

beer and drank it while deciding their next move. One of them suggested robbing Wise's. They planned that Ray Smith and the appellant would go in while Stanley Young would wait in the car with the motor running.

After arriving at Wise's, Ray Smith, wearing a ski mask, approached Mrs. Wise outside of the store. He ordered her inside and then struck her on the head with his pistol, knocking her unconscious for a moment. When Mrs. Wise came to she saw that her husband was being robbed by the appellant. Ray Smith then sprayed her face with mace. The appellant struck Mr. Wise in the head, got a small amount of money, and then shot Mr. Wise three times. The men ran outside to the waiting car and fled.

Stanley Young was arrested two days later. He testified for the State at the appellant's trial.

The appellant raises four issues on appeal. First he argues that the trial court erred in denying his motion for a change of venue. His motion included affidavits by four Columbia County residents who stated that the appellant would be unable to get a fair trial there. The State countered with two affidavits that averred that the appellant could receive a fair trial. The trial court held a venue hearing at which the appellant called eight witnesses who testified that they felt that the citizens of the county would be unable to render an impartial verdict. Three of the witnesses admitted, however, that all or most of the people they talked to about the robbery were from Magnolia. Three witnesses stated that they could not speak for anyone else, that it was merely their own opinion that the defendants would be unable to receive a fair trial in Columbia County. One of the witnesses admitted that he believed that the State would still have to prove its case beyond a reasonable doubt before obtaining a conviction. The State called no witnesses at the hearing.

A movant must demonstrate that there is countywide prejudice against him before his motion for a change of venue will be granted. *Cheney* v. *State,* 205 Ark. 1049, 172 S.W. 2d 427 (1943). At the hearing the trial judge made a concerted effort to determine whether the witnesses had

personal knowledge of countywide sentiment towards the appellant. From the witnesses' answers he concluded that the appellant had not met his burden of proving that he was entitled to a change of venue. The denial of a motion for a change of venue is within the discretion of the trial judge and his order is conclusive on appeal in the absence of an abuse of that discretion. *DuBois* v. *State,* 258 Ark. 459, 527 S.W. 2d 595 (1975). There was ample testimony by the appellant's witnesses from which the trial judge could conclude that the witnesses had no personal knowledge of prejudice that existed throughout Columbia County.

In his second point for reversal the appellant argues that there was insufficient evidence that the appellant committed second degree battery on Mrs. Wise and that the charge should not have been submitted to the jury. Mrs. Wise testified that Ray Smith, the appellant's accomplice, hit her in the head with his pistol. The blow cut her ear, knocked her down, and caused her to lose consciousness. As she came to, Smith sprayed her face with mace.

The applicable statute only requires that a person cause another physical injury by means of a deadly weapon. Ark. Stat. Ann. § 41-1602 (1) (b) (Repl. 1977). Mrs. Wise testified that she suffered physical injury when she was hit with a pistol, which is a deadly weapon. There was no error in submitting that charge to the jury.

Appellant argues in his third point that he was prejudiced when the judge spoke with Stanley Young during a recess in the trial in the presence of the jury. He contends that the judge's action lent a special credibility to Young's testimony for the State. The appellant does not provide us with any facts as to the reason for the conversation, what was said, whether it was within the hearing of the jury, the length of the conversation, or who initiated it. Neither does the appellant demonstrate how he was prejudiced. In the absence of any such facts we cannot say the appellant was prejudiced when the court denied his motion for a mistrial after the incident occurred.

In his fourth point for reversal, the appellant argues

that first and second degree battery are lesser included offenses of aggravated robbery and, therefore, to convict him of all three violates the constitutional prohibition against double jeopardy. We will not consider the argument as it relates to the second degree battery because he did not raise it to the trial court. Instead, the only objection made was:

> The defendant Lloyd Foster moves the Court that the charges of aggravated robbery and the charges of first degree battery with the appendage of the extra penalty for firearms constitute a double jeopardy, and one or the other should not be submitted.

Nor will we consider the argument made on appeal that the extension of appellant's sentences for first and second degree battery for use of a firearm pursuant to Ark. Stat. Ann. § 41-1004 subjects him to double jeopardy because it was not raised below. *Wicks* v. *State,* 270 Ark. 781, 606 S.W. 2d 366 (1980).

Ark. Stat. Ann. § 41-105 (1) (a) and (2) (a) (Repl. 1977), provides:

> (1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in subsection (2); . . .
>
> (2) . . . An offense is so included if:
>
> (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged; . . .

At issue is whether first degree battery is established by proof of the same or less than all of the elemens required to prove aggravated robbery. In this case, we must determine whether it is possible to commit aggravated robbery without

committing first degree battery. We find that it is possible. One can commit aggravated robbery merely by committing robbery and being armed with a deadly weapon or representing that he is so armed. Ark. Stat. Ann. § 41-2102 (Repl. 1977). To commit first degree battery, however, one must actually inflict serious injury. Ark. Stat. Ann. § 41-1601 (Repl. 1977). Therefore, the appellant's conviction of both aggravated robbery and first degree battery did not violate the double jeopardy prohibition of Ark. Stat. Ann. § 41-105. *See Swaite* v. *State,* 272 Ark. 128, 612 S.W. 2d 307 (1981).

Affirmed.

Richard Daniel McGUIRE, C.L. McGUIRE and Viola McGUIRE *v.* Sharon Lynn McGUIRE, Rebecca Lynn McWILLIAMS and Reba Evett McWILLIAMS

82-21 631 S.W. 2d 12

Supreme Court of Arkansas
Opinion delivered April 5, 1982

*LeRoy Autrey,* of *Autrey & Weisenberger,* and *Kirk D. Johnson,* of *Lingo & Johnson,* for appellants.

*C. Wayne Dowd,* of *Dowd, Harrelson & Moore,* for appellees.

JOHN I. PURTLE, Justice. The Probate Court of Miller County considered an instrument purporting to be the last will and testament of the decedent, Carl Edward McGuire, and a petition to grant letters of administration on the estate. The will had given the testator's property to his wife with the residual beneficiaries being his stepchildren. A divorce ensued; however, the will was not changed. The court rejected the petition for letters of administration and construed the will as though the widow had predeceased the testator and awarded the bounty to the decedent's stepchildren in accordance with the terms of the will.

On appeal the appellant argues two points: (1) the court erred by faiing to recognize the intent of the decedent as expressed in his will and in treating the will as though the former wife had predeceased him; and, (2) the court erred in holding that the stepchildren named in the will should take the estate as residuary legatees. We hold that the probate judge reached the right results in his construction of the will and in the rejection of the petition for appointment of an administrator of the estate.

Carl Edward McGuire executed his last will and testament on January 21, 1975, while he was a resident of Jacksonville, Florida. He and his wife, Sharon Lynn McGuire, were subsequently divorced in Miller County, Arkansas, on January 28, 1980. He died on February 23, 1980. His will was not changed prior to his death.

On March 26, 1980, appellant, Richard Daniel McGuire, oldest brother of the decedent, filed a petition in the probate court in which he sought appointment as administrator of the decedent's estate whom he alleged had died intestate. On April 9, 1980, the former wife filed a petition to probate the will of the decedent.

The pertinent parts of the will were as follows:

*SECOND:* I give, devise, and bequeath the rest, residue

> and remainder of my estate of every nature and wherever situated to my wife, SHARON LYNN McGUIRE, or, if she shall not survive me, to my surviving stepchildren in equal shares. If neither my wife nor any stepchild shall survive me, I give, devise, and bequeath the rest, residue, and remainder of my estate of every nature and wherever situated to my brother, RICHARD DANIEL McGUIRE, of Texarkana, Arkansas.
>
> *THIRD:* At the time of the execution of this will I have two stepchildren, REBECCA LYNN McWILLIAMS and REBA EVETTE McWILLIAMS. If subsequent to the execution of this will there shall be additional children born to me, including additional children born after my death or, if there shall be additional children adopted by me, and if any such children shall survive me, then and in such event such children shall share in the benefits of my estate equally and to the same extent as my stepchildren hereinabove named, and the provisions of this will shall be deemed modified to the extent necessary to effectuate such intention.

The facts were stipulated and the court admitted the will to probate and ruled that the stepchildren should take the estate of the testator as residuary devisees. The court held that the divorce caused the will to be treated as if the wife had predeceased the testator.

Ark. Stat. Ann. § 60-407 (Supp. 1981) reads as follows:

> If after making a will the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse are thereby revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator; subject, however, to the provisions of Section 33 [§ 60-501] of Act 140 of the Acts of 1949.

We think the above-quoted statute is controlling in this case. The clear meaning of the words used in the statute is

that any bequest to the former spouse is void but the remainder of the will remains in effect. Therefore, the stepchildren were the residuary legatees and the proper parties to receive under the will. It is not necessary for us to try to reach the intent of the testator because the statute solves that problem for us. In view of the obvious effect of the statute we see no reason to embark upon a long discussion in order to decide this case. Therefore, in accordance with Ark. Stat. Ann. § 60-407 the named stepchidren are entitled to receive the property under the terms of the will.

Affirmed.

Frank SMITH *v.* Bill CAUTHRON, as Sheriff of Sebastian County

CR 81-124 631 S.W. 2d 10

Supreme Court of Arkansas
Opinion delivered April 5, 1982

*John W. Settle,* for appellant.

*Steve Clark,* Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The Sebastian County Circuit Court rejected appellant's petition for a writ of habeas corpus wherein he sought release from confinement being imposed pursuant to the Governor's arrest warrant on extradition proceedings. This appeal is based solely upon the grounds that the court erred in failing to grant the writ. We hold the trial court acted properly in denying the petition for a writ of habeas corpus.

On February 18, 1981, the Fort Smith Police Department received a teletyped message from the Newport News, Virginia, Police Department that one Frank Smith was wanted in Virginia on a warrant charging him with

embezzlement. They furnished the Fort Smith officers the name, address and telephone number where Frank Smith could be contacted. Two officers proceeded immediately to the address, found the appellant and informed him he was wanted on a warrant in Newport News, Virginia. They placed him under arrest to be held for the Virginia authorities. After arriving back at the station the officers recontacted the Virginia authorities, both by teletype and telephone, and were furnished more details about the warrant. While at the police station, appellant admitted he had been employed by the people who had caused the warrant to be issued but denied that he took any money. An information sheet and arrest report were made out which included the appellant's date of birth and social security number. It later developed that the date of birth was exactly two years off and the social security number had the two middle numbers different from the information received from Virginia.

The appellant remained in the Sebastian County jail until his petition for habeas corpus was heard on August 27, 1981. In the meantime, on April 8, 1981, the Governor of Arkansas issued his warrant ordering appellant extradited. Appellant is, of course, being held subject to disposition of this case on appeal.

The only issue before the court is whether the Governor's warrant of arrest was valid. It appears valid on its face as does the requisition from the Governor of Virginia. This case is almost on all fours with the case of *Cadle & Pierce* v. *Cauthron, Sheriff,* 266 Ark. 419, 584 S.W. 2d 6 (1979). There we pointed out that the Constitution of the United States, art. 4, § 2, cl. 2, states:

> A person charged in any State with Treason, Felony, or other Crime who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

We also pointed out in *Cadle & Pierce* that Arkansas had adopted the Uniform Criminal Extradition Act [Ark. Stat.

Ann. §§ 43-3001 — 3030 (Repl. 1977)], which is essentially the same as the provisions of 18 United States Code § 3182 which in turn reflect the same provisions as the federal constitution quoted above.

After the Governor issues his warrant the only matters which can be considered by the court, when extradition is contested, are (1) whether the party detained is the person named in the warrant and, (2) whether he is a fugitive. *Glover* v. *State,* 257 Ark. 241, 515 S.W. 2d 641 (1974).

The facts reveal the Virginia authorities contacted the Arkansas authorities and furnished appellant's name, address and telephone number. The appellant was picked up at this address almost immediately. Later on the same day the Fort Smith police learned the name of the employer from whom the appellant was alleged to have taken funds. Appellant admitted having been employed by that employer in Newport News but denied he took any funds. The minor error in the social security number and the date of birth resulted from information furnished by the appellant after he was taken into custody and informed there was a warrant in Virginia for his arrest. The above unrefuted facts are substantial evidence which could properly be used to determine the appellant was indeed the man named in the Virginia warrant and that he was a fugitive. The requisition from the Governor of Virginia shows facts necessary to return the appellant to the state, thus everything being in proper order the judgment below is affirmed.

Appellant argues that his initial arrest was violative of his constitutional rights, and that subsequent actions culminating in the Governor's warrant were illegal. Once the Governor's warrant has issued we cannot review upon appeal anything other than what has previously been set out. Therefore, we do not consider the manner of the initial apprehension and the detention which could have been questioned prior to the issuance of the Governor's warrant.

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I concur in the decision because the names in this case were identical. That is, Frank Smith conceded that he was the prisoner and that is the name of the person demanded. In such a case a presumption exists that must be rebutted. *Lindley* v. *Crider,* 223 Ark. 200, 265 S.W. 2d 498 (1954); *In Re: Extradition of D'Amico,* 177 F. Supp. 648 (D.C. N.Y. 1959); *Fernandez* v. *Phillips,* 268 U.S. 311 (1925).

Mildred M. ALEXANDER *v.* FIRST NATIONAL BANK OF FORT SMITH

81-255 631 S.W. 2d 278

Supreme Court of Arkansas
Opinion delivered April 5, 1982
[Rehearing denied May 10, 1982.]

*Richard D. Hampton,* for appellant.

*Rose Law Firm,* by: *W. Dane Clay,* for appellee.

STEELE HAYS, Justice. This is the second appeal from orders of the Crawford Probate Court affecting the estate of J. Fred Alexander, who died in 1956, survived by his widow, Mildred, and two adult children, Caruth and Mary. Fred Alexander left a sizeable estate, subject to the terms of a standard marital deduction will leaving one-half of the estate to Mildred and the balance to her in trust for Caruth and Mary, with the income of the trust belonging to Mildred.

In 1967 Caruth died survived by his widow, Dorothy, the executor of his will, and a minor son, and litigation between Dorothy and Mildred over the handling of the estate began in earnest, culminating in *Alexander, Ex'x* v. *Alexander, Ex'x,* 262 Ark. 612, 561 S.W. 2d 59 (1978). There, we upheld the Crawford Probate and Chancery Courts on numerous disputed issues, including an order directing Mildred to account for real and personal property, but excluding income from the trust. The case was remanded for further proceedings and in June 1978 Mildred filed what purported to be a full and final accounting, to which the executor in succession, the First National Bank of Fort Smith, objected. The bank filed its own accounting, and petitioned for distribution of the remaining assets (four farms and cash totalling $77,478.59) 40.8% to Mildred and 59.2% to the trust. Mildred protested, asserting various agreements and transactions among the heirs and alleging in particular a family settlement allowing her to receive all undistributed assets. The trial court found there was no proof of a family settlement and approved the bank's

accounting and proposed distribution. For reversal, Mildred Alexander argues her right to all undistributed assets as fixed by family settlement. Alternatively, she claims the trust has been excessively distributed, the intent of the testator was defeated by the findings of the trial court, the bank's accounting should not have been adopted, her request for unpaid income should have been allowed, and probate court lacked jurisdiction to determine family settlements. We find the arguments to be without merit.

In support of the family settlement theory, Mildred points generally to the manner family business was conducted after the death of Fred Alexander; she contends the family was close, given to confiding in each other, always handling matters affecting the estate by agreement; that Caruth collected rental payments, made deposits, transferred funds of the estate and advised her in all business and financial matters. She points to a number of beneficial distributions made prematurely to Caruth and Mary and notes that Mary does not dispute the alleged settlement. She also relies on a number of instruments and memoranda of transactions which she insists demonstrate a family settlement.

It cannot be questioned that with Mildred's approval advances were made to Caruth and Mary they were not otherwise entitled to or that the family handled the estate in many respects with a notable absence of formality, but her claim of family settlement rests largely on her own conclusory assertions and on writings she attributes to Caruth, but to which the trial court plainly gave no credence. We do not find in the record credible proof of an actual agreement of the settlement she claims or even of evidence from which an implied settlement could be reliably inferred sufficient to overturn the trial court. She cites a number of our cases for the principle that family settlements are greatly favored, but the problem here is the trial judge found, in rather emphatic terms, an absence of proof supporting the alleged settlement. He also found her arguments to be similar if not identical to those argued in the earlier case, which were decided adversely to her. Further, the trial court gave scant regard to a number of exhibits consisting of instruments or

memoranda relied on by Mildred Alexander, describing such proof as "fabricated, unverified or unsupported documentation." It seems clear the overall credibility of her claim before the trial court was tarnished by the introduction of evidence of questionable authenticity. Too, her disobedience to court orders to deliver records and information to the executor in succession seriously impeded the progress of the case and her actions were condemned by the trial court as contumacious and "absolutely lacking in candor and cooperation." We note a similar comment in the opinion of this court: "There is a total absence of any showing of good faith of Mildred Alexander in the exercise of her discretion in this case." (*Alexander, Ex'x* v. *Alexander, Ex'x, supra,* at p. 630.) Without belaboring the point, we have reviewed the evidence she cites and even if her arguments were not *res judicata,* we are unable to say findings of the trial court were clearly erroneous. Rule 52, A. R. Civ. P.

Another contention is that even without a family settlement agreement the court erred in holding that the trust had not been excessively distributed. Appellant points primarily to the fact that in 1959 she distributed 300 shares of stock of the Commercial Bank of Alma to Caruth and two farms of comparable value to Mary. Other distributions of cash are cited. Aside from the absence of any authority for this assignment of error, the argument is untenable because the distributions on which appellant relies have already been dealt with and are not now open to review. That can be said with certainty of the bank stock issue (see *Alexander, Ex'x* v. *Alexander, Ex'x, supra,* at p. 620) although whether the other items she claims were specifically resolved in the earlier stages of this litigation is not clear. But if not, they could have been and the result is the same — they are now foreclosed. *Hastings* v. *Rose Courts, Inc.,* 237 Ark. 426, 373 S.W. 2d 583 (1963); *Taylor* v. *Taylor,* 153 Ark. 206, 240 SW. 2d 6 (1922); *Motors Ins. Corp.* v. *Coker,* 218 Ark. 653, 238 S.W. 2d 491 (1951).

Appellant contends the probate court is without jurisdiction to determine whether a family settlement agreement was reached. We disagree. This was not an original action to cancel or enforce an alleged family settlement agreement

where chancery jurisdiction might be said to attach. The alleged family settlement agreement was part of a dispute among the heirs over distribution of the estate within the probate proceeding itself, and not independent of it. In fact, the issue was asserted by Mildred Alexander in support of her own accounting and proposed distribution. Clearly, the probate court had jurisdiction to try the issues in this case and its jurisdiction was not lost simply because a family settlement agreement was alleged. *Snow & Smith* v. *Martensen,* 255 Ark. 1049, 505 S.W. 2d 20 (1974); *Hartman* v. *Hartman, Admr.,* 228 Ark. 692, 309 S.W. 2d 737 (1958); *Thomas* v. *Thomas,* 150 Ark. 43, 233 S.W. 808 (1921). We note, too, the absence of any objection to probate jurisdiction until the case reached this court on appeal. An objection to jurisdiction made in good faith should have come before the case was tried and decided on its merits. *Hobbs, Admr.* v. *Collins,* 234 Ark. 779, 354 S.W. 2d 551 (1962); *Park* v. *McClemens, Excr.,* 231 Ark. 983, 334 S.W. 2d 709 (1960).

Other arguments have been considered and rejected: appellant claims impounded income should have been released to her, but the withholding of her funds was due to her failure to comply with court orders and we are not willing to say the court was wrong. She also submits the bank's accounting is improper. We fail to see the merit of the argument; moreover, we are not disposed to strain in behalf of the argument in view of her obdurate refusal to obey orders to surrender records and supply information that would have aided the executor in succession in preparation of an accounting. Without that assistance the bank was left to reconstruct an accounting from tax returns and other data and since she affirmatively impeded its preparation, we find little equity in her argument the accounting is wrong.

The order of the probate court is affirmed.

Odis Donell THOMAS *v.* STATE of Arkansas

631 S.W. 2d 14

Supreme Court of Arkansas
Opinion delivered April 5, 1982

*Robert B. Wellenberger,* for appellant.

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

PER CURIAM. Odis Donell Thomas, by his attorney, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and that it was no fault of the appellant.

However, the motion does not state good cause for granting the motion as discussed in our per curiam issued February 5, 1979, 265 Ark. 964. If the attorney for Thomas will concede that it was his fault that the record was not filed, or if other good cause is shown, then the motion will be granted. The present motion for rule on the clerk is denied.

# ACLIN FORD COMPANY, INC. d/b/a ACLIN TOYOTA *v.* FIAT MOTORS OF NORTH AMERICA, INC.

82-34 631 S.W. 2d 283

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Rice, Batton & Pierce, P.A.,* by: *Ben E. Rice,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

RICHARD B. ADKISSON, Chief Justice. On May 6, 1980, Holcomb, plaintiff, brought suit against Aclin Ford Company, Inc. and Fiat Motors of North America, Inc. for breach of warranty in the purchase of a Fiat automobile.

On August 5, 1980, the case came on for trial. As a matter of trial strategy no cross-claim was filed by Aclin against Fiat. Immediately preceding trial, the trial court dismissed Fiat from the suit because no ground for relief was stated against it in the complaint. Aclin then orally requested permission to file a third party complaint against Fiat, which was denied. The trial resulted in a judgment for Holcomb.

In a motion for a new trial, Aclin again requested that it

be allowed to file a third party complaint against Fiat, which was granted. But, at a subsequent hearing, the trial court granted Fiat's motion to strike this complaint, holding it was not timely filed. On appeal, we affirm.

Rule 14, ARCP, Ark. Stat. Ann., Vol. 3A (Repl. 1979) provides for third party complaints:

> (a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than 10 days after he files his answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and the third party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant shall thereupon assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third party claim or for severance or separate trial. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of

> the claim made in the action against the third party defendant.

Generally, the purpose of this rule is to settle all controversies at one time, thereby avoiding a multiplicity of suits. *See U.S.* v. *Yellow Cab Co.,* 340 U.S. 543 (1951).

Implicit in Rule 14 is the assumption that the third party complaint will be filed before the issues are resolved at trial; otherwise, its provisions allowing the third party defendant to assert defenses against the original plaintiff would have no meaning. Therefore, the trial court was correct in granting Fiat's motion to strike the third party complaint since it was filed after trial.

Nor can we say that the trial court abused its discretion in refusing to allow Aclin to file a third party complaint against Fiat on August 5, 1980, the day of the trial. If this pleading had been allowed at that time it would have surely caused a delay of the trial.

Aclin argues on appeal that it should now be allowed to assert its claim against Fiat in a separate action. We do not decide this issue since it was not raised in the trial court.

Affirmed.

Barney Lee DOLES *v.* STATE of Arkansas

CR 82-27 631 S.W. 2d 281

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Jim Bob Steel,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, appellant, Barney Lee Dole, was convicted of the second-degree murder of James Harris and sentenced to 20 years in the Department of Correction. On appeal we reverse, holding that appellant was entitled to a jury instruction on justification (self-defense).

On the evening of the shooting appellant, Lisa Dean, and the victim were drinking together. All three were good friends. Lisa was a hitchhiker appellant had brought to Arkansas after picking her up in Florida. However, at the time of the incident, Lisa was living with the victim in his trailer.

During the course of the evening the victim became belligerent. He began talking about "busting" a whiskey bottle over his friends' heads. He also suggested that Lisa should take her things and get out of his trailer. Finally, appellant decided to go home; the victim volunteered to take him.

When the three of them reached appellant's home, appellant asked Lisa if she wanted to spend the night at his house. This apparently angered the victim who began threatening appellant. Appellant then ran into his house to get a gun "to scare him [victim] off." The victim went to the door and called to appellant who went back to the door without finding the gun.

Meanwhile, appellant's father, awakened by the loud noise, came to the front porch. The father testified that the victim threatened his son. "He told him that he'd get him before the night was over, said the night wasn't over. Said he'd put a load of shot or a bullet one right between his eyes." By this time the victim was inside appellant's home, and appellant's father had gotten a gun from a closet. Appellant took the gun from his father and begged the victim to leave. But, the victim kept coming at him; appellant then shot him.

Appellant testified that the victim said he was going to shoot him that night and that he was scared; that he did not intend to shoot him and that he shot him in accident. He stated that he begged the victim to leave; that he did not premeditate or deliberate; and that he just turned around and shot.

Police officers stated that the victim's body was found lying partially on the porch and partially on the front steps.

The medical examiner testified that the victim was extremely drunk when he was killed.

Appellant argues, and we agree, that the trial judge erred in refusing to instruct the jury on a person's right to use reasonable force to protect himself and on a person's right to not retreat when in his own home. Justification is not an affirmative defense which must be pled, but becomes a defense when any evidence tending to support its existence is offered to support it. *Peals* v. *State,* 266 Ark. 410, 584 S.W. 2d 1 (1979); *Thomas* v. *State,* 266 Ark. 162, 583 S.W. 2d 32 (1979).

In this case there was sufficient evidence to support a justification instruction to the jury. Testimony indicated that the victim was in appellant's home, that the victim threatened to kill appellant, and that appellant was scared of the victim. Appellant also testified that he repeatedly asked the victim to leave him alone but that the victim refused to do so. From this evidence the jury could have found that appellant was justified in using deadly physical force to defend himself in his home.

Appellant also argues that the trial court erred in refusing to admit a statement made by Lisa Dean, who was out of the state at the time of the trial. Lisa's statement was made to a criminal investigation officer shortly after the crime and contains her version of the occurrences that night. It is not handwritten, but it is signed by Lisa.

Its admission is urged under Rule 804 (b) (5), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1977), which allows hearsay evidence if the declarant is unavailable:

> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

> procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Lisa's statement is not admissible under this rule for two reasons. First, it does not contain the "equivalent circumstantial guarantees of trustworthiness" as do the other exceptions to the rule against hearsay under Rule 804 (b). Second, appellant has not brought himself under the provisions of this rule because Lisa cannot be considered unavailable. Although the sheriff testified that he had contacted her in Dallas, Texas, and advised her of the trial date, the record does not reflect that Lisa's attendance was sought under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, Ark. Stat. Ann. §§ 43-2005 — 2009 (Repl. 1977). The prosecutor listed Lisa as a witness, but apparently neither party attempted to utilize the necessary procedure as set out by this statute to require her attendance at trial. Therefore, she was not "unavailable" as required by Rule 804 (a), and the 804 (b) (5) exception does not apply.

Reversed and remanded.

John A. ZARDIN *v.* Martin TERRY

81-246 631 S.W. 2d 452

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Gordon L. Cummings,* for appellant.

*Robert E. Estes,* of *Estes, Estes & Estes,* for appellee.

GEORGE ROSE SMITH, Justice. This action by Martin Terry for personal injuries and property damage stems from a traffic collision in Fayetteville on April 4, 1978. Terry filed this suit on June 5, 1978. Zardin, the defendant, was served with summons on June 15, but he let the case go by default without filing any pleading. When a default judgment was entered in Terry's favor on October 5, Zardin had become an inmate of the state penitentiary pursuant to a marihuana conviction that was entered 21 days after the traffic collision, but which directed that Zardin not be committed to the penitentiary until September 18, 1978.

After writs of execution and garnishment had been issued some years later, Zardin filed a motion on June 4, 1981, to set aside the default judgment because it was entered while Zardin was in the penitentiary. After a hearing the trial judge held, on proof that Zardin had admitted to a police officer on the morning after the collision that he had run a stop sign and had assumed full responsibility for the accident, that no meritorious defense had been shown and that the judgment should stand.

For reversal Zardin argues that the default judgment was absolutely void, not merely voidable, and therefore his failure to show a meritorious defense is immaterial. Since the judgment was entered before our Rules of Civil Procedure took effect on July 1, 1979, the case is governed by the earlier statutes, but we do not imply that our decision would be different if ARCP 4 (d) (4) and 17 (c) were controlling.

The issue is whether the 1978 judgment against Zardin entered while he was in prison, was void or merely voidable. On this point we might, except for some imprecise language in a 1939 decision, dispose of the present case by citing a precedent so nearly identical to this case as to be indistinguishable. *McDonald* v. *Fort Smith & Western R.R.*, 105 Ark. 5, 150 S.W. 135 (1912). The only factual difference is that in *McDonald* the defendant Ella Hare was insane when the judgment was entered against her without any defense in her behalf; here Zardin was in prison when the judgment was entered against him without any defense being made. But the controlling statute, the Civil Code of 1869, was essentially the same as to both defendants. In successive sections the Civil Code provided in § 74 that service of process upon an insane person should be upon his guardian, his wife, or the keeper of the asylum where he was confined, and in § 75 that service upon a prisoner in the penitentiary should be upon the prisoner, the keeper of the penitentiary, and the prisoner's wife. Ark. Stat. Ann. §§ 27-337 and -338 (Repl. 1962). In related provisions of the Civil Code it was declared in § 53 that no judgment "can be rendered" against an insane person until after a defense in his behalf, and in § 56 that no judgment "can be rendered" against a prisoner in

the penitentiary until after a defense in his behalf. §§ 27-830 and 833.

In *McDonald* judgment was rendered against the insane woman with no defense in her behalf. The court stated the same issue as that now before us: "The question, therefore, to be determined is whether said judgment is void or only voidable." Our answer was clear-cut:

> A judgment, however, which is rendered without the appointment of or defense by a guardian for such insane person is not void. It would be erroneous to render a judgment against an insane person without the appointment of, or a defense made by, his guardian, and a judgment so rendered would be liable to reversal upon appeal or to vacation upon a proper action being instituted to that end. *But such judgment would be voidable only.* (Italics supplied.)

The out-of-step case, on which Zardin now relies, is *Puckett* v. *Needham,* 198 Ark. 123, 127 S.W. 2d 800 (1939). In *Puckett* the facts, as fully shown in the record on file in our clerk's office, were that Clark Needham filed a complaint for divorce against his wife Goldina, with whom he had not lived for some years. Goldina owned a house and lot she had received from her mother, but Clark falsely alleged in his complaint for divorce that the property belonged to him. A summons was served on Goldina, then in the county jail. Several persons intervened to assert laborers' and materialmen's liens against Goldina's property, but they obtained *no* service of process on Goldina. Goldina, like Zardin in the case at bar, made no defense, and a default decree was entered against her after she had been transferred to a federal penitentiary. She, however, promptly filed a motion to set aside both the foreclosure of the liens and the ensuing judicial sale to Puckett. The chancellor set the decree aside during the same term of court, as he then had the discretion to do, and later held a hearing. Goldina proved by undisputed proof that her husband's allegations of ownership and the intervenors' assertions of liens were wholly fraudulent. The chancellor sustained her obviously meritorious defense and awarded her the property, which had

belonged to her all along. The effect of his decree, as we pointed out, was to leave intact the divorce (which was based upon a valid service of summons) but to set aside the liens (with respect to which Goldina had received no notice).

The chancellor in *Puckett* treated the original decree only as voidable, not as void, for he set it aside upon a showing of a meritorious defense. But in affirming his action we referred loosely to the decree as void, on the theory that the court had no jurisdiction over a penitentiary prisoner for whom no defense had been made. The decree was in fact void, for want of any service of process to support the new causes of action asserted by the lienors, but we referred to it as void for a completely erroneous reason. The *McDonald* case, *supra,* which would have dictated the correct holding — that the decree was merely voidable — was not cited by counsel and of course was not cited in the opinion, nor was any other Arkansas case referred to. *Puckett* was later followed by *Shappy* v. *Knight,* 251 Ark. 943, 475 S.W. 2d 704 (1972), but there the order of adoption was certainly voidable for want of service; so we need not discuss that holding.

In the case at bar Zardin was a free man when he was served with summons and when he permitted the time to expire for filing his answer to the complaint. Thus the court had jurisdiction both of the subject matter and of the person when it entered its default judgment after Zardin had become a prisoner. That judgment, if not completely valid, was at the very worst merely voidable for the reasons given in the *McDonald* case. Zardin has failed in his effort to avoid the judgment, for his proof did not establish a meritorious defense. The trial court's judgment was therefore correct.

Affirmed.

HOLT and PURTLE, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. A. R. Civ. P., Rule 17 (c), reads as follows:

No judgment shall be rendered against a prisoner in the

> penitentiary until after a defense is made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him.

I still believe we should take the rules promulgated by this court and the enactments of our General Assembly to mean exactly what they say so long as there are no ambiguities in the language used therein. A rule or statute could not be more plainly worded than the one set out above. Sometimes it seems to me this court strains at a gnat and swallows a camel. The majority has done both in the present case. In any event, they beat around the bush and come up with the wrong reasoning and results.

Why should we be trying to explain away the rule in our former opinions when they were perfectly clear up until this time? In *Puckett* v. *Needham,* 198 Ark. 123, 127 S.W. 2d 800 (1939), we flatly stated:

> Under the statutes, the fact of confinement in the penitentiary *deprives the court of jurisdiction* until answer is filed by the defendant's attorney, or until the attorney appointed by the court has made proper defense. (Italics mine.)

In *Shappy* v. *Knight,* 251 Ark. 943, 475 S.W. 2d 704 (1972), we followed the rule stated in *Puckett* v. *Needham,* supra, and which has been incorporated into our code. In *Shappy* we stated:

> We think the wisdom of the legislature in enacting this statute in 1869 is amply demonstrated by the facts in this case. No doubt the legislature was aware that inmates in the penitentiary are so disadvantaged in their liberties and ability to communicate their interest directly to courts that it deemed this statute desirable to prevent misunderstandings, such as this, and to provide for the inmate's day in court.

The majority simply muddies the waters of the cases and law which have heretofore been clear and unequivocal as to judgments rendered against inmates of the peni-

tentiary. I would affirm the trial court in compliance with the plain language stated in the rule and for reasons of precedent.

HOLT, J., joins in this dissent.

Alan VIRGIN *v.* STATE of Arkansas

CR 81-134 631 S.W. 2d 285

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Jim King,* for appellant.

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

GEORGE ROSE SMITH, Justice. Some 50 days after having received a 20-year sentence upon a negotiated plea of guilty to charges of aggravated robbery and habitual criminality, the appellant filed a Rule 37 petition for postconviction relief, asserting ineffective assistance of counsel in that his attorney had erroneously advised him that if he were found guilty the jury would have to impose a sentence of either 50 years or life. After an extended hearing the trial court denied

the petition. The appeal comes to this court under Rule 29 (1) (e).

Inasmuch as the denial upon conflicting testimony does not appear to be erroneous, appellant's present attorney has understandably abandoned his client's original ground for relief and now argues only that Virgin's first lawyer testified at the Rule 37 hearing that he had advised Virgin that the range of punishment was from 10 years to 50 years or life. It is asserted that the advice was wrong in that the minimum was actually 5 years. Even so, in the trial court Virgin did not even hint in his petition or in his testimony that he had been concerned about the minimum sentence. Moreover, in testifying before his former lawyer took the stand, Virgin stated under oath three separate times that his lawyer had advised him that the minimum was 5 years. Thus the present argument for reversal is totally without merit.

Affirmed.

Benjamin C. McMINN et ux *v.* CITY OF LITTLE ROCK

82-20 631 S.W. 2d 288

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Wright, Lindsey & Jennings,* for appellants.

*R. Jack Magruder, III,* City Atty., by: *Carolyn B. Witherspoon,* Asst. City Atty., for appellee.

FRANK HOLT, Justice. Appellants sought rezoning of their property from A single family to D apartment classification. The appellee's planning staff and Commission recommended denial because it did not represent the best possible principles of land use planning. The City Board of Directors also denied appellant's application for rezoning. The chancellor affirmed. For reversal the appellants con-

tend that the appellee unreasonably and arbitrarily refused to rezone their property. They argue that the denial is based upon preventing other property in the area from being rezoned; that the city had agreed that the property should be used for apartments and the preponderance of the evidence establishes that the city's action was unreasonable and arbitrary. We affirm the chancellor.

The property in question is a 5-room, 1-bath residence at 5419 Kavanaugh Boulevard. It is situated on land with a 90′ frontage on Kavanaugh and 150′ deep. It appears that this house was built about twenty years ago. Appellants purchased the property in December, 1978, and one month later sought rezoning. Since the purchase for $55,000, appellants have spent $5,000 to $20,000 in improvements. Appellants are using the property as a Montessori school or a kindergarten for infants between the ages of one to three. See *City of LR* v. *Infant-Toddler Montessori Sch.*, 270 Ark. 697, 606 S.W. 2d 743 (1980). Reclassification to D apartment would remove any legal question about operating the school which is the only purpose for which the appellants plan to use the property. They acknowledge there was considerable opposition in the neighborhood to the rezoning. The requested rezoning was the result of a suggestion by the city planning director that the property should be used for a nice condominium development.

Directly north and across the street from appellants' property is a United States Post Office, zoned E-1. To the west and immediately adjacent to appellants' property is a two story apartment house, a non-conforming use, with seven or eight apartments. To the south and west is an adjacent duplex. Contiguous to the property on the east is another duplex. Generally speaking, the property north, east and south is predominantly residential. For several blocks to the west is intensive commercial use by various retail businesses. It appears there has been no rezoning in this neighborhood for about twenty years.

Appellants presented as witnesses a local planning consultant and a real estate broker and developer, who had made a study of the area. They considered such factors as the

commercial and residential use of the property in proximity to the area, the flow of traffic and the length of the existence of the surrounding neighborhood. They were of the view that the proper use of the property should be E-1 quiet business or D apartment zoning, a less intensive use. These uses would be compatible with the neighborhood. These witnesses acknowledged that others could come to a different conclusion or recommendation other than that made by them. The owner of two duplexes in the vicinity did not object to the rezoning and did not feel that the reclassification would adversely affect his property. He would not seek rezoning of his property should appellants' request be approved.

The appellee's witnesses were the director of the city's Planning Commission, two former members of that Commission, and a witness whose formal education and experience was that of an architect and city planner. The director acknowledged that he had told the appellant a condominium development would be a reasonable use; however, it was a question of degree of the use. These witnesses testified that they had made a study of the area and had been familiar with it for many years. Some of the factors they took into consideration were traffic, the commercial and residential usage in the neighborhood, character and type of neighborhood and the feelings of the residents. According to their testimony, a reclassification to D apartment would result in a higher intensity of use. Although it was appellants' desire to use it only for the school, once it is rezoned to D apartment the potential exists that it could be used, *inter alia,* for such as a boarding and lodging house, fraternity house, club or facilities of a philanthropic nature and various retail shops which would be incompatible with the long established neighborhood. The high density use for D apartment would constitute a precedent for further rezoning in the Kavanaugh area. Reclassification could cause a major adverse impact on the neighborhood and could permit a three story apartment building, 80′ x 100′, of ten units with fifteen parking spaces. A compatible use would be a 4-unit apartment building which is a lower density use. The city is very cautious about approving a D apartment classification. In summary, the expert witnesses

were of the view that, although a two family duplex or a 4 unit apartment would be compatible with the neighborhood, D apartment would be incompatible since it is a most intense type of development. They characterized the area as being a strong residential one where values are up instead of down and the property is well maintained. The area was described as one of the prime residential neighborhoods in the city which has been established for some 50 years and successfully sustained. Residents in the immediate neighborhood expressed opposition to the rezoning.

We review the chancellor's finding to determine whether it is clearly against the preponderance of the evidence that the action of the city board was not arbitrary, capricious and unreasonable. In other words, whether there was any reasonable basis for the board's decision. *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W. 2d 664 (1981); and *Lindsey* v. *City of Fayetteville,* 256 Ark. 352, 507 S.W. 2d 101 (1974). We have held that "arbitrary" means decisive but unreasoned action and that "capricious" means not guided by a steady judgment or purpose. *City of North Little Rock* v. *Habrle,* 239 Ark. 1007, 395 S.W. 2d 751 (1965); and *McMinn Co.* v. *City of Little Rock,* 257 Ark. 442, 516 S.W. 2d 584 (1974). Residential property which adjoins business property is only one factor to be considered; it does not automatically entitle one's property to rezoning; and the decisions of the city officials in zoning matters are legislative in nature since our state legislature has delegated the power of comprehensive planning in classifying the various areas of the city into proper zones or classifications. *City of Little Rock* v. *Breeding, supra;* Ark. Stat. Ann. §§ 19-2804 *et seq.* and 19-2825 (Repl. 1980). The feelings of the residents in the neighborhood with reference to the approval or disapproval of the request for rezoning is a legitimate factor to be considered. *Downs* v. *City of Little Rock,* 240 Ark. 623, 401 S.W. 2d 210 (1966). In *Taylor* v. *City of LR,* 266 Ark. 384, 583 S.W. 2d 72 (1979), we quoted with approval:

> Obviously from the alignment of the eminent expert witnesses in their opposite views, we are dealing in an area in which honest, dedicated and sincere people differ. The Court does not conclude that either side of

> this argument can be said to reach their respective conclusions arbitrarily, capriciously or unreasonably, and in such position, and this Court being limited to a determination of this narrow issue, the Court concludes that the Complaint of the Plaintiff must be dismissed without relief.

Here, the witnesses for both sides acknowledged that their opinions were a matter of judgment and that an opposite view could be said to be reasonable. We cannot say the chancellor's finding that the city Board of Directors did not act arbitrarily, capriciously and unreasonably or without any reasonable basis is clearly against the preponderance of the evidence.

Appellants next assert that the unreasonable limitation placed upon the use of appellants' property by the city's refusal to rezone, as requested, deprived them of the use of their property and constitutes a taking for public use without compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. 2, § 8, Ark. Constitution (1874). We cannot agree. Appellants purchased the property knowing it was zoned A single family. Further, rezoning is not justified by the mere fact the property owner seeking the rezoning would benefit economically if the rezoning was allowed, or that the land would be put to its most remunerative use. *City of Little Rock* v. *Breeding, supra;* and *Lindsey* v. *City of Fayetteville, supra.* See Wright, *Zoning Law in Arkansas: A Comparative Analysis,* 3 U.A.L.R. Law Journal, 421 (1980). Appellants have failed to establish an unreasonable limitation has been placed upon their land.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. In my opinion, this is a very arbitrary, capricious and unreasonable decision rendered by the Board of Directors. I am disappointed that the majority does not recognize that the appellants are quite obviously being given unequal treatment of the law by the

city of Little Rock, Arkansas. Originally, the appellants acquired this property which was clasified "A-1" family. The ordinance in effect allowed "A-1" family district and "B residence" district to be used among other things for "public schools, elementary and high, and other educational institutions with curriculum equivalent to a public elementary school or public high school." It is obvious to me that the Montessori School operated by the appellants at the above property classified as the equivalent to a public elementary school. See *City of LR* v. *Infant-Toddler Montessori Sch.*, 270 Ark. 697, 606 S.W. 2d 743 (1980). Additionally, the property sits directly across Kavanaugh from the post office and has a garage on the east side and an apartment house behind. The area to the west includes such businesses as the Kroger Grocery Store and other similar businesses. Nevertheless, this court upheld the court below in ruling that this Montessori School was not equivalent to public elementary schools.

When the appellants received notice of rejection of their application to rezone the property, even though several other schools were then and are still presently operating in "A-1" family districts, they applied for classification as "E-1." This was denied by the Board of Directors. They then filed an application for variance to allow their school to continue, like many others are continuing. The variance was denied.

The staff for the city recognized that this particular property was no longer suitable for single family dwellings. In fact, the staff of the Planning Commission stated: " . . . Single family dwellings are no longer appropriate with an orientation towards Kavanaugh; particularly one which faces the U.S. Post Office across the street." This is the arm of the city government that furnishes information to the city directors in order that their decisions might be based upon sound footing.

Appellants' property is actually an enclave into the surrounding business area. To the immediate west and contiguous to this land is a multi-unit apartment house built on a 50 foot lot; to the south is a duplex which is

contiguous to the property in question. Across Kavanaugh Street and directly in front of the subject property is a branch office of the United States Postal Service. On the east side of the property there is a garage and a single family dwelling. This single family dwelling on the northeast corner is the only single family property contiguous to appellants' property here in question and it is separated by an alley.

The staff recommended to the Board of Directors that this property is no longer suitable as single family dwelling property. The appellants have first requested to be allowed to operate their school in the area which, in my opinion, was already authorized, but their request was denied. They then petitioned to rezone the property to a quiet business type property. They were refused. They made application for a waiver, and it was refused. Finally, in desperation they brought this second suit in order to try to get the property classified in a manner which would make it productive to them. They did not even seek to have it classified into the classification which most of the property along Kavanaugh has been assigned.

Every time the appellants appear before a commission, board or court they are told they should try some other classification. When such classification is sought, it is denied. Appellants' property is almost completely surrounded by property which is classified other than "A-1" residential. It is clear enough to me that the appellants in this case have not been given equal protection of the law as guaranteed by the state and federal constitutions. Therefore, I would reverse the case and send it back with directions to reclassify it.

Mike McGEE *v.* Nellie L. WILSON et al

82-22 631 S.W. 2d 292

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Curtis E. Rickard* and *Joe Hardin,* for appellant.

*Hobbs, Longinotti & Bosson,* for appellees.

JOHN I. PURTLE, Justice. The Garland County Circuit Court refused to set aside a default judgment granted against Mike McGee, the appellant herein. The appellant had contended unavoidable casualty and excusable neglect in an attempt to set aside the default judgment.

On appeal he contends that the trial court erred in refusing to set aside the default judgment and that the court erred in awarding treble damages in this particular case. We disagree with both arguments and affirm the action taken by the trial court.

The facts reveal that Charles McGee contracted with

Georgia Pacific to harvest certain tracts of timber land. The contract in this particular case was subcontracted to his son, Mike McGee. Mike McGee and his crew were harvesting the timber when they crossed over onto the property of the appellees and cut a considerable amount of timber. It is not clear from the record whether McGee hauled any of the timber to Georgia Pacific or whether it was left in the woods and carried away by woodcutters. In any event, Mike McGee ceased cutting on appellees' land as soon as he was informed he had crossed onto appellees' land.

On September 30, 1980, the appellees filed a complaint against Charles McGee, Mike McGee and Georgia Pacific Corporation alleging willful trespass upon appellees' land and seeking treble damages pursuant to Ark. Stat. Ann. § 50-105 (Repl. 1971). Georgia Pacific filed a timely answer and subsequently filed a motion for a summary judgment which was granted by the court. Mike McGee received process of service on October 4, 1980, at the same time the deputy sheriff left the summons for Charles McGee with Mike McGee. Charles McGee lived in a different county. Neither Charles McGee nor Mike McGee answered the complaint of summons. On December 1, 1980, the trial court rendered a default judgment against Charles and Mike McGee. On June 9, 1981, appellees' attorney notified Charles McGee and Mike McGee that a hearing would be held in Garland County on July 6, 1981, to determine the amount of damages to be recovered by the appellees. Neither defendant appeared for the hearing and testimony was presented to the effect that the value of the timber cut was between $4,000 and $6,000. The testimony also indicated that other timber was damaged and the soil was compacted.

On August 17, 1981, Charles McGee and Mike McGee filed motions to set aside the default judgments rendered against them. They alleged unavoidable casualty and excusable neglect. The hearing was held on this motion, and the court upon learning that Charles McGee was not properly served vacated the default judgment against Charles McGee. Mike McGee's defense was that both he and his father had insurance to cover them against liability, and Charles McGee told Mike McGee he would turn the matter

over to his insurance company for a defense. Subsequently Charles McGee's company declined to provide a defense because the complaint alleged willful and wanton action on the part of the policyholder. The court found against Mike McGee on his motion to vacate the default judgment and this appeal follows. The judgment against Charles McGee was vacated for lack of proper service.

The complaint alleged willful and wanton conduct on the part of Mike McGee in trespassing upon appellees' land. Fifty-seven days after service of summons the court entered default against Mike McGee. The appellees waited approximately six months after entering the default judgment before arranging a hearing on damages. Appellant was notified by letter 30 days prior to the hearing on the amount of damages to be awarded. He did not attend the hearing and did not contest the allegations of the complaint until he filed his motion to set aside the judgment. ARCP Rule 60 (c) sets out the grounds for setting aside a judgment after 90 days. It states as follows:

> The court in which a judgment has been rendered or order made shall have the power, after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . .
>
> (7) For unavoidable casualty or misfortune preventing the party from appearing or defending.
>
> . . .

There simply is nothing to show that there was unavoidable casualty or anything which prevented the appellant from appearing or defending in this action. The most that can be said is that he had a misunderstanding about being defended by an insurance company.

The evidence presented at the trial was that the timber damaged ranged in value between $4,000 and $6,000 and that

there was additional damage to other timber and the land. Certainly, the amount of $16,000 awarded in this case is less than three times the highest estimate of the damages presented to the court. Under these circumstances we are unable to say the court abused its discretion.

Affirmed.

Thomas Wayne WILKINS *v.* Dorothy M. FORD

81-256 631 S.W. 2d 298

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Gordon L. Humphrey,* of *Boeckmann & Humphrey,* by: *E. Alvin Schay,* for appellant.

*Steve Inboden,* of *Webb & Inboden,* for appellee.

ROBERT H. DUDLEY, Justice. Dorothy Ford filed a

bastardy action naming appellant Thomas Wilkins as the putative father. On November 21, 1980, the county court filed its finding of paternity and order of support. Appellant Wilkins did not perfect his appeal within the prescribed 30-day period. After the term lapsed appellant filed a written motion asking permission of the county court to file a belated appeal to circuit court. The appointed referee did not grant the motion, but on February 5, 1981, on the oral motion of appellant, the referee vacated the finding of paternity and order of support and then, on February 26, 1981, filed an order which was practically identical to the original order. In the brief before us appellant admits the purpose of the latter action was to allow a belated appeal. The circuit court dismissed the appeal and we affirm.

The appellant received notice of the suit, appeared, defended and lost. The time for appeal has passed and appellant now seeks to directly attack the judgment of paternity. This type of attack is not allowed unless a petitioner pleads and proves grounds, otherwise judgments would never be final. Appellant has neither pleaded nor proved a ground to vacate the judgment and he has neither pleaded nor made a prima facie showing of a valid defense.

The parties have filed briefs with extensive arguments on whether a county court may, on oral motion, vacate a judgment after the term has lapsed or more than 90 days after filing of the order. We do not reach that issue because the appellant was not entitled to have the judgment vacated without pleading a ground and asserting and making a prima facie showing of a valid defense. In his brief appellant refers to the ground of unavoidable casualty but that ground for vacating a judgment is "For unavoidable casualty or misfortune preventing the party from appearing or defending." ARCP Rule 60 (c) (7). The appellant appeared, defended and lost. He does not come within this ground.

In addition to a valid ground to vacate a judgment the moving party must prove a prima facie showing of a valid defense. In *Burnett* v. *Burnett,* 254 Ark. 507, 494 S.W. 2d 482 (1973), we stated:

. . . Our Ark. Stat. Ann. § 29-509 (1962 Repl.) [substantially the same as Rule 60 (d), ARCP] provides that a judgment shall not be vacated "until it is adjudged that there is a valid defense to the action . . . " The word "valid" as used in the statute means "meritorious". *Berringer* v. *Stevens,* 145 Ark. 293, 225 SW. 14 (1920). In *Nichols* v. *Arkansas Trust Co.,* 207 Ark. 174, 179 S.W. 2d 857 (1944) we said:

> In a long line of cases beginning with *State* v. *Hill,* 50 Ark. 458, 8 S.W. 401, and extending to *O'Neal* v. *Goodrich Rubber Co.,* 204 Ark. 371, 162 S.W. 2d 52, and *Davis* v. *Bank of Atkins,* 205 Ark. 144, 167 S.W. 2d 876, this statute has been construed as imposing the requirement that a prima facie showing of a valid defense be made before the judgment will be vacated, although it is shown that it was rendered without notice.

Later holdings of the same import are *Haville* v. *Pearrow,* 233 Ark. 586, 346 S.W. 2d 204 (1961), and *Agee* v. *Wildman,* 240 Ark. 111, 398 S.W. 2d 542 (1966).

Appellant contends that Ark. Stat. Ann. § 34-706.1 (Supp. 1981) modifies the procedure in bastardy actions and the court can modify any order at any time. It provides:

> Modificiation of judgment. — County courts may at any time, enlarge, diminish or vacate any order or judgment awarding an allowance for child support in bastardy cases.

The statute was enacted in response to our ruling in *Carter* v. *Clausen,* 263 Ark. 344, 565 S.W. 2d 17 (1978), which held that county courts had no authority to adjust the amount of support. The statute authorizes modifications from time to time in the continuing order of support but it does not authorize a modification of a finding of paternity. Appellant also contends that the last sentence of Ark. Stat. Ann. § 34-706 (Supp. 1981) authorizes a vacation at any time. That statute refers to a vacation of an order of commitment for failure to pay support.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Ark. Stat. Ann. § 34-706.1 (Supp. 1981) reads as follows:

> County courts may at any time, enlarge, diminish or vacate any order or judgment awarding allowance for child support in bastardy cases.

On November 18, 1980, the county court of Poinsett County entered an order in a bastardy action declaring the appellant to be the natural father of the bastard child and further ordered the appellant to pay the sum of $50 per week for support of the child until a certain age. However, on February 5, 1981, the county court vacated its order of November 18, 1980.

The action of the court to vacate its prior order was clearly within the terms of the above-stated statute. I am not willing to state that the General Assembly did not have the right to enact a law allowing the county court to do exactly what it did in this case. In my opinion, it is not the place of this court to tell the legislature which laws to enact.

The majority seem to mistakenly rely upon our Rules of Civil Procedure. I see no need to discuss the Rules or the terms of court because they simply do not apply to county courts. The first statement of the Rules of Civil Procedure states that they are applicable only to circuit, chancery and probate courts. See ARCP Rule 1.

If the General Assembly enacted § 34-706.1 for the purpose of avoiding our holding in *Carter* v. *Clausen,* 263 Ark. 344, 565 S.W. 2d 17 (1978), they did an excellent job. *Carter* held the county court had no power to modify a bastardy order. Now the same courts have the express authority to vacate or modify orders in any manner without limitation as to time. Therefore, until the General Assembly enacts another law or we adopt a rule change, the county court has the unqualified power to modify or vacate its own decrees.

Relying upon the plain and simple language used in the statute, I would reverse this case.

Kevin Andre ROBINSON *v.* STATE of Arkansas

CR. 81-106 631 S.W. 2d 294

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*William R. Simpson, Jr.,* Public Defender, and *James Phillips* and *Kelly Carithers,* Deputy Public Defenders, by: *Deborah R. Sallings,* Deputy Public Defender, for appellant.

*Steve Clark,* Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant Kevin Andre Robinson was convicted and sentenced to consecutive terms of fifty years for rape and twenty years for attempted rape. He argues that his due process rights were violated by the in-court identification which he claims was tainted by unnecessarily suggestive pretrial procedures. The evidence established that five young girls were walking to Oakhurst School in Little Rock on December 5, 1980, when the appellant approached them and asked if they would go into the woods and help him put some puppies in a bag. The three older girls declined and walked on. Appellant approached the other two girls and told them he would pay them five dollars for their help. They agreed to help and walked into the woods, where appellant grabbed them and raped one and attempted to rape the other. The crime was reported and an investigation ensued. A photographic spread was made up consisting of six photographs and it was shown to the two victims and to the other three girls. The appellant was identified as the rapist. A physical lineup was then conducted which included appellant and five other men. Again, appellant was identified as the rapist. Contending that the identification was inherently unreliable, the appellant filed a motion to suppress any in-court identification of him which the trial court denied. We affirm.

Specifically the appellant contends that the lineup identification was suspect because he was the only person included in both the photo spread and the lineup, because he had on the same shirt in both and because he appeared to be several inches taller than the other men in the lineup. Appellant cites a United States Supreme Court opinion where a lineup resulted in a violation of the petitioner's constitutional rights and argues that decision should control here. *Foster* v. *California,* 394 U.S. 440 (1969). But in

*Foster* there were only three men included in the lineup and the accused was six feet tall while the other two men were only five and one-half feet tall. Also, a jacket similar to the one described by the victim was worn by the accused and the victim could not positively identify the robber. The victim asked to speak with the accused and after a confrontation he was still not certain as to whether the petitioner was the robber. One week later another lineup was conducted and the accused was the only person who had appeared in the first lineup. The victim finally identified the accused and the court noted that:

> The suggestive elements in this identification procedure made it all but inevitable that the victim would identify petitioner whether or not he was in fact "the man." This procedure so undermined the reliability of the eyewitness identification as to violate due process.

In *Fountain* v. *State,* 273 Ark. 457, 620 S.W. 2d 936 (1981), we announced the factors used to determine the reliability of an identification. They are (1) the opportunity of the witness to view the criminal at the time of the crime (2) the witness' degree of attention (3) the accuracy of the witness' prior description of the criminal (4) the level of certainty demonstrated by the witness at the confrontation and (5) the length of time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. Here all the witnesses had ample opportunity to view the appellant and they were with him for an extended period. Their degree of attention was such that they gave similar descriptions. These descriptions were used to conduct the lineups from which appellant was identified. At the trial the witnesses were definite in their in-court identification. The appellant was identified at all three stages in the proceedings — at the photographic lineup six days after the crime, at the lineup eleven days later and at the trial approximately six and one-half months later. The procedure used and the resulting identification were reliable under the factors enumerated.

All of the witnesses were certain in their in-court

identification of appellant. In *Fountain* v. *State,* supra, we stated, "When a photographic identification is followed by an eyewitness identification at trial, the conviction will be set aside only if the photographic show-up was so suggestive as to create a substantial possibility of irreparable misidentification." The identification in this case was based upon the observation by the witnesses and was not induced by investigation procedures.

The appellant also made a motion for a mistrial when the prosecutor commented on the reliability of the photographic lineup during his closing argument. In appellant's closing argument it was noted that there was no "neutral representative" in the room where each witness observed the physical lineup, therefore there was no way of knowing if the witnesses were coerced. The prosecutor responded in his closing argument that a neutral authority, the trial judge, had reviewed the procedure in a pretrial hearing and found that the procedure was not defective. The trial court admonished the jury but refused to grant a mistrial and we affirm. It is permissible to comment upon matters which were discussed or invited by the appellant's preceding closing argument. *Ruiz and Van Denton* v. *State,* 265 Ark. 875, 582 S.W. 2d 915 (1979). A mistrial is a drastic remedy and will not be resorted to unless the prejudice is so great that it cannot be removed by an admonition to the jury. *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979). Here the trial judge admonished the jury to disregard the comment. Since a mistrial is within the sound discretion of the trial judge and the decision will not be reversed unless there is a clear showing of abuse, we cannot say that the trial judge abused his discretion. *Cary* v. *State,* 259 Ark. 510, 534 S.W. 2d 230 (1976).

Charges against the appellant had been filed in two other incidences of similar rapes but in a pretrial hearing the trial court ruled that no mention of those other rapes could be made. On cross-examination, a police officer was asked by appellant's attorney if he told the appellant why he was being asked to go to the police station. The officer answered "yes" and was then asked what he told appellant. He answered that he told him, "I was investigating a series of

rapes." Appellant's motion for a mistrial was denied on the basis that counsel's question elicited the response. The trial judge was correct in his ruling. In *Stovall* v. *State*, 233 Ark. 597, 346 S.W. 2d 212 (1961), we said that when the appellant injects the matter into the case by questions on cross-examination, he cannot complain of what develops. Since appellant asked the specific question, the officer could truthfully answer it. The granting of a threshold motion to prevent certain testimony does not require a witness to conceal the truth in order to respond to a question by the moving party.

Affirmed.

ADKISSON, C.J., and PURTLE and HAYS, JJ., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority have incorrectly held that, during closing argument, the defense invited certain comments by the prosecuting attorney. Not only were the prosecutor's comments uninvited but were so damaging that their prejudicial effect was not removed by the admonition of the trial judge.

During closing argument the appellant's attorney made an argument to the jury concerning the lineup conducted by the police:

> But Kevin [appellant] had signed a waiver saying that he didn't want to be represented by counsel. So, even though there has been, as Mr. Adams said, no hint that there was some sort of collusion or some sort of directing of their attention towards someone, we don't know. I mean, there is no neutral representative in that dark room, to stand there as an impartial witness and say, 'That didn't happen.' All we have is a police officer who said, 'No, I didn't try to guide which way they were supposed to look or which person they were supposed to look at.' And I'm not accusing a police officer of lying. All I'm saying is that we don't have a neutral representative to know.

By using this statement as having "opened the door,"

the prosecuting attorney argued to the jury:

> The defendant sought to say that there had been no neutral authority who has reviewed the actions of the police department, reviewed the line-ups, but there has been. And that's the authority of the Judge. Ladies and gentlemen, if there had been something wrong — if there had been a defect in the photo show-ups or the line-ups, they wouldn't be here before you. We had a pre-trial hearing on that. They're here before you because the Judge found no defects.

It is conceivable that a prosecutor, during the urgency of the trial, could confuse the defense attorney's statement that there was not a neutral person present at the lineup with the trial judge's neutrality in later finding that the identification of the defendant by the witnesses was reliable. However, it is inconceivable that this court could be confused by this language and hold that the defense comment invited the prosecutor's remarks. As the record clearly reflects, the defense counsel's statement in no way referred to the pretrial determination by the trial judge.

Appellant promptly objected to the prosecutor's argument and asked for a mistrial, which was denied. The trial judge then attempted to glaze over the error by an unsatisfactory admonition to the jury:

> The Court will indicate to the jury that you are to consider only the evidence and the facts that have been elicited here today. Whatever happened before, that did not come up in this trial before you through the live witnesses or through the opening remarks of the attorneys, is not to be considered. I ask you to disregard any statements or comments about anything that happened outside of this courtroom today, that did not come in through live testimony or stipulations.

This admonition by the trial court, unquestionably, did not remove the effect of the prosecutor's very damaging and prejudicial remarks. Actually, it is difficult to imagine what the trial court could have said to cure this error. The

prosecutor's statement to the jury was intentional and couched in clear and unmistakable language.

The trial judge must determine as a matter of law whether there are constitutional infirmities rendering identification evidence inadmissible. If admissible, reliability of identification is an issue of fact to be decided by the jury. *See Synoground* v. *State,* 260 Ark. 756, 543 S.W. 2d 935 (1976). Here, the defendant was entitled to have the issue of the reliability of the identification determined by the jury, unbiased and unaffected by the opinion of the trial judge. *See Sharp* v. *State,* 51 Ark. 147, 10 S.W. 228 (1888). A mistrial should have been declared. I would reverse and remand for a new trial.

I am hereby authorized to state that PURTLE and HAYS, JJ., join in this dissent.

Bynum GENT *v.* James Eugene GOIN and Dorothy Jean ENEGREN, Executors of the Estate of Edith Gertrude Goin GENT, Deceased

82-23 631 S.W. 2d 303

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*Homer E. McEwen, Jr.,* for appellant.

*Gary E. Johnson,* for appellees.

STEELE HAYS, Justice. Appellant, Bynum Gent, seeks to establish a curtesy interest in the estate of Mrs. Edith Gertrude Goin, whom he married on September 13, 1978. They lived together until her death on March 5, 1981. Her will, dated some four months before her marriage to Gent, left the entire estate to two children by previous marriage.

On March 20, 1981, Gent filed an election to take against the will pursuant to Ark. Stat. Ann. § 60-501 (Repl. 1971), which gave surviving husbands a curtesy interest in the estate of a deceased wife, provided she died either intestate or her will pre-dated the marriage. The executors denied the election on the strength of *Stokes Ex'r* v. *Stokes,* 271 Ark. 300, 613 S.W. 2d 372, decided February 23, 1981. In *Stokes,* § 60-501 and several other of our statutes were declared unconstitutional, their gender-based classifications being held violative of the equal protection clause of the Fourteenth Amendment, the constitutionality of all gender-based laws having first been called into question by *Orr* v. *Orr,* 440 U.S. 268 (1979).

The void necessarily created by our decision in *Stokes* was promptly filled by the adoption of Act 714 of the 1981 Acts of Arkansas, effective March 25, 1981, which cured the constitutional infirmity of our statutes by substituting a neutral-based treatment in place of the gender-based treatment.

Soon after the adoption of Act 714, Bynum Gent filed a substituted election and it, too, was denied. Gent has appealed the probate judge's refusal to apply Act 714 retroactively. We agree with the trial court.

The essential issue of this appeal has been presented some four times since *Stokes* v. *Stokes* was decided, all with the same result. Act 714 creates substantive rights, not merely procedural, and is not subject to a retroactive application. *Hall* v. *Hall, Ex'r,* 274 Ark. 266, 623 S.W. 2d 833 (1981); *Huffman* v. *Dawkins & Holbrooks,* 273 Ark. 520, 622 S.W. 2d 159 (1981); *Bennett* v. *Bennett,* 275 Ark. 262, 628 S.W. 2d 565 (1982); *Thomas* v. *Gertsch,* 275 Ark. 398, 630 S.W. 2d 43 (1982).

Affirmed.

Sam HARSHAW *v.* STATE of Arkansas

CR 81-116 631 S.W. 2d 300

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*R. Wayne Lee,* for appellant.

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

STEELE HAYS, Justice. On August 9, 1980, Tammy Sherman was robbed as she was leaving Hudson's Fish Market where she worked. Moments later she was shot twice

as she attempted to go back inside the market. Appellant, Sam Harshaw, was tried and convicted of aggravated robbery and first degree battery for his participation in the crime, receiving concurrent sentences of fifty and twenty years. Appellant alleges three errors by the trial court. We disagree with the arguments and affirm the judgment.

First, appellant contends the court erred in denying his motion for a directed verdict on the aggravated robbery charge, claiming there was no evidence linking him with the robbery. The State's evidence showed Tammy Sherman got off work at 9 p.m. When she reached her car, Ronnie Dokes and two other men approached her and demanded her money. At gun point Dokes took her purse and a sack of bread and the three men left. Tammy Sherman walked a few steps toward the market to report the robbery when she saw Sam Harshaw, whom she knew, crouched behind another vehicle. He stood up, told her he had a gun and to "get back." Ms. Sherman ignored Harshaw's warning telling her he would have to shoot her. As she turned to walk on, Harshaw shot her first in the hand and then in the back, inflicting a permanent paralysis from the waist down.

The evidence of Harshaw's identification is positive and unequivocal. Mr. Bert Mitchell testified that a few minutes before the robbery he saw Harshaw and three other men standing near the door of the market. Mitchell knew Harshaw and spoke to him as he passed.

The State's evidence linking Harshaw to the aggravated robbery is entirely circumstantial, but that does not preclude a finding he was involved in the robbery. Harshaw was placed at the scene immediately before and after the robbery. His conduct is unexplainable except in connection with the robbery. The only plausible inference is that Harshaw was hiding a few feet away during the robbery and when he was recognized by the victim he shot her to give his companions and himself time to get away from the scene. In *Darville* v. *State,* 271 Ark. 580, 609 S.W. 2d 50 (1980), we said:

> We have often stated the rules in regard to circumstantial evidence that where circumstantial evi-

> dence alone is relied upon, it must exclude every other reasonable hypothesis but the guilt of the accused. *Hurst* v. *State,* 251 Ark. 40, 470 S.W. 2d 815 (1971); *Ayers* v. *State,* 247 Ark. 174, 444 S.W. 2d 695 (1969). The question whether circumstantial evidence excludes every other reasonable hypothesis other than the guilt of the accused is usually one for the jury. *Abbott* v. *State,* 256 Ark. 558, 508 S.W. 2d 733 (1974); *Smith* v. *State,* 264 Ark. 874, 575 S.W. 2d 677 (1979). The jury is permitted to draw any reasonable inference from circumstantial evidence to the same extent it can from direct evidence. It is only when circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law and the test is whether there was substantial evidence to support the verdict when viewing the evidence in the light most favorable to the state. *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904 (1974); and *Abbott* v. *State, supra.* (At 581.)

In *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904 (1974), we said:

> When circumstantial evidence rises above suspicion 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. (At 433.)

The pertinent sections of the Criminal Code on this issue state:

41-2102. Aggravated robbery. — (1) A person commits aggravated robbery if he commits robbery as defined in section 2103 [§ 41-2103] and he:

(a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or

(b) inflicts or attempts to inflict death or serious physical injury upon another person.

41-2103. Robbery. — (1) A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

Under the due process clause of the Fourteenth Amendment, the State must, of course, prove each element of a crime beyond a reasonable doubt. *In Re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Harkness* v. *State,* 267 Ark. 274, 590 S.W. 2d 277 (1979); *Peals* v. *State,* 266 Ark. 410, 584 S.W. 2d 1 (1979). However, an element may be inferred by circumstantial evidence where there is no other reasonable explanation for the accused's conduct.

No explanation was offered for the shooting of Ms. Sherman and no other reasonable hypothesis exists except that it was connected to the robbery. Harshaw's defense was based on a denial he was present at the robbery or at the shooting. Where common sense will allow no other reasonable conclusion to be drawn from the evidence but that the accused was involved in the robbery the denial of a motion for a directed verdict cannot be regarded as error.

Second, Mr. Harshaw argues the trial court erred in allowing the State to call Dr. Stephenson Flannagin to testify as to Mrs. Sherman's injuries. Harshaw offered to stipulate as to the injuries Ms. Sherman sustained. He contends the doctor's testimony was cumulative evidence and the only purpose for introducing it was to inflame the jury. However, the record does not reveal any objection to Dr. Flannigan's testimony based on prejudice or its inflammatory nature. (Tr. 125.) Harshaw cites the case of *Lee* v. *State,* 266 Ark. 870, 587 S.W. 2d 78 (Ark. App. 1979), to support this contention,

but there are differences. In *Lee,* the appellant was charged with three counts of manslaughter stemming from an auto accident. Dr. Jorge Johnson was allowed to testify in detail about the victim's unsuccessful, agonizing four-day struggle to survive though Lee had conceded the cause of death. Dr. Flannigan's testimony, unlike Dr. Johnson's, was only a brief and general description of Ms. Sherman's injuries and the permanent effect of her paralysis. His testimony was relevant to show an element of the aggravated robbery — the infliction or intent to inflict death or serious injury to another. Ark. Stat. Ann. § 41-2102. Whether the probative value of relevant evidence is outweighed by any prejudice it may produce is for the trial court to determine. Rule 403, Arkansas Uniform Rules of Evidence.

Finally, Harshaw contends the trial court erred in admitting testimony of acts committed by Dokes and the other two. For the reasons already stated, we conclude there was evidence linking Harshaw to the robbery and, therefore, that testimony is relevant to Harshaw. Generally, all evidence that is relevant is admissible. Arkansas Uniform Rules of Evidence 401, 402; Ark. Stat. Ann. § 28-1001 (Repl. 1978). The evidence was also admissible because it established a link in the entire criminal transaction of the offense charged. In *Russell and Davis* v. *State,* 262 Ark. 447, 559 S.W. 2d 7 (1977), we stated:

> . . . when acts are intermingled and contemporaneous with one another, evidence of any or all of them is admissible to show the circumstances surrounding the whole criminal episode. (At 452.)

The judgment on the sentences is affirmed.

Curtis W. URQUHART *v.* STATE of Arkansas

CR 81-35 631 S.W. 2d 304

Supreme Court of Arkansas
Opinion delivered April 12, 1982

Petitioner, *pro se.*

*Steve Clark,* Atty. Gen., for respondent.

PER CURIAM. Petitioner Curtis Urquhart was convicted by a jury of rape and sentenced to forty years imprisonment and a $4,000 fine. He was also convicted of burglary in the same proceeding and sentenced to fifteen years imprisonment. The terms were ordered served consecutively. We affirmed. *Urquhart* v. *State,* 273 Ark. 486, 621 S.W. 2d 218 (1981). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37.

Petitioner Urquhart was identified by a deaf woman as the man who broke into her apartment on the night of July 17, 1980, and raped her. She identified Urquhart by a large scar on his shoulder. She also testified that she was familiar with Urquhart because he was a frequent visitor to the neighborhood. Urquhart's defense was that the woman had invited him to her apartment and consented to sexual relations.

Petitioner claims ineffective assistance of counsel because counsel (1) consulted with petitioner only three times before trial; (2) did not prepare for trial; (3) was incompetent to deal with a deaf witness; and (4) did not consult with petitioner before allowing nine women to be seated on the jury. Petitioner also states that he and counsel could not agree on anything related to his defense. The allegations are conclusory. Allegations which are not supported by facts and a showing of some prejudice to the petitioner do not justify postconviction relief. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W. 2d 184 (1981). The mere fact that petitioner did not agree with his attorney on the composition of the jury or on the many tactical decisions which must be made by counsel before and during trial does not demonstrate that counsel was ineffective. See *Leasure* v. *State,* 254 Ark. 961, 497 S.W. 2d 1 (1973). To warrant postconviction relief, a

petitioner must show that he was prejudiced by counsel's conduct. Furthermore, he must show by clear and convincing evidence that the prejudice resulting from the representation of counsel was such that he did not receive a fair trial. *Blackmon,* supra. Petitioner has fallen far short of demonstrating that he did not receive a fair trial.

Since the offense charged was rape, petitioner contends that the trial court and his attorney should not have allowed nine women to serve on the jury. He asserts that all women feel the same about rape and are not willing to make a fair judgment in a trial involving the crime. The impartiality of a prospective juror is a question of fact for the trial court to determine in its sound discretion. Ark. Stat. Ann. § 39-105 (c) and (e) (Supp. 1981). No abuse of that discretion can be discerned from this petition. Also, the issue of the composition of the jury is one which could have been raised in the trial court; as such, it is not a proper ground for a petitioner under Rule 37. *Neal* v. *State,* 270 Ark. 442, 605 S.W. 2d 421 (1980). Petitioner argues, however, that counsel accepted the jury, leaving him powerless to challenge the panel as he wished to do. This argument is basically one of ineffective assistance of counsel which must fail because petitioner has not shown bias on the part of any particular juror. Jurors are assumed to be unbiased; the burden of demonstrating actual bias on the part of any member of the panel is on the petitioner. See *Strode* v. *State,* 257 Ark. 480, 517 S.W. 2d 954 (1975). A general indictment of all women as being unsuitable jurors for a rape trial is not only highly questionable but also insufficient legally.

Petitioner next alleges that the trial court should have permitted him to dismiss his court-appointed attorney. Petitioner erroneously states that he had the legal right to dismiss as many as three attorneys before the court could decline to appoint another. The right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient and effective administration of justice. *Tyler* v. *State,* 265 Ark. 822, 581 S.W. 2d 328 (1979). The trial court was obligated to appoint competent counsel, not to comply with petitioner's wishes.

Petitioner's final allegation is unclear. A friend of the victim testified at trial that the victim told her in sign language about the rape. Petitioner may be saying that this friend's testimony was inadmissible. If so, the question was raised on appeal and decided adversely to petitioner. It may not be raised again in a Rule 37 petition. *Houser* v. *State,* 508 F.2d 509 (8th Cir. 1974). On the other hand, petitioner may be contending that the interpreter at trial was a friend of the victim. If so, the record does not support his argument. There is nothing to indicate any relationship between the victim and the trial interpreter. Furthermore, no objection to the interpreter was made at trial. This Court will not consider in a petition for postconviction relief matters which could, and should, have been raised at trial. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980).

Petition denied.

John P. FORSYTH *v.* STATE of Arkansas

631 S.W. 2d 304

Supreme Court of Arkansas
Opinion delivered April 12, 1982

*W. H. Taylor,* for appellant.

*Steve Clark,* Atty. Gen., for appellee.

PER CURIAM. Appellant, John P. Forsyth, by his attorney, has filed for a rule on the clerk.

His attorney, W. H. Taylor, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

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