RK.

[redacted]

[redacted]

[redacted]

Donald McENTIRE *v.* MONARCH FEED MILLS, INC.

82-40 631 S.W.2d 307

Supreme Court of Arkansas
Opinion delivered April 19, 1982

Ponder & Jarboe, for appellant.

Simpson & Riffel, for appellee and cross-appellant.

FRANK HOLT, Justice. This is an arbitration case. In May, 1980, the appellee contracted to purchase from appellant a quantity of yellow grain sorghum, which appellant expected to grow on his farm during the 1980 crop season. Upon failure to deliver the grain as agreed, the appellee initiated arbitration proceedings, pursuant to their contract, to determine its damages. The appellant responded by filing a petition in chancery court for a stay of arbitration. The appellee filed a counter complaint asking for a mandatory injunction requiring the appellant to submit to arbitration. The court, in dismissing the case, found it did not have jurisdiction to grant a stay, the appellant had an adequate remedy at law, if any, in federal court and denied appellee's petition to require appellant to submit to arbitration. Hence come this appeal and cross-appeal in which both parties urge that the chancellor had jurisdiction to consider a stay of arbitration.

Appellant contends that our Uniform Arbitration Act, Ark. Stat. Ann. §§ 34-511 — 34-532 (Supp. 1981), gave the chancery court power to stay the arbitration proceedings. However, since that act, until amended in 1981, validates only arbitration agreements with respect to construction and manufacturing contracts, the arbitration contract here is unenforceable. Therefore, since the contract involves only intrastate commerce, the chancellor should enter a stay of the arbitration and leave the appellee to his remedy at law. On cross-appeal the appellee argues that even though our state Uniform Arbitration Act on the date of this contract did not include the subject matter here, the trial court did have jurisdiction, pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1, *et seq.,* inasmuch as interstate commerce is involved in this transaction. Con-

sequently, the chancellor has the power to require submission of the controversy to arbitration.

The issue was submitted to the chancellor on a stipulated record which consisted of the pleadings, the written contract which provided for arbitration, and argument per letters to the chancellor. The appellee, whose principal place of business is in Dexter, Missouri, buys grain and sells feed in southern Missouri and northern Arkansas. It has manufacturing facilities in Dexter, Missouri, and Pocahontas, Arkansas. The contract provided that the appellee would purchase 200,000 pounds of No. 2 yellow grain sorghum at a stipulated price from the appellant, a farmer living near Walnut Ridge, Arkansas. The grain was to be delivered to the appellee's plant in Pocahontas. Pertinent clauses in the contract provide that:

> Seller agrees that no deliveries on this contract will be adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act, or is an article or commodity which may not, under provisions of Section 404 or 506 of the Act, be introduced into interstate commerce. . . .
>
> Buyer and seller agree that all controversies between them under this contract be settled by arbitration in accordance with the rules and regulations in the Grain Trade Rules of the National Federal Grain and Feed Association.

Section 1 of the Federal Arbitration Act, *supra,* reads: "[C]ommerce, as herein defined, means commerce among the several States . . ." Section 2 of the Act reads:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

> such grounds as exist at law or in equity for the revocation of any contract.

Arbitration is favored by a strong public policy and courts look with favor upon arbitration as an expeditious means of removing contentions from the area of litigation, which is less expensive to the parties and also eases congestion of court calendars. 6 C.J.S. Arbitration § 2. In *Franks* v. *Battles,* 147 Ark. 169, 227 S.W. 32 (1921), we said:

> It has been said by this court, and by numerous others, that it is the policy of the law to encourage and uphold settlements of disputes in this manner.

Here, when we consider the undisputed facts that appellee's activities involve transactions in Missouri and Arkansas, together with the recited provisions in the arbitration contract, it appears fair to say the parties' transactions involved interstate commerce. Therefore, the Federal Arbitration Act is applicable.

We further observe that a state court, as here, has concurrent jurisdiction with the federal courts to enforce rights granted by a federal act unless prohibited from doing so. *Duke* v. *Helena-Glendale Ferry Co.,* 203 Ark 865, 159 S.W.2d 74 (1942); Wright, Law Fed. Cts. 3d Ed., Ch. 8 (1979); 1 Moore's Federal Practice § 0.6 [3], p. 237; *Claflin* v. *Houseman, Assignee,* 93 U.S. 130 (1876); *Mondou* v. *New York, New Haven & Hartford Railroad Co.,* 223 U.S. 1 (1912); and *McKnett* v. *St. Louis and S.F. Ry. Co.,* 292 U.S. 230 (1934).

Here, we find no provision in the Federal Arbitration Act which gives the federal courts exclusive jurisdiction over matters which come within its purview. It follows that the refusal of the chancellor to take jurisdiction of the subject matter was erroneous.

Reversed and remanded on direct and cross-appeal.

Frank ARNOLD, County Judge of Sharp County, Arkansas, et al *v.* NORTHEAST ARKANSAS PLANNING & CONSULTING COMPANY

82-3 631 S.W.2d 610

Supreme Court of Arkansas
Opinion delivered April 19, 1982

Stewart K. Lambert, Deputy Pros. Atty., and *Coop & Hopper,* by: *Paul E. Hopper,* for petitioners.

William R. Hass and *H. David Blair,* for respondents.

DARRELL HICKMAN, Justice. For almost five years, Sharp County, through its elected officials, has resisted paying a $15,000 claim by the Northeast Arkansas Planning and Consulting Company. In June of 1980, we upheld a jury verdict against the county for $15,000. *Sharp County* v. *Northeast Planning & Consulting Company,* 269 Ark. 336, 602 S.W. 629 (1980). But the county still refused to pay.

The trial court issued a writ of mandamus to the county judge, Frank Arnold, and six members of the quorum court to take the necessary steps to pay the judgment. They refused, were held in contempt of court and ordered jailed until they paid the claim. We find no reason to disturb the findings and order of the trial court.

All the excuses offered by the officials are meritless. The debt has been determined valid, and Sharp County has had its day in court. The burden was on the county to show payment of the obligation would have violated the tenth amendment to the Arkansas Constitution. *City of Piggott* v. *Woodard,* 261 Ark. 406, 549 S.W.2d 278 (1977). The county did not meet their burden because there was no showing that the county did not have funds to pay the claim in 1975, the year the debt was incurred.

There is sufficient money in the county treasury to pay it now. The fact that the county has appropriated 100% of that money for other debts is irrelevant. The officials knew of the debt in question and took no steps to appropriate money for payment of it. In fact, it seems they refused to do so and that is why the trial judge ordered them to. So we do not have a case of ordering county officials to do what they cannot legally do. If funds have

to be diverted from present appropriations it will have to be done. Any problems created by that action will be the result of the officials' refusal to fulfill their responsibility in the first place — that is paying this just debt of the county.

For the first time Sharp County argues the judgment entered cannot bear interest because of Ark. Const., art. 16, § 1. That issue was not raised in *Sharp County* v. *Northeast Planning & Consulting Company, supra,* and the law of that case applies. The issue cannot be raised now.
now.

We granted a temporary stay of the trial court's order pending review of this matter on what we deem to be a petition for a writ of certiorari. That stay is dissolved and the matter is remanded. The trial court is free to proceed with its previously entered order.

April Yvonne LAWSON *v.* George LEWIS
and Dorothy LEWIS, His Wife

81-265 631 S.W.2d 611

Supreme Court of Arkansas
Opinion delivered April 19, 1982

Laser, Sharp & Huckabay, P.A., for appellant.

Jack R. Kearney, for appellee.

STEELE HAYS, Justice. This is a damage suit. Appellee Lewis and his wife brought suit against appellant Lawson for personal injuries and loss of consortium arising from a collision on December 20, 1977, between Lawson's automobile and Lewis's motorcycle. The case was tried to a jury upon an admission of liability by Lawson, but denying that any injury had been sustained by Lewis. The jury's verdict found for the Lewises on their complaint and assessed their damages at "NONE."

Appellees Lewis filed a motion for a judgment n.o.v. and in the alternative for a new trial. Over Lawson's objection, the trial court set aside the verdict and granted a new trial, which Lawson claims on appeal was error. We disagree.

Appellant concedes that the law gives the trial court broad discretion in setting aside a jury verdict which it finds to be against the clear preponderance of the evidence. She argues, however, that its discretion here was abused as a matter of law, in that the instructions demonstrate that because of her admission of liability the issue of negligence was not submitted to the jury and, hence, the trial judge's recollection to the contrary was mistaken. She contends the jury believed the injuries were fictitious.

The argument is unpersuasive because the trial judge gave an additional reason for setting aside the verdict. In a memorandum opinion he explained his reasons:

> The Court in review of this matter must agree with petitioner in this instance and grant the Motion for New Trial. There is simply no substantial evidence upon which the jury should not have awarded some damages. The defendant had admitted liability; the Court erred in its failure to limit the jury's verdict to the sole issue of those damages resulting; and the Court must now set aside the verdict.

Thus, whether the trial court's recollection was accurate with respect to how the case was submitted to the jury we need not decide, as it is clear he found the verdict and the evidence to be at odds. But neither do we decide whether the evidence and the verdict were consistent, as appellant has abstracted nothing from the testimony and proof, other than a single medical report, and it would be utterly impossible to find an abuse of discretion where a new trial is granted because the evidence and the verdict fail to agree. Appellant's brief tacitly concedes the point, as most of her argument is devoted to a discussion of the weaknesses and contradictions of appellees' evidence with respect to the injuries, concluding that: "[A] review of the record in this case will readily establish that the jury did not reach an impermissible result or one unwarranted by the attempts of the appellee to portray the nature and extent of his alleged injuries. Certainly, contrary to the trial court's order, there was at least 'substantial' evidence that the appellee had indeed received no injuries which were approximately caused by the accident in question."

Unfortunately, we have no way of validating the argument in the face of the abstract given us. Supreme Court Rule 9 requires an abstract of so much of the record as is necessary to an understanding of the issues raised on appeal. To hold that the trial judge abused its discretion by finding the evidence to be such as to require a verdict in some amount for the plaintiffs (appellees) is utterly impossible where we have no basis on which to review his actions.

ARCP Rule 59 gives the trial court the discretionary power to grant a new trial to any party for "grounds materially affecting the substantial rights of such party," including error in the assessment of the amount of recovery, whether too large or too small, or where the verdict is contrary to the preponderance of the evidence. *Dorey* v. *McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969); *Bobbitt* v. *Bradford*, 241 Ark. 697, 409 S.W.2d 339 (1966). We find no abuse of discretion and the order is affirmed.

Herbert L. STORTHZ and Charlotte M. STORTHZ
v. COMMERCIAL NATIONAL BANK

81-236 631 S.W.2d 613

Supreme Court of Arkansas
Opinion delivered April 19, 1982

R. J. Brown, P.A., for appellants.

Haley & Young, P.A., by: *Jack Young* and *Martha L. Strother*, for appellee.

JEFF STARLING, Special Chief Justice. This case is on appeal to this court pursuant to Rule 29. This is a suit filed in circuit court by appellee to secure a judgment against the appellants on two promissory notes. The appellants filed an answer and a counterclaim. Prior to the scheduled trial by jury, the appellee filed a motion for summary judgment which was granted by the trial court thereby affirming the relief prayed for in the appellee's complaint and dismissing the counterclaim of the appellants.

In April, 1974, appellants obtained an agreement from First Federal Savings and Loan Association of Little Rock to advance to appellants the sum of $459,000.00 for the construction of the Renaissance Condominium project.

In July, 1974, First Federal refused, for internal reasons, to make the loan. Appellants' attorney made demand upon First Federal to honor its commitment for the loan. In an effort to avoid litigation, Charles Johnston, President of First Federal, arranged with appellee for appellee to provide appellants with the financing for the project.

Appellee subsequently made the loan to appellants based upon an oral commitment from Mr. Johnston whereby he agreed that he would personally commit a limited amount of collateral to appellee should there be a

default on the part of appellants and any loss to the bank on its loan to appellants.

On August 14, 1974, appellee loaned appellants $459,000.00 which was evidenced by appellants' promissory note with interest thereon at ten percent (10%) per annum, payable semi-annually. This promissory note was secured by a construction mortgage on the condominium project. This promissory note was extended on several occasions with the final extension becoming due on August 9, 1978.

In June, 1976, appellants obtained from appellee an additional loan in the amount of $83,000.00 for the purpose of completing the interior decorations of the project units. This indebtedness was also evidenced by appellants' promissory note with interest at the rate of ten percent (10%) per annum. This promissory note was also extended on several occasions with the final extension also becoming due on August 9, 1978.

On October 25, 1978, Mr. Johnston, as trustee, assigned to appellee a promissory note in the amount of $108,666.67 secured by a lien retained in a warranty deed. Subsequently, a $49,000.00 certificate of deposit was substituted by Mr. Johnston for the above mentioned promissory note. Thereafter, on August 6, 1980, a $27,000.00 cashier's check purchased by Mr. Johnston and made payable to appellee was substituted for the $49,000.00 certificate of deposit.

Appellants were unaware of the personal verbal commitment between Mr. Johnston and the appellee and the amount of the collateral pledged and substituted until the fall of 1978.

Prior to the two promissory notes becoming due on August 9, 1978, appellants attempted several accomodations with appellee, namely, urging appellee to accept the project units, which were the mortgaged collateral, in cancellation of the indebtedness owed by appellants to appellee. Appellee refused.

On August 9, 1978, the amounts due and owing pursuant to the two promissory notes were unpaid and in default.

On January 16, 1979, appellee filed suit in circuit court seeking judgment against appellants on the two promissory notes in the amount of $151,561.91, together with accrued interest from and after August 9, 1978, until paid, costs and attorneys' fees.

Appellants filed their verified answer and counterclaim denying certain material allegations in the appellee's complaint, raising affirmative defenses, alleging deceit and seeking judgment against appellee in the sum of $350,000.00 and punitive damages in the sum of $700,000.00 and for penalties as provided by federal law for usurious transactions.

On or about July 31, 1980, appellee cashed the $27,000.00 cashier's check of Mr. Johnston.

The case was set for jury trial on February 10, 1981. On February 2, 1981, appellee filed its motion for summary judgment which was submitted on the pleadings, depositions, affidavit of Charles Johnston and brief of the appellee.

On February 9, 1981, the motion for summary judgment was heard by the trial court. On the same day, appellants filed a first amended answer and counterclaim alleging that the $27,000.00 collateral received by appellee from Mr. Johnston should be credited against appellants' indebtedness.

The trial court granted appellee's motion for summary judgment in the amount of $151,561.91 with accrued interest from August 9, 1978, until paid, as prayed for in appellee's complaint. The trial court specifically found that the $27,000.00 collateral received by appellee from Mr. Johnston was not a credit against the indebtedness owed by appellants to appellee. From a granting of that motion, appellants bring this appeal.

Appellants argue the following points for reversal on appeal to this court.

> I. The trial court erred in granting summary judgment because genuine issues of material fact remain to be determined by the jury:
>
> A. Whether the bank charged or collected usurious interest so that the penalty of federal law should be applied.
>
> B. Whether the bank applied the credit from the collateral provided by Charles Johnston correctly to appellants' note.
>
> C. The amount that the defendants owe to the bank.
>
> II. The trial court erred in dismissing the counterclaim of the defendants against the bank because the counterclaim states a cause of action for deceit or misrepresentation through concealment of the guaranty of Charles Johnston or First Federal Savings and Loan, raising material issues of fact which can only be decided by the jury.

Each point shall hereafter be discussed.

It is well-settled that summary judgment should be granted only when a review of the pleadings, depositions and other filings reveal that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Arkansas Rules of Civil Procedure.

First, appellants contend that appellees' collection of interest on a semi-annual basis pursuant to a promissory note "with interest from date until maturity at the rate of ten percent per annum . . payable semi-annually" is usury in that such collection allows the appellee to utilize appellants' interest payment money for six months and that the income appellee earns on the mid-year payment

of interest constitutes additional interest thereby making the note usurious.

It is clear from a reading of the cases that a note obligation at maximum interest requiring quarterly or semi-annual payments of interest, with or without principal, does not render the transaction usurious. *Pellerin Laundry Machinery Sales Company* v. *Hogue,* 219 F. Supp. 629 (D.C. W.D. Ark. 1963). One simply needs to reflect upon the common everyday situation in which a debtor borrows money for six months at maximum interest. If, at the end of the six month period, the debtor cannot repay the principal but is allowed to pay only the interest and thereby renew the note for the principal for an additional six months at maximum interest, such a transaction clearly does not constitute usury.

Next, appellants argue that appellee's alleged use of 360 days as the basis year in computing simple interest is usury. It is now settled that the use of a 360 day basis year in computing simple interest is one of the correct methods of computing simple interest and is not usury. *Martins Mobile Homes* v. *Moore,* 269 Ark. 375, 601 S.W.2d 868 (1980).

Thirdly, appellants argue that the $27,000.00 received by appellee from Charles Johnston, pursuant to his oral agreement to commit a limited amount of personal collateral to appellee in case of appellants' default, should have been credited against the indebtedness of the appellants.

It is not necessary to determine whether or not the $27,000.00 collateral received by appellee should have been credited to the indebtedness of the appellants under the facts of this case insofar as appellee, at oral argument before this court, conceded that it would credit the $27,000.00 to the indebtedness of the appellants. Therefore, we would remand to the trial court the proper allocation of this credit. This mathematical computation will necessarily resolve appellant's next point regarding the amount that the appellants' owe to the appellee.

As their final point, appellants urge reversal in that the trial court dismissed that portion of appellants counterclaim alleging a tort cause of action in deceit.

In *MFA Mutual Insurance Company* v. *Keller,* 274 Ark. 281, 623 S.W.2d 841 (1981), this court specifically set forth the five elements of the tort cause of action in deceit. Proof of each element is necessary. The elements are as follows:

> 1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
>
> 2. Knowledge or belief on the part of the defendant that the representation is false — or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of "scienter".
>
> 3. An intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.
>
> 4. Justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it.
>
> 5. Damage to the plaintiff, resulting from such reliance.

The threshold requirement of the first element set forth above is that there must be a "false representation". Here, appellee made no representation at all, much less one that was false. Thus, it is apparent from the record before us that proof of the first element in the tort cause of action in deceit is clearly absent. Furthermore, under the facts of this case, we find that appellee had no duty to disclose the oral commitment between Mr. Johnston and appellee.

In conjunction with this final point, appellants further argue that appellee had a duty to accept the collat-

eral of the appellants (the condominium units) in lieu of pursuing payment on the promissory notes. However, appellants cite no authority nor are we aware of any such authority which would contradict the well-established principle of law that the holder of a note has no duty to accept the collateral pledged absent agreement to do so.

While it is true that upon motion for summary judgment the trial court should review the record in the light most favorable to the party resisting the motion and resolve any doubts or inferences against the movant, where the movant makes a *prima facie* showing of entitlement to summary judgment the respondent must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. *Hughes Western World, Inc.* v. *Westmoor Manufacturing Company,* 269 Ark. 300, 601 S.W.2d 826 (1980); *Coffelt* v. *Arkansas Power & Light Company,* 248 Ark. 313, 414 S.W. 2d 881 (1970). Here, we cannot say that there was a genuine issue as to any material fact or that the trial court erred in granting appellee's motion for summary judgment. In respect to the $27,000.00 credit to the indebtedness of the appellants as conceded by the appellee, this case is remanded to the trial court for further proceedings consistent with this opinion.

Affirmed as modified and remanded.

GEORGE STEELE, Special Justice, joins in the opinion.

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

Felton ADAMS *v.* STATE of Arkansas

CR 79-201 631 S.W.2d 828

Supreme Court of Arkansas
Opinion delivered April 26, 1982

Robert F. Morehead, for appellant.

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

FRANK HOLT, Justice. Following our reversal in *Adams* v. *State,* 263 Ark. 536, 566 S.W.2d 387 (1978), a jury found appellant guilty of aggravated robbery and theft and as-

sessed his punishment at 25 years and 7 years respectively as a habitual offender. We affirm.

We first consider appellant's contention, through court appointed counsel, that the court erred in allowing the state to substitute an expert fingerprint witness the day before trial because of the unexpected illness of the scheduled expert witness. The state had tried to immediately notify appellant's counsel. The trial court denied appellant's motion that the substituted witness be precluded from testifying. However, the court did grant a six day recess to permit defense counsel to interview the witness and investigate his qualifications. No error is demonstrated. *Sumlin* v. *State,* 273 Ark. 185, 617 S.W.2d 372 (1981).

Neither can it be said that the trial court erred in denying appellant's motion for funds to pay some unknown, unnamed witness to rebut the testimony of the state's substituted fingerprint expert. Admittedly, appellant knew that the state would present a fingerprint expert witness. Further, appellant does not argue nor has he shown that the testimony of a substitute witness would be any different from that of the unavailable witness for which he had admittedly made sufficient preparation.

Appellant asserts that the trial court erred in numerous other instances. A sufficient answer is that we do not consider arguments which are not presented to the trial court and are raised for the first time on appeal in this type of case. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980); *Sumlin* v. *State, supra.* The record on appeal is confined to that which is abstracted. *Jones* v. *Reed,* 267 Ark. 237, 590 S.W.2d 6 (1979). Furthermore, we do not reach a contention when, as here, it is not supported by convincing argument nor authority unless apparent, without further research, the contention is well taken. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

Again we find it necessary to emphasize compliance with the procedure set out in Rule 9, Rules of the Supreme Court, Ark. Stat. Ann. Vol. 3A (Repl. 1979), which must be strictly followed in order to enable the court to determine

whether there is merit in any asserted point of error. That necessity was fully discussed in *Randle* v. *State,* 257 Ark. 232, 516 S.W.2d 6 (1974); *Kitchen* v. *State, supra;* and *Jones* v. *Reed, supra.* The mere scattering of transcript references in an appellant's argument is not a sufficient substitute for the requirement of a proper abstract. *Kitchen* v. *State, supra.*

Affirmed.

Don BROWN *v.* STATE of Arkansas

CR 81-127 631 S.W.2d 829

Supreme Court of Arkansas
Opinion delivered April 26, 1982

James W. Russell, for appellant.

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

DARRELL HICKMAN, Justice. Don Brown was convicted of aggravated robbery with a deadly weapon and sentenced to fifty years imprisonment. On appeal he raises two issues. First, he argues the court was wrong in granting a mistrial in the presence of the jury and dismissing two co-defendants from the trial. Second, he argues the court was wrong in admitting his confession because it was involuntary, taken after an undue delay and an illegal arrest. We find no error and affirm the judgment.

Brown, along with two other men, Edward Brown and Johnnie Glenn, was tried for the robbery of the Majik Market in West Memphis, Arkansas, which occurred on December 4, 1980. During closing argument, counsel for Brown pointed out to the jury that Brown was the only defendant who had taken the witness stand. At this point counsel for the other two defendants asked for a mistrial and it was granted. There was no objection to the motion for a mistrial, no exceptions to the judge's ruling, and no request for an admonition. It is suggested that we should apply the plain error rule in this case and take into consideration the fact that the jury only had one of the three defendants before it and took its wrath out on this defendant. There is no evidence whatsoever to support that supposition. Brown's counsel brought this matter about. No objection was made and without any showing of prejudice, we find no error in the court's action.

The second issue requires more discussion. The court held a *Denno* hearing and heard testimony of various police officers and witnesses regarding the circumstances that led to Brown's arrest, his incarceration, and his admission that he was involved in the Majik Market robbery. The West Memphis police department was investigating another robbery concerning the A-1 Liquor Store. A victim of that robbery had identified the appellant as the robber and the police obtained a warrant for Brown's arrest. When Brown went to the police station to obtain his automobile, which had been confiscated, they arrested him for this robbery. He was advised of his rights twice according to the police and at first denied complicity in the A-1 robbery. Later, on Sunday, the officers said that Brown confessed to both the Majik Market robbery and the A-1 robbery. They testified that the confession was voluntarily given without any coercion on their part. On the basis of this confession they caused an information to be filed against Brown for the Majik Market robbery. Two witnesses who saw the Majik Market robbery told the police that Brown was one of the robbers. The witnesses said that they did not immediately identify Brown when they were questioned by the police but later did identify him. This all occurred during the weekend Brown was in jail. Brown testified that he was physically and mentally intimidated during his incarceration, threatened, and awakened early Sunday morning and questioned again.

It is unnecessary to elaborate in detail all the testimony of the police officers and Brown. Suffice it to say the trial court held a *Denno* hearing and found that the officers had probable cause to arrest Brown and that the statement was not involuntary. On appeal we make an independent determination of voluntariness of a confession. We consider the totality of the circumstances and will resolve all doubts in favor of individual rights, but we will not reverse the trial court's holding unless it is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974). In this case there was a conflict between the testimony of Brown and the police officers and we have to defer to the superior position of the trial court to resolve the issue of credibility of the witnesses. *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978).

Certainly we cannot say it is reversible error that Brown was not arrested for the Majik Market robbery until after he confessed. There is no doubt that a warrant was issued for his arrest in connection with the A-1 robbery and he was arrested and incarcerated for that offense. He was in custody at the time he was placed under arrest for the Majik Market robbery and an information was caused to be filed against him for that offense. Even if the arrest was illegal, and we in no way deem it so, it would not vitiate his confession. *Sanders* v. *State,* 259 Ark. 329, 532 S.W.2d 752 (1976).

It is undisputed that Brown was held from late Friday afternoon through the weekend before he was taken before a magistrate on Monday morning. A.R.Cr.P., Rule 8.1, requires that an arrested person be taken before a magistrate without unnecessary delay. We cannot say on the facts in this case that Rule 8.1 was violated. See *Wilson* v. *State,* 258 Ark. 110, 522 S.W. 2d 413 (1975), cert. denied 423 U.S. 1017 (1975).

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

JOHN I. PURTLE, Justice, concurring in part, dissenting in part. I concur with that portion of the majority opinion which holds that the granting of a mistrial in the presence of the jury as to the codefendants did not amount to prejudicial error. However, I disagree with the holding which allows appellant's confession to be introduced into evidence.

I feel a few more facts need to be set out in order to present a fuller understanding of what happened in this case. The Majik Market Store and the A-1 Liquor Store were both robbed on December 4, 1980. Three witnesses observed the robbery at the Majik Market. The manager of the Majik Market could not identify the robbers nor could she pick them out from mug shots shown to her on the day of the robbery or the next day. Her identification materialized at the time she met the appellant in court with his attorney. The appellant was arrested at 5:00 p.m. on Friday, December 5, 1980, for robbery of the A-1 Liquor Store. The warrant of arrest was issued by a deputy clerk in relation to the robbery of the A-1 Liquor Store. There was no affidavit for an arrest warrant, and there is no statement by anyone personally

identifying the appellant either in person or from mug shots for either robbery. Although the appellant was picked up the afternoon of December 5, 1980, he declined to issue a statement. However, on Sunday the officers managed to obtain confessions from him not only for the robbery of the A-1 Liquor Store but also the Majik Market. Both confessions are dated at 11:30 a.m. on December 7, 1980. The record indicates the three witnesses to the Majik Market robbery identified the appellant from mug shots sometime during the day of December 7, 1980. The record does not show whether the witnesses identified the appellant before or after the statement was given. Each of these witnesses testified that they were acquainted with the appellant and recognized him at the scene of the robbery. However, they could not explain why they did not tell the officers who the robber was when they talked with the officers shortly after the robbery on December 4, 1980. The explanation of one was "I recognized Don Brown but I wanted to wait and see his picture to be sure it was him." This shows absolute confusion. The only thing in the record relating to the identification of the appellant as being the robber of the A-1 Liquor Store is a statement by an officer that the operator of the liquor store had identified him. There is no confirmation of this fact in any other form. The officer does not even state that the witness told him the appellant was the person and there is nothing else whatsoever in the record to show the reliability of the statement, if it was ever made.

If appellant was not in legal custody, then I am sure the majority would agree that his confession should have been excluded. The officer who arrested him did not see him commit any violation of the law and, therefore, had no right to arrest on such grounds. There is nothing in the record to show that the officer had reasonable cause to believe that the appellant had committed the felony other than a vague hearsay statement by an officer that the operator stated the appellant had robbed the store. This does not measure up to probable cause by any stretch of the imagination.

It is uncontroverted that the arrest warrant in this case was issued by a deputy court clerk. A.R.Cr.P., Rule 7.1, states in part:

> (a) A judicial officer may issue an arrest warrant for a person who has failed to appear in response to a summons or citation.
>
> (b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it . . .

Section (c) of the above rule provides that a deputy clerk may issue an arrest warrant upon the *filing of an information or affidavit sworn to by a complainant provided such authorization has been granted by the judge* of the court. It is obvious the warrant involving the A-1 Liquor Store was absolutely void on its face. There was never even a warrant issued in the Majik Market robbery much less any affidavits filed. Therefore, the appellant was held in custody without authority some two days before he eventually gave the officers the statement they wanted.

The burden is on the state to prove the voluntariness of an in-custody confession. *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). The trial court was not called upon and did not rule upon the legality of the custody of the appellant. The court ruled only on the voluntariness of the confession and the photo identification procedure. Although the court was not apprised of the fact that appellant was not legally in custody, I would employ the plain error rule and reverse and remand for a new trial. It is the duty of our circuit courts in criminal trials to afford defendants a fair and impartial trial under the Sixth Amendment to the United States Constitution. If this is to be enforced, we must be able to bring to that court's attention prejudicial errors in a defendant's trial, when they are of a magnitude that would infringe upon his constitutional rights. I cannot help but think that the framers of our constitution in their wisdom wanted this right preserved. To follow the reasoning of the majority would chip away at one of the most fundamental constitutional rights, that of a fair trial. I prefer to leave the constitution unchipped and unblemished.

STATE of Arkansas *v.* Eddie Lee SMALL

CR 81-136 631 S.W.2d 616

Supreme Court of Arkansas
Opinion delivered April 26, 1982

Steve Clark, Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellant and cross-appellee.

William R. Simpson, Jr., Public Defender, and *Jim Petty,* Deputy Public Defender, Trial Attorney, by: *Deborah R. Sallings,* Deputy Public Defender, for appellee and cross-appellant.

ROBERT H. DUDLEY, Justice. Appellee Eddie Lee Small was charged with committing rape upon Enis Robinson on August 11, 1980. The Arkansas Rape Shield Statute, Ark. Stat. Ann. §§ 41-1810.1 and 41-1810.2 (Repl. 1977) prohibits evidence of the victim's prior sexual conduct unless, upon written motion and hearing, relevancy of the proffered evidence is established and its probative value outweighs its prejudicial effect. At the pretrial hearing appellee offered

evidence of prior inconsistent extrajudicial statements about previous acts of consensual intercourse between the prosecutrix and the appellee. The trial court ruled the proof was relevant and its relative probative value outweighed its prejudicial nature. Pursuant to the statute the state takes this interlocutory appeal. We reverse on direct appeal.

At the pretrial hearing defense counsel stated positively that consent by the prosecutrix was not an issue; appellee denies the act occurred and contends the charges are false. We have consistently held that acts of prior consensual intercourse with the accused are admissible only to show that consent may have been given. *Eskew & Bolton* v. *State,* 273 Ark. 490, 621 S.W.2d 220 (1981); *Manees* v. *State,* 274 Ark. 69, 622 S.W.2d 166 (1981); *Marion* v. *State,* 267 Ark. 345, 590 S.W.2d 288 (1979); *Houston* v. *State,* 266 Ark. 257, 582 S.W.2d 958 (1979). Here, consent is not at issue and the prior sexual conduct of the prosecutrix is not relevant to the principal issue. To permit evidence of inconsistent statements about prior sexual conduct, a collateral matter, would rob the statute of its efficacay and thwart the obvious intent of the General Assembly. Therefore, if the state does not raise the issue on direct examination, evidence of prior inconsistent extrajudicial statements regarding previous acts of consensual intercourse is not admissible and we reverse on that point.

Eddie Lee Small, as cross-appellant, argues that the trial court erred in suppressing evidence that the prosecutrix was a prostitute. The trial court correctly ruled that appellee would, under the rape shield statute, be permitted to develop proof of any bias and motive on the part of the prosecutrix. In conjunction with that holding, the trial court sustained an objection, based on hearsay, to testimony that the prosecutrix was a prostitute. None of the witnesses had firsthand knowledge that the prosecuting witness had been a prostitute within the last four years. A ruling on whether testimony is hearsay is not subject to an interlocutory appeal under the rape shield statute and accordingly, we do not consider the matter.

Reversed on direct appeal and the cross-appeal is dismissed.

Don McCLELLAN, d/b/a McCLELLAN AGENCY *v.* Michael BROWN, d/b/a BROWN RAILROAD CONSTRUCTION COMPANY

82-44 632 S.W.2d 406

Supreme Court of Arkansas
Opinion delivered May 3, 1982
[Rehearing denied June 1, 1982.]

The Strother Firm, by: *Lane H. Strother* and *Judith C. Strother,* for appellant.

Henry J. Osterloh, for appellee.

GEORGE ROSE SMITH, Justice. For a year or two the plaintiff Brown, engaged in a construction business, obtained his various types of insurance through the defendant McClellan's insurance agency. On April 21, 1978, Brown paid McClellan $1,856 for workers' compensation coverage on Brown's employees, but McClellan failed to obtain the necessary policies, though he represented to Brown that he had done so. As a result of the omission Brown was compelled to pay $17,120 to an injured employee, plus legal fees and costs.

Brown, in asserting this claim for actual and punitive damages, alleged that McClellan's "acts were willful and wanton in that defendant failed to pay the premium even though he had been paid" by Brown. McClellan's liability for Brown's actual damages is not questioned. With regard to the claim of punitive damages the trial judge, sitting without a jury, allowed Brown to call witnesses who had been dissatisfied with McClellan's handling of their insurance coverage and allowed McClellan to call witnesses to express their satisfaction with his services. At the conclusion of the testimony the court orally made these findings:

> This Court finds that there was willful, wanton, and malicious conduct on the part of the defendant. And frankly, it appears to the Court that what the defendant may well have done was to have gambled. The truth of the matter is that when he accepted eighteen hundred and fifty-six dollars from the plaintiffs, he cashed the money and did not provide coverage and did not return the money, he was in fact guilty of a crime. Theft of property.

(The court, in referring to the possibility that McClellan had gambled, apparently meant that McClellan may have taken a deliberate risk by leaving Brown uninsured in the hope that no compensable injury to his employees would occur.)

Counsel for the appellee declares in his brief: "The instant case is not a contract action, it is a tort action and always has been." We are at a loss to understand how it can be called a tort action. Prosser points out how difficult it is to frame a complete definition of a tort. Prosser on Torts, § 1 (4th ed., 1971). In general, the law of torts provides redress for various injuries; the purpose of the law of contracts is to see that promises are performed. *Atkins Pickle Co.* v. *Burrough-Uerling-Brasuell,* 275 Ark. 135, 628 S.W.2d 9 (1982). We have followed Prosser's view that a breach of contract is not treated as a tort if it consists merely of a failure to act (nonfeasance) as distinguished from an affirmatively wrongful act (misfeasance). *Morrow* v. *First Nat. Bank of Hot Springs,* 261 Ark. 568, 550 S.W.2d 429 (1977). In our opinion the present case is plainly an action for breach of contract, there being no duty on McClellan's part except to perform his promise to obtain insurance coverage for Brown.

Punitive damages are not ordinarily recoverable for breach of contract. *Snow* v. *Grace,* 25 Ark. 570 (1869). In adhering to that principle we have said: "To support a claim for punitive damages there would have to be a willful or malicious act in connection with a contract. A bare allegation of fraud which results in a monetary loss would not justify punitive damages and that is essentially what the complaint alleges in this case." *Curtis* v. *Partain,* 272 Ark. 400, 614 S.W.2d 671 (1981).

The trial judge doubtless believed that McClellan acted dishonestly in not obtaining insurance for Brown and in later assuring Brown that he was protected, but McClellan's misuse of the money was not criminal theft. If commercial transactions are to have validity, it is essential that money be truly negotiable. No matter whether McClellan used Brown's premium payment to pay his own debts, to support his family, to make a church contribution, or to bet on a horse race, the bare misuse of the money was not a tort or a crime.

Granted that McClellan acted intentionally in not obtaining workers' compensation coverage and in telling Brown that he had done so, the issue is still whether his

action was so *willful* within the intent of our holding in *Curtis* (malice not being indicated in the case at bar) as to justify the imposition of punitive damages. Since any intentional act may be referred to as "willful," we must always consider circumstances other than the wrongdoer's intention to do what he did, in order to determine whether punitive damages are appropriate.

An excellent discussion of basic principles underlying the imposition of punitive damages is contained in Justice Schaefer's opinion in *Mattyasovszky* v. *West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975). After first noting that punitive damages are awarded "to punish the offender and to discourage other offenses," the court examined the reasons and justification for such awards:

> The underlying strength of these objectives of punishment and deterrence varies substantially from case to case. Where, for example, the defendant has benefited by his misconduct, a judgment which only compensates the plaintiff for what he has lost would permit the defendant to keep his wrongful gain. Apart from such cases, the situations in which punitive damages become an issue cover a broad spectrum that ranges from the intentional tort which is also a crime [citation omitted], to what we characterize today as "willful and wanton" conduct, a characterization that shades imperceptibly into simple negligence.
>
> The objectives of an award of punitive damages are the same as those which motivate the criminal law — punishment and deterrence. Yet in a criminal case the conduct which gives rise to the imposition of punishment must be clearly defined. That is not so when the question is whether the conduct of the defendant can be characterized as either negligence or as willful and wanton conduct. The fine that is imposed upon the defendant in a criminal case goes to the State. But in a civil case the exaction taken from the defendant, under the label of exemplary damages, becomes a windfall for the plaintiff. The maximum and minimum amounts of the fine imposed by way of

> punishment and deterrence in a criminal case are fixed by statute. In the civil case, however, the jury is left at large to take from the defendant and deliver to the plaintiff such amount as it sees fit.

Here we do not have a typical situation mentioned by Schaefer, in which the wrongdoer retains a wrongful gain after the payment of compensatory damages. To the contrary, not only must McClellan pay in compensatory damages some $15,000 more than the possible gain from his misconduct, he has also surrendered his license as an insurance agent. Hence in the case at bar compensatory damages also inflict punishment.

There remains the deterrent effect of the trial court's award of punitive damages. In *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 1045, 479 S.W.2d 518 (1972), we quoted an observation in a New York opinion, that one who acts out of anger or hate in committing assault or libel is not likely to be deterred by the fear of punitive damages. Similarly, an insurance agent who risks the loss of ten or fifty times his possible gain, and the loss of his livelihood as well, is not apt to be deterred by the fear of punitive damages.

In *Ray Dodge* we sustained an award of punitive damages against a used-car dealer who had turned back an odometer reading to make the vehicle's mileage appear smaller than it really was. We pointed out, however, that compensatory damages in an occasional lawsuit of that kind would not deter other used-car dealers from victimizing thousands of other purchasers. In the present case the deterrent effect of punitive damages would be negligible. On the minus side, if such damages were permitted the testimony might range far afield, as it did here, with 13 witnesses being called to testify whether McClellan had treated them well or badly in earlier unrelated transactions.

We find little persuasive force in two Georgia cases having somewhat similar fact situations. In the first case the court did not even discuss punitive damages, merely mentioning in passing that the jury had awarded compensatory and punitive damages. *Patterson* v. *Castellaw,* 119 Ga. App.

712, 168 S.E.2d 838 (1969). In the second case the court said that punitive damages can be awarded (in Georgia) upon proof of "that entire want of care which would raise the presumption of a conscious indifference to consequences." *Speir Ins. Agency* v. *Lee,* 158 Ga. App. 512, 281 S.E.2d 279 (1981). That language describes mere recklessness, which is not a ground for the exaction of punitive damages in Arkansas.

The award of punitive damages is set aside and that cause of action dismissed.

PURTLE, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I believe the trial court was entirely correct in awarding punitive damages. First, the pleadings and proof were sufficient to support a cause of action in tort and, second, under the circumstances of this case, punitive damages are appropriate to a cause of action for breach of contract, I agree that ordinarily punitive damages are not recoverable in breach of contract cases, but the rule is not absolute and there are exceptions. The elements that make this case exceptional are found in the fact that the breach of contract was accompanied by intentionally dishonest acts by the appellant for his own personal gain.

Actions brought by an insured for breach of duty owing to him by an insurance agent may be laid in contract or in tort. 44 C.J.S. Insurance 172b, p. 863. By amended complaint Brown alleged "willful and wanton" conduct on McClellan's part and prayed for punitive damages. The trial court expressly found McClellan had acted willfully, wantonly and maliciously in twice misappropriating Brown's insurance premium payments while representing to him that he was covered. Thus, elements of a cause of action sounding in both tort and contract were pleaded and proved at trial. The trial court also found McClellan's actions in placing Brown's premium payment in his own personal account while representing that he had paid the insurance company

amounted to theft. The majority opinion discounts McClellan's intentional dishonesty, focusing only on his breach of contract. In fact, the majority treats McClellan exactly as if he had been merely negligent.

The effect of the majority opinion is to allow an insurance agent by practicing a fraud and deception upon his principal, to act as an insurance carrier, gambling that no loss will occur. Since an individual agent rarely has the financial reserves of an insurance carrier, the likelihood that in the event of a loss the "insured" will not be compensated, is greatly increased. Public policy demands such practices be penalized.

Assuming, for the sake of argument, that appellee's cause of action is based solely on contract, recovery of punitive damages will still lie where the breaching party's conduct is willful and malicious. *Curtis* v. *Partain,* 272 Ark. 400, 614 S.W.2d 671 (1980). Also, where breach of contract includes elements that enable the court to regard the case as falling within the field of tort, or closely analogous, punitive damages may be awarded by way of punishment. 5 *Corbin on Contracts* § 1077 at 439. "Thus where the acts constituting a breach of contract also amount to a cause of action in tort, there may be recovery for exemplary damages on proper allegations and proof." 25 C.J.S. Damages § 120 at 1128.

> As a general rule, damages for breach of contract are limited to the pecuniary loss sustained. . . . This rule does not obtain, however, in those exceptional cases where the breach amounts to an independent, willful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness or oppression. 22 Am. Jur. 2d Damages § 245 at 337.

The cases cited in the majority opinion are distinguishable from the case under review. In *Morrow* v. *First Nat. Bank of Hot Springs,* 261 Ark. 568, 550 S.W.2d 429 (1977), no intentional wrongful acts were alleged or proven. In *Curtis* v. *Partain, supra,* this court said punitive damages may lie in

a breach of contract action, but there the plaintiff had waived punitive damages by seeking them against only one of four co-defendants involved in the same scheme and because there was no claim of willful or malicious conduct.

Other cases recognize punitive damages are appropriate where, as here, an agent maliciously breaches a duty to his principal based on contract. *Brown* v. *Coates,* 102 App. DC 300, 253 F. 2d 36, 67 ALR 2d 943 (1958). *See also* 67 ALR 2d 952. In *Brown* a real estate broker acted fraudulently in conveying his client's house to himself without applying the value of the equity toward the client's purchase of a second house as he represented he would do. The court said:

> . . . [O]nce it has been shown that one trained and experienced holds himself out to the public as worthy to be trusted for hire to perform services for others, and these so invited do place their trust and confidence, and that trust is intentionally and consciously disregarded, and exploited for unwarranted gain, community protection, as well as that of victim, warrants the imposition of punitive damages. (At 950.)

And at 949:

> We believe the better view in certain, narrowly defined circumstances, where a breach of contract merges with, and assumes the character of a willful tort, calculated rather than inadvertent, flagrant, and in disregard of obligations of trust punitive damages may be assessed.

In *Speir Insurance Agency, Inc.* v. *Lee,* 281 S.E.2d 279 (1981), the Court of Appeals of Georgia upheld an award of punitive damages in an action for breach of contract brought by the insured against an insurance agent upon proof the agent had issued a binder insuring the plaintiff's automobile with American Reserve for $500 from July 15, 1978, to July 5, 1979. On August 11, 1978, American Reserve notified the agent the binder had expired "pending receipt of additional information" from the agent. The agent failed to obtain additional coverage and also failed to refund the

unused portion of the $500 payment, and on September 2, 1978, the plaintiff was involved in an automobile collision without coverage. Upholding the trial court's award of punitive damages the court said:

> To authorize the imposition of punitive or exemplary damages there must be evidence of wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. *Southern R. Co.* v. *O'Bryan,* 119 Ga. 147 (1), 45 S.E. 1000 (1903). Under the circumstances in this case the trial court was authorized to impose punitive damages against Speir. See *Patterson* v. *Castellaw,* 119 Ga. App. 712(1), 168 S.W.2d 838 (1969).

Similarly, in *Patterson* v. *Castellaw,* 168 S.E.2d 838 (1969), the same court in an action for deceit held an insurance broker was liable for compensatory and punitive damages to a plaintiff by accepting an insurance premium and causing him to believe his automobile was covered against theft when in fact it was not. The broker was found to have willfully misrepresented to a second broker, also acting for the plaintiff in attempting to secure coverage, that he had placed a binder on the automobile which was knowingly false and made to induce placement of the insurance through his own firm.

The Supreme Court of Alabama in *Proctor Agency, Inc.* v. *Anderson,* 358 So. 2d 164 (1978), set aside an award of punitive damages against an insurance agent who, when asked by his insured if he was covered for the costs of corrective surgery for an inguinal hernia under his policy with St. Paul Fire & Marine, told the insured to go ahead and have the operation. Coverage was denied by St. Paul and a jury awarded punitive damages which the Supreme Court disallowed, saying there was no evidence the agent's misrepresentation was committed with an intention to injure and defraud. But, significantly, the opinion recognizes that punitive damages will lie where, as here, an agent misrepresents coverage with an intention to injure or deceive the insured.

In sum, I believe the majority opinion errs in concluding that an agent who is guilty of intentionally dishonest acts against his principal for his own gain cannot be punished by punitive damages if the suit is basically for breach of contract; in necessarily concluding, though without discussion of the issue, that the trial court lacked discretionary power to treat the pleadings and proof as sounding in tort rather than in contract; and, in effect, disregarding the fact that punitive damages are intended to punish a wrongdoer rather than to compensate an injured party. *Ray Dodge* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972); *Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96 (1961); *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W.2d 613 (1960).

I would affirm the judgment.

SOUTHERN STEEL AND WIRE COMPANY *v.*
Jim WOOTEN, Director, Department of Finance
and Administration et al

81-261 631 S.W.2d 835

Supreme Court of Arkansas
Opinion delivered May 3, 1982

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

James R. Eads, Jr.; H. Thomas Clark, Jr.; Timothy J. Leathers; Robert J. DeGostin, Jr.; Cassandra Wilkins-Slater; Wayne Zakrewski; Kelly S. Jennings; John H. Theis; by: *Joseph V. Svoboda,* for appellees.

FRANK HOLT, Justice. The appellee assessed appellant with a use tax on various items it had purchased. Following an administrative hearing affirming the assessment, appellant filed a complaint in chancery court seeking a refund in the amount of the taxes it had paid under protest. The chancellor affirmed the assessment on certain machinery, equipment and chemicals.

Appellant produces steel wire products primarily for the refrigeration and freezer industry. It purchases wire, then straightens, cuts, forms, and welds the wire to obtain a finished product. The wire shelves produced are finished with either zinc plating or an electrostatic powder-plastic coating. In the electrostatic power-coating process, the wire shelves are passed through a spray booth where apoxic powder is sprayed on and induced with a 60,000 volt electrical charge, which causes the powder to cling to the

shelves. The shelves are then baked so that the powder forms a permanent finish. An ultraviolet detection system monitors the electrostatic equipment.

Appellant first asserts that the chancellor erred in finding the ultraviolet system, purchased for $8,054.23, was not exempt from taxation. It argues the equipment meets the requirement of machinery or equipment used "directly in the actual manufacturing or processing operation . . . . " Ark. Stat. Ann. § 84-3106 (D) (2) (c) (Repl. 1980). That subsection reads in pertinent part:

> It is the intent of this subsection to exempt only such machinery and equipment as shall be utilized directly in the actual manufacturing or processing operation . . . . The term 'directly' as used in this Act is to limit the exemption to only the machinery and equipment used in actual production during processing, fabricating or assembling raw materials or semifinished materials into the form in which such personal property is to be sold in the commercial market . . . .

The electrostatic equipment was purchased following an explosion within the system. It serves two functions — (1) it is a safety monitor, which acts to shut down the powder-coating system in the event a spark or fire is detected in the system; and (2) it provides a printout analyzing the performance of the powder-coating process. Although the powder coating system operates normally 99% of the time, appellant considered the ultraviolet system as being vital and necessary in monitoring the entire system.

Appellee responds that neither function demonstrates that the detection system meets the requirements of § 84-3106 (D) (2) (c). Appellee characterizes the ultraviolet detection system as a "burglar alarm" which operates only in the event of a fire. Further, as a monitoring apparatus, it merely is an "information device" which is not used directly in the manufacturing process.

In *Cheney* v. *Georgia Pacific Paper Corp.*, 237 Ark. 161,

371 S.W.2d 843 (1963), we held that informational devices used to record the functioning of other equipment were not exempt. Further, we have said it is well established that any exemption provision must be strictly construed against the exemption, and to doubt is to deny the exemption. *S.H. & J. Drilling Corp.* v. *Qualls, Director,* 268 Ark. 71, 593 S.W.2d 178 (1980); and *Ark. Beverage Co.* v. *Heath, Director,* 257 Ark. 991, 521 S.W.2d 835 (1975). The appellant has the burden of clearly establishing the exemption beyond a reasonable doubt. *Heath* v. *Westark Poultry Processing Corp.,* 259 Ark. 141, 531 S.W.2d 953 (1976). On appeal we review the exemption cases *de novo* and do not reverse the chancellor's findings of fact unless it is clearly against the preponderance of the evidence. *Ark. Beverage Co.* v. *Heath, Director, supra.* Here, tested by these rules we cannot say that the chancellor's finding that the ultraviolet system is not exempt is clearly against the preponderance of the evidence.

Appellant next contends the chancellor erred in finding that the control panels, air cylinders, and transformers were not exempt from the use tax as "machinery purchased to replace existing machinery in its entirety." Ark. Stat. Ann. § 84-3106 (D) (2) (b). We cannot agree.

During the period encompassed by the audit, appellant was enlarging its manufacturing plant and increasing production. Component parts necessary to construct control panels were purchased for $74,416.96, which appellee taxed. The control panels are designed from scratch and plugged into a welding machine to control the welding process. Appellant urges that each is a separate piece of machinery and that since these control panels can be utilized with different welding machines and are physically plugged into a welder to achieve the desired results, they are distinguishable from the component parts of a drilling rig which we considered in *S.H. & J. Drilling Corp.* v. *Qualls, supra.* There we held that where the appellant purchased certain items to replace existing items of a drilling rig, even if the individual item was considered a machine within the definition of *Heath* v. *Research-Cottrell, Inc.,* 258 Ark. 813, 529 S.W.2d 336 (1975), once they were assembled into a rig and are designed to accomplish a single purpose, they

become a single unit and are not exempt from taxation. We find that reasoning controlling here. It appears undisputed that the control panels, air cylinders and transformers are physically combined with other existing components in order to construct a welding machine which has a single purpose and function. The control panels and welding machines are interconnected or component parts of welding machines and designed to accomplish a single purpose — welding wire to form shelves. They must function simultaneously as a single unit. The trial court correctly found these items did not constitute replacement of the welding machines in its entirety and, therefore, are not exempt.

Appellant further argues that the chancellor erred in finding zinc anode baskets and plating racks consisting of racks, tips and studs purchased by appellant for $18,461.90 were not exempt from the use tax as machinery or equipment used directly in the manufacturing process. These items conduct electricity necessary to perform the zinc-plating process and are connected to the conveyor system. The zinc anode baskets also hold the zinc chemical. Appellant argues these items are machinery and used directly in the manufacturing process. We feel these items, component parts of the plating machine, are not exempt for the same reason the control panels are not exempt. They have no independent function. They are interconnected with the zinc plating machine to accomplish a single purpose. See *S.H. & J. Drilling Corp.* v. *Qualls, supra.* Appellant has not met its required burden of proof. To doubt is to deny.

The appellant next asserts the chancellor erred in finding an analytical PH recorder purchased for $500.80 was not exempt as machinery or equipment used directly in the manufacturing process. The appellant claims exemption under § 84-3106 (D) (2) (d). That subsection exempts "[m]achinery and equipment required by State law or regulations to be installed and utilized by manufacturing or processing plants or facilities in this State to prevent or reduce air and/or water pollution or contamination which might otherwise result from the operation of such plant or facility." Admittedly, this is only a monitoring device. Even so, appellant argues that it is necessary to monitor the

discharge of waste materials and chemicals in order to be in compliance with state pollution law. The flaw in this argument is that the PH recorder itself does not "prevent or reduce air and/or water pollution or contamination." Its purpose is merely to inform the appellant of the level of pollutants present in the waste water discharge. Appellant can then take corrective action. There is no evidence here, as there was in *Heath* v. *Research-Cottrell, supra,* that this or any other equipment actually prevented or controlled pollutants in the waste materials. Here, again, when we apply our well established standards of appellate review in tax exemption cases, we cannot say that the chancellor's finding is clearly against the preponderance of the evidence.

Neither do we agree with appellant's last contention for reversal that the chancellor erred in finding that certain chemicals purchased by it were not entitled to exemption from the use tax as items purchased for resale. The "sale for resale" exemption is § 84-1904 (i), which is made applicable by § 84-3106 (B). Appellant argues that the coating and plating process of the finished article could not be properly completed and marketable without these chemicals and, therefore, they constitute an essential part of the finished product and are necessary to its completeness. The appellee correctly responds that the chemicals used in the manufacturing process become neither a recognizable or integral part of the finished shelves. It appears that the chemicals are merely cleansing agents in the manufacturing process which are used at separate rinsing stages to remove not only chemicals but also dirt and oil accumulations from the unfinished shelves. In the circumstances, when we strictly construe, as we must, tax exemptions against the claimant, we certainly cannot say that the chancellor's finding that these items are not exempt under "sale for resale" exemption, § 84-1904 (i), is clearly against the preponderance of the evidence. *Great Lakes Chem.* v. *Wooten,* 266 Ark. 511, 587 S.W.2d 220 (1979); and *Hervey* v. *Internat'l. Paper Co.,* 252 Ark. 913, 483 S.W.2d 199 (1972).

Affirmed.

Lamar HALL, Executor *v.* Helen Strohl HALL

82-9 631 S.W.2d 838

Supreme Court of Arkansas
Opinion delivered May 3, 1982

Randall L. Gammill, for appellant and cross-appellee.

House, Holmes & Jewell, P.A., by: *Philip E. Dixon* and *Daryl G. Raney,* for appellee and cross-appellant.

DARRELL HICKMAN, Justice. The question to us on appeal is the ownership of an $18,000 certificate of deposit and a $5,000 savings account. The same question was presented to the trial court after both parties moved for summary judgment on what can be fairly said are agreed facts.

The certificate of deposit was originally issued in the names of Charles L. Hall or Helen Hall, who were husband and wife. Subsequently, Charles L. Hall, without the knowledge of his wife, Helen, asked the bank to change the certificate and her name was deleted upon his oral request. The probate court held that this was an improper change according to statutory law and the issuance of the certificate to Mr. and Mrs. Hall created an estate by the entirety; thus, Mrs. Hall was entitled to the proceeds since Mr. Hall was deceased. The $5,000 savings account was opened in Charles L. Hall's name alone, at the same time the certificate was issued. The court held that this account was the property of Charles L. Hall's estate since it was initially opened in his name only. Both Mrs. Hall and the estate appeal from the probate judge's ruling; each party is seeking all the money. We affirm the trial court.

Charles L. Hall and Helen Hall were married April 7, 1977. In September of 1977, Mr. Hall had his individual checking account at the First State Bank of Lonoke changed to a joint account in the name of "Mr. or Mrs. Charles L. Hall (Helen L.)." On April 11, 1978, he purchased a $30,000 certificate of deposit in the name of "Charles L. or Helen L. Hall." He told Mrs. Hall he had placed $30,000 in savings in both names. The certificate matured in April, 1979, and Charles L. Hall cashed it for $31,840.00 and purchased a new certificate of deposit for $25,000.00. It was issued just like the former certificate. The balance of the money was deposited in the joint checking account. The $25,000.00 certificate matured in October, 1979, and the maturity sum, $26,059.59, was deposited in their joint checking account. The next day, Mr. Hall drew a $23,000.00 check on their account and purchased the $18,000.00 certificate of deposit in question. With the remaining $5,000.00 he opened the individual savings account in question in his name only.

Mrs. Hall said she was shown the $18,000.00 certificate, and saw both their names on it. She said Mr. Hall placed it in a drawer, specifically telling her that it was there if she ever needed it or wanted it. She said it was only after his death that she examined the certificate and found it had been changed. Unknown to his wife, Mr. Hall had taken the

certificate to the bank and requested a bank official to alter it to read Charles L. Hall. Her name was erased and the certificate altered to so read. It was initialed by the bank official.

It was undisputed that the money used to buy all these certificates was Mr. Hall's funds; Mrs. Hall made no contributions at all. While she wrote a check occasionally, Mr. Hall managed the checking account. She did not allege she was denied access to any of these transactions.

The trial court was right in holding that the alteration of the certificate of deposit was contrary to law. Ark. Stat. Ann. § 67-552 (g) requires that in order to change the designee of an account there must be written directions accepted by the banking institution. *Lovell* v. *Marianna Federal Savings & Loan,* 264 Ark. 99, 568 S.W.2d 38 (1978). There is no doubt the Halls held the certificate as tenants by the entirety, and since that estate was not legally changed, it remained so. The proceeds are Mrs. Hall's. But the estate argues that Ark. Stat. Ann. § 67-552 requires written instructions *before* such an estate can be created in such an instrument, and since there were no written instructions to the bank to issue these instruments, no estate by the entirety was ever created. We held in *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969) that no such instructions are necessary when issuance is to husband and wife.

The $5,000.00 savings account was properly issued in Mr. Hall's name only; it was never altered and the trial court held that it belonged to the estate. Mrs. Hall argues that since the checking account was in the name of Mr. & Mrs. Hall, it was their joint property as were the certificates of deposit bought from the funds in that checking account; therefore, the funds got from the redemption of the $25,000.00 certificate of deposit, $5,000.00 of which was deposited in Charles Hall's savings account, were also joint property. Mr. Hall properly drew the checks on their checking account to purchase the certificates and those certificates were properly issued and redeemed. Mr. Hall opened the savings account with part of those funds and, therefore, the account was not illegally or improperly created. Mrs. Hall was never denied

access to the checking account and the last transactions occurred over five months before Mr. Hall died. She certainly could have known of all the transactions regarding the checking account if she chose to. *See Lovell* v. *Marianna Federal Savings & Loan, supra.* Based on such a state of undisputed facts the trial court properly ruled that as a matter of law the savings account was not jointly held and was the property of the estate.

The estate argues that the probate court did not have jurisdiction since this was a dispute over the title to the accounts, a subject for litigation in chancery court. This argument is premised on the fact that since Mrs. Hall could not receive her dower interest because of our decision in *Hall* v. *Hall,* 274 Ark. 266, 623 S.W.2d 833 (1981), she was a stranger to this action and, therefore, any dispute between her and the estate belonged in chancery. The simple fact that Mrs. Hall was denied certain rights by operation of law did not make her a legal stranger to this case. She was still his widow and the claim was properly adjudicated by the trial court.

Affirmed.

Vivian HAY et al *v.* Joe SCOTT and Rita SCOTT, d/b/a/ THE WISHING WELL

82-52 631 S.W.2d 841

Supreme Court of Arkansas
Opinion delivered May 3, 1982

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellants.

John Harris Jones of *Jones & Petty*, for appellee.

JOHN I. PURTLE, Justice. A trial court jury found against the appellants' claim that an overloaded extension cord caused a fire which damaged a business known as The Wishing Well and spread to businesses known as The Gift Box, B G's Fashions, Inc., The Frame House and Mike R. Lawyer. Apparently, other businesses located in the East Plaza Shopping Center, in the vicinity of the Wishing Well, filed suits against the appellees. All suits were consolidated for trial.

On appeal it is argued: (1) the trial court erred in failing to strike the testimony of Joe Scott as to the electrical origin of the fire because he was not qualified as an expert in electricity nor fire causation and that there was no foundation for his testimony; (2) the trial court erred in allowing the testimony of Homer Justice for the same reasons set out in point one above; (3) the trial court erred in admitting certain photographs into the record; and, (4) the trial court erred in failing to allow appellants' expert witnesses to testify as to the appellees' exercise of reasonable care. We do not agree with the appellants on any of the four points argued for reversal.

A fire originated in the business known as The Wishing Well and spread to adjacent businesses. The other tenants in

the shopping center adjacent to appellees' business filed a complaint alleging the appellees negligently caused the fire resulting in damage to their property. The primary issue in the court below was whether the appellees negligently selected and used an inadequate extension cord which caused the fire.

We will first deal with the argument that appellees' witnesses, Joe Scott and Homer Justice, were not qualified to testify on the subject matter. Mr. Homer Justice testified that he had been an active electrician for more than 40 years, and that he was presently a licensed master electrician and had been so licensed for 15 to 20 years. Some of the jobs that he had worked on as an electrical supervisor or contractor were Simmons Bank, National Bank, Woolworth, Southern Federal, Pinecrest Cotton Mill, Hudson Pulp, Weyerhaeuser, and various schools in the Pine Bluff area. He further testified that he graduated from an electrical school in Chicago in 1939. Following graduation he wired R.E.A. houses, Jacksonville Ordinance Plant, Pine Bluff Arsenal, Ford Leonardwood, Missouri, and Camp Walters, Texas. He also testified he operated his own company for eight or nine years. Before that he was employed by A & M Electric and Fagan Electric. His duties generally included being in charge of electrical installation in the buildings being constructed.

Joe Scott was vice-president of Pine Bluff Heating and Air Conditioning, having been in the heating and air conditioning business about 20 years. Mr. Scott attended a vo-tech school and received electrical refrigeration training. Some of the heating and air conditioning installations that he supervised in the Pine Bluff area were Simmons Bank, Simmons East, many branch banks in Pine Bluff, NBC at Broadmoor, Broadmoor Theaters, five White Hall schools and four schools in Dumas, plus a number of apartments in Little Rock and the Four-H building in Ferndale. He estimated that 90% of the knowledge required for heating and air conditioning was electrical knowledge. He stated that he had an appliance license to do internal wiring, including high voltage 440 and whatever might be in the appliance to the point of the receptacle. Primarily his work

commenced at the receptacle and extended to the various appliances.

In *Dixon* v. *State,* 268 Ark. 471, 597 S.W.2d 77 (1980), we stated:

> It is well-settled that the determination of the qualifications of an expert witness lies within the discretion of the trial court, and his decision will not be reversed unless that discretion has been abused.

Uniform Rules of Evidence, Rule 702, in regard to expert testimony, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 704 in regard to opinions on the ultimate issues, states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705 in regard to disclosure of facts or data underlying the expert opinion, states:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Considering the above rules of evidence and the case quoted, it is obvious that the judge properly exercised judicial discretion in allowing these witnesses to testify as they did. Also, we think he properly refused the appellants'

request to strike the testimony for the reason that these two witnesses were not qualified to testify about the matters under consideration.

The appellants also argue the court erred in allowing certain photographs to be introduced. Neither the maker of the photographs nor the person who had placed two red arrows on them were present or testified. The photographs were admitted on the basis of the testimony of Rita Scott that the photographs were an accurate representation of what The Wishing Well looked like on July 30, 1979, the day after the fire. The two arrows on the photographs objected to were marked in red and pointed to the receptacle area where the extension cord had plugged into the wall. In *Higdon* v. *State,* 213 Ark. 881, 213 S.W.2d 621 (1948), we stated:

> The admission and relevancy and materiality of photographs is left to the discretion of the trial judge...

In *McGeorge Construction Co.* v. *Mizell,* 216 Ark. 509, 226 S.W.2d 566 (1950), we held that the validity of photographs introduced into evidence was not objectionable merely because the witness did not take the pictures and was not present when they were taken. We stated that the test of whether photographs are admissible into evidence depends on the fairness and correctness of the portrayal of the subject. We also stated in *McGeorge* that the admissibility of photographs addresses itself to the sound discretion of the trial judge. We will not disturb such a ruling unless there is an abuse of discretion.

Appellants have failed to show that the photographs were misleading or prejudicial in any manner. In fact, it is obvious that they would be an aid to the jury in understanding much of the testimony presented to them. The red arrows simply point to the area where all witnesses agree the fire originated. The expert witnesses for appellees essentially testified that the fire started in the receptable and the expert witnesses for the appellants testified the fire originated in the extension cord near the receptacle where it plugged into the wall. Therefore, we think the court did not

abuse its discretion in allowing the photographs to be introduced into evidence.

Finally, the appellants argue it was error for the court to refuse to allow their expert witnesses to testify that appellees did not use reasonable and ordinary care in using the extension cord to operate the refrigerator and coffee pot. The testimony was proffered and appears to be proper. As stated in Rule 704 expert testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Immediately after the proffer of this evidence in chambers the appellants' witness, Charles McKenny, took the stand and testified to the following as abstracted by appellants:

> My opinion that the use of this extension cord was not reasonable or proper was based on the statements I read in the reports and everything. ... that gives me reason to believe that they weren't exercising a due amount of care on it. I don't know what had happened to the refrigerator before or what happened to it at this time. I'm saying that the fire started at the end of the cord by that shelf from overheating caused by an excessive pull of current. *** In my opinion, the cause of the fire was overloading of that cord.

The other expert witness after proffering his testimony testified before the jury as follows, according to appellants' abstract:

> In my opinion, the fire began on the white extension cord, 18 gauge, and overheated to the point it fed across and then fed into the board or paneling on the east side, and from there fed up and outward. *** It was heated from an internal to an outward point. *** I am satisfied that the fire started along the extension cord along the storage shelves at the receptacle area for two reasons. One is that the "V" point showed that as the point of origin. The fact that the extension cord in my opinion was burned from the inside out is important. *** I am both master electrician and the Chief of the Pine Bluff

Fire Department . . . some or all of the acts of Rita Scott just listed were a cause of the fire.

We think any possible error was cured by the skill of the appellants' attorneys in obtaining exactly the same evidence in subsequent testimony by these witnesses. Therefore, we do not feel there was prejudicial error in the rejection of the proffered testimony.

Affirmed.

Casell PRIDGETT and Levester WILLIAMS, Jr.
v. STATE of Arkansas

CR 82-28 631 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered May 3, 1982

James L. Sloan, for appellant Pridgett.

Robert F. Morehead, for appellant Williams.

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

ROBERT H. DUDLEY, Justice. Appellants were jointly charged and tried for aggravated robbery and theft of property at a Safeway store in Pine Bluff. While they were jointly charged, tried and convicted, the state's cases against them are vastly different. We affirm the convictions of appellant Levester Williams, Jr., and reverse and dismiss the convictions of appellant Casell Pridgett.

The evidence established that two men, later positively identified as appellant Levester Williams, Jr., and a third person entered the store on August 25, 1979, around 10:50 p.m. and, after pushing their grocery cart to the checkout stand, at gunpoint forced the employees to open the safe. They then took money and fled from the store.

Just after 10:00 p.m., or approximately 45 minutes before the robbery, a witness saw a white Lincoln automobile headed west at 30th and Hazel Streets going toward the Safeway store which is located at 28th and Hazel Streets. The witness testified that the same car went by the intersection of 30th and Hazel Streets at least three times between 10:00 and 10:30 p.m. The car was driven by an unidentified black man. The witness testified that the car's license plate number was DZE 050, but the witness was uncertain about the E. Appellant Casell Pridgett, a black male, owned a white Lincoln with the license plate number DZC 050. Five days after the robbery Casell Pridgett's car was seen on a Piggly Wiggly grocery store parking lot in Stuttgart, which is approximately 40 miles from Pine Bluff. The Stuttgart police stopped the car and found appellant Pridgett, appellant Williams and the other subsequently identified robber in the car along with a fourth person. At trial, Pridgett took the stand and denied any part in the robbery and theft. The jury returned a guilty verdict and sentenced Pridgett to fifteen years in prison for the aggravated robbery conviction

and seven-and-one-half years for the theft of property. We reverse and dismiss. Williams was sentenced to twenty years for the aggravated robbery charge and ten years for the theft of property. We affirm.

Pridgett contends that the evidence is insufficient to sustain the verdict against him. We agree. Viewing the evidence most favorably to the state we find no substantial evidence to support the jury verdict. Only two men entered the store and took part in the robbery. They were both identified and Pridgett was neither one of them. There was no proof that the robbers used an automobile in their arrival or their escape. The only evidence positively identifying Pridgett with the crime is his association with the participants at a time, five days, and a place, 40 miles, remote from the offense. This case is wholly different from those cases in which evidence to connect the accused with a crime is his proximity to the scene and timely association with a person involved in a manner suggestive of joint participation. E.g. *Vaughn and Wilkins* v. *State,* 252 Ark. 505, 479 S.W.2d 873 (1972), distinguished in *Redman* v. *State,* 265 Ark. 774, 784, 580 S.W.2d 945 (1979).

The evidence is strong that Pridgett's automobile was seen three times at 30th and Hazel Streets heading west toward the Safeway store at 28th and Hazel Streets at about the time of the robbery, but there is no proof that Pridgett was driving the car, that an automobile was used in the crimes, or that more than two persons participated in the robbery. The evidence, wholly circumstantial, falls short of establishing anything more than a suspicion of Pridgett's guilt. The verdict is not supported by substantial evidence and the jury had to reach its conclusion by resorting to speculation or conjecture. When a verdict is based solely upon speculation or conjecture, we reverse. *Abbott* v. *State,* 256 Ark. 558, 508 S.W. 2d 733 (1974). Therefore we reverse the convictions and dismiss the charges against appellant Casell Pridgett.

Appellant Levester Williams, who was identified by eyewitnesses as one of the two robbers, contends that the trial court "erred in not excluding the identification testimony

and evidence being tainted and again in so doing without an in-camera voir dire of identification witnesses." There was no motion to suppress the identification evidence nor was there any objection to the identification testimony. The issue was never presented to the trial court, is raised for the first time on appeal, and is not properly before this court. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Williams also contends that the evidence is insufficient to sustain the verdicts. There was substantial evidence against Williams since eyewitnesses positively identified him as one of the two armed robbers. The jury chose to believe the testimony was reliable. The assessment of the reliability of witnesses is the very task our system assumes juries can perform. We affirm the convictions of Levester Williams, Jr.

Affirmed as to Levester Williams, Jr.

Reversed and dismissed as to Casell Pridgett.

Gardner SMITH, Jr. *v.* STATE of Arkansas

631 S.W.2d 835

Supreme Court of Arkansas
Opinion delivered May 3, 1982

Charles P. Allen, for appellant.

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

PER CURIAM. Gardner Smith, Jr., by his attorney, has filed for a rule on the clerk.

His attorney, Charles P. Allen, has attached an affidavit admitting 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.

Willie Earl JOHNSON, Jr. and Murphy CARROLL
v. STATE of Arkansas

CR 82-29 632 S.W.2d 416

Supreme Court of Arkansas
Opinion delivered May 10, 1982

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

Law Office of Paul Johnson, by: *John Lloyd Johnson, Jr.,* for appellant Carroll.

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

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, appellants, Willie Earl Johnson and Murphy Carroll, were convicted of aggravated robbery and sentenced to 20 years in the Arkansas Department of Correction. On appeal, both appellants allege that the evidence is insufficient to support their convictions. We affirm.

The evidence, when viewed in the light most favorable to the State, reveals that Joel Sealey, a New Mexico rancher, and his family were spending the night at the Holiday Inn, North Little Rock. During the evening, before retiring for the night, Sealey opened the door of his room to let in cool air. At that time he noticed appellants standing suspiciously off to the side of his door. There was a space between the curtain and the wall through which appellants could have looked into the room. He then placed his loaded revolver on the bed. Later, he looked out the window several times and did not see anyone; so he cracked the door open and sat on the edge of the bed. After a few seconds he again saw appellants and noticed that one of them had a pistol at his side. He grabbed his revolver and jumped up to close the door. Before he could close the door appellant Carroll kicked the door open, stuck a pistol to his chest and said, "Get them up." Appellant Johnson was in the room, standing behind Carroll. Sealey began shooting at appellants; both were wounded and quickly left the room. Sealey then called the lobby, stating that "somebody had tried to rob us or something."

Appellants argue that there is insufficient evidence from which the jury could find that the purpose or intent of appellants was to commit a theft as required by our aggravated robbery statute, Ark. Stat. Ann. §§ 41-2102 — 41-2103 (Repl. 1977). There is no merit to this argument. Intent or purpose to commit a crime is a state of mind which is not ordinarily capable of proof by direct evidence, so it

must be inferred from the circumstances. *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979).

The jury is allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved. Here, there is no evidence that appellants knew any women were in the room; therefore, the jury could have excluded intent to rape. The jury could also have concluded that if appellants had intended to murder Sealey they would not have paused to demand that he raise his hands.

Common knowledge and experience, when considered in the light of the facts of this case, could enable the jury to find that the only purpose appellants could have had in sticking a gun in Sealey's chest and saying, "Get them up." was to rob Sealey.

Affirmed.

James SOUTHALL *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS

82-42 632 S.W.2d 420

Supreme Court of Arkansas
Opinion delivered May 10, 1982

Cliff Jackson, P.A., and *Miller, Jones & Goldman, P.A.*, for appellant.

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

GEORGE ROSE SMITH, Justice. This suit was tried in the court below as a test case to determine whether an insurance policy covering loss caused by hail includes loss caused by sleet. The Court of Appeals certified the case to us as presenting an issue of public interest, because a number of other pending cases may be affected by the decision. Rule 29 (4) (b).

The plaintiff Southall, the insured, introduced proof to show that on January 11, 1978, sleet fell all day long and into the night. The next morning Southall found that the accumulation of about four inches of sleet on top of his chicken house had caused it to collapse. In this suit upon the policy the court instructed the jury that the term "hail" as used in the policy should be given the meaning ordinarily applied to that term in the everyday affairs of life. The jury's verdict was for the insurance company.

The extended-coverage section in the policy provides that "the coverage of this policy is extended to include direct loss by . . . hail. . . . " Later in the same section is this limitation: "Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) ice (other than hail) . . . . "

At the trial there was undisputed testimony that the word "hail" includes large hail, small hail, winter hail, and sleet. A witness employed by the Weather Service testified that hail is so defined in a recognized meteorological dictionary. Webster's Second New International Dictionary

(1939) is to the same effect, subdividing hail into summer hail and winter hail. In a case directly in point it was held that a policy covering loss by hail includes loss by sleet. *Evana Plantation* v. *Yorkshire Ins. Co.*, 214 Miss. 321, 58 So. 2d 797 (1952). No case to the contrary is cited. In fact, at the trial the appellee's vice-president conceded on the witness stand that the sleet on the roof of the plaintiff's chicken house was small hail.

The trial court was in error in instructing the jury that the term "hail" was to be given its everyday meaning. An insurance policy is to be construed strictly against the insurer, who chooses its language. The construction and legal effect of written contracts are matters to be determined by the court, not by the jury, except when the meaning of the language depends upon disputed extrinsic evidence. *Ark. Rock & Gravel Co.* v. *Chris-T-Emulsion*, 259 Ark. 807, 536 S.W.2d 724 (1976); *Security Ins. Co.* v. *Owen*, 252 Ark. 720, 480 S.W.2d 558 (1972). In the interpretation of a contract negotiated between individuals no doubt there might be conflicting testimony presenting an issue of credibility for the jury with respect to the meaning of the language used, but there was no such issue in this case. The court should, if appropriate, have instructed the jury that the word "hail" as used in the policy included sleet.

The appellee's vice-president testified that he construed a "direct loss" by hail to mean only the damage caused by the initial impact of the hail, but we have held that a direct loss is one proximately caused by the hazard insured against. *Farmers Union Mut. Ins. Co.* v. *Blankenship*, 231 Ark. 127, 328 S.W.2d 360 (1959). If the weight of the hail damaged the chicken house, the hail was the proximate cause of the loss, absent some other possible cause. It is also argued that the policy did not cover loss caused by ice, but that argument is refuted by the language we have quoted, that the company shall not be liable for loss caused directly or indirectly by *ice other than hail.*

The judgment must be reversed, but the record does not support the appellant's argument that we should enter judgment here. There may be an issue of proximate causa-

tion to be submitted to the jury upon a retrial, because it does not appear to be an undisputed fact that the collapse was caused by an accumulation of sleet rather than of snow.

Reversed and remanded.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority opinion because I think the jury and the insurance company were right. One typical weather report (January 11, 1978) stated:

> By mid-morning light freezing rain, sleet and snow covered much of central and southwest Arkansas. The area coverage is expected to continue to increase over the state today . . . while from one to three inches, which includes a mixture of snow, sleet and freezing rain is forecast for the southern section.

The appellant had insurance with the appellee. His insurance was evidenced by a standard fire insurance policy with an attached extended coverage endorsement. The extended coverage is a named peril insurance endorsement. In this case the coverage was extended to specifically include direct loss by "windstorm, hail, explosion, riots . . . " and a number of other named occurrences. The policy went on to define certain terms and under one such paragraph, headed: "Provisions Applicable Only to Windstorm and Hail," said, "This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) ice (other than hail), snowstorm, waves, tidal wave, high water or overflow, whether driven by wind or not." I agree with the appellant that the extended coverage endorsement applied only to direct loss by hail. This could mean damages such as puncturing the roof, denting the sides, breaking windows or other damage caused by the impact of hail.

I would affirm.

Barbara COLLINS *v.* STATE of Arkansas

CR 82-43 632 S.W.2d 418

Supreme Court of Arkansas
Opinion delivered May 10, 1982

James M. Barker and *Robert F. Morehead,* for appellant.

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

GEORGE ROSE SMITH, Justice. Barbara Collins was charged with first-degree murder, found guilty of second-degree murder, and sentenced to 20 years' imprisonment. Apart from objections to an autopsy report, which we find to be without merit, the only argument for reversal is that the trial court abused its discretion in refusing to grant a continuance on the day of trial. That contention must be sustained.

We recognize at the outset our familiar rules that the

granting of a continuance rests in the sound discretion of the trial court and that a defendant cannot be permitted to use a change of lawyers as a device to delay a scheduled trial. In harmony with those principles the real issue is whether, as the defendant contends, she was the victim of an unfortunate misunderstanding shared by the trial judge, the prosecutor, and the two defense lawyers or, as the State contends, she attempted to switch counsel as a ruse to obtain a continuance.

After the defendant was charged in Chicot County with murder, she was continuously confined to jail there until the trial. She first employed James M. Barker, an Ashley County lawyer. He interviewed her and filed motions, but he did not begin to prepare for trial by talking to witnesses. On March 30, 1981, the court entered an order setting the case for trial on Thursday, May 14.

Sometime in April the defendant's mother talked to Robert F. Morehead, a Jefferson County lawyer, about taking over the defense. Morehead consulted the defendant in Chicot County on April 24, but told her he could not enter the case until her retained counsel had been relieved. The defendant dismissed Barker by a letter received by him on April 27. On May 4 the court granted Barker's motion to be relieved as counsel, the court's order containing this language:

> [I]t is found that the granting of [Barker's] request will not unduly burden, delay or hinder the operations of this court. Further, that the request is timely, and should be granted, with a provision that [Barker] deliver to the Defendant's new Attorney [all discovery items delivered to Barker].

It is indicated that both the prosecutor and the trial judge intended the order to be conditioned on the new attorney's being ready to try the case on May 14 as scheduled, but unfortunately that condition was not expressed in the order and was not brought home to either defense lawyer.

Barker, having been relieved by the May 4 order, sent a

copy of it to the defendant on May 5 and cautioned her: "There is a lot of discovery in this case and you need for you or your new attorney to notify me as soon as possible regarding this discovery." On May 6 or 7 the jailer in Chicot County called Morehead's office and left word for him to call the defendant collect. Morehead had a two-day trial in progress on the 6th and 7th, but he called the jailer and said that he had another matter in Ashley County on Friday, May 8, and would see the judge and the prosecutor then. He did see the prosecutor and the judge on Friday. He explained at least to the prosecutor that he already had a schedule and could not try the case on May 14, only six days away. At that point the matter was left unresolved.

On Monday, May 11, the court entered an order reciting that Barker had been relieved on May 4, reciting that no substitute counsel had entered an appearance for the defendant, noting that the case was set for trial on May 14, setting aside the order relieving Barker, and directing that he continue to represent the defendant. The judge called Barker at 4:30 p.m. and read him the order, which was also served on him by the sheriff a few minutes later. Barker had a trial in chancery court the next morning. Thus Barker, practicing in an adjoining county, was brought back into the case without prior notice and in effect was given a day and a half to prepare to try a first-degree murder case.

On Thursday, the day of trial, the defendant moved for a continuance. At a long hearing Barker and Morehead testified to the facts we have narrated. They also stated they had not interviewed the witnesses and they had not subpoena'd any witnesses. The trial judge overruled the motion for a continuance and proceeded with the trial. He explained that he had a responsibility to move the business of the court and could not allow litigants to determine when they desired a trial. The jury returned a finding of second-degree murder, with a 20-year sentence.

We hold that the trial judge abused his broad discretion in refusing a continuance. We are convinced that the difficulty would not have arisen if the order relieving Barker had been conditioned, as the trial judge undoubtedly

intended it to be, upon Morehead's being ready for trial on May 14. However, it was not so conditioned. Moreover, there is no indication that the defendant herself, who was in jail and had little to gain by delay, changed lawyers in an effort to force a continuance. (The State erroneously attributes to the witness Scales a statement, as worded in the State's abstract, that "Barbara [the defendant] told me she wanted to hire Mr. Morehead to get Morehead to get her a continuance." Actually the witness was referring not to Barbara but to her mother, nor was the statement as positive as the quoted paraphrase indicates.) As for the attorneys, we have set out their activities in almost a day-to-day sequence from May 4 to May 14 and find no real indication of any effort on their part to play for delay.

Error is presumed to be prejudicial unless we can say with assurance that it is not. Both attorneys were, without question, not prepared for the trial. No witnesses had been interviewed. The trial resulted in a 20-year sentence. Since counsel had scant opportunity to interview possible defense witnesses, we cannot fairly require counsel to demonstrate specific prejudice by showing just what the defense would have been if a continuance had been granted. The error cannot be dismissed as harmless.

Reversed and remanded for a new trial.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. The trial court properly refused appellant's request for a continuance, first requested on the day of the trial.

The party alleging error is required to demonstrate that prejudice did in fact exist. *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977); *Renton* v. *State,* 274 Ark. 87, 622 S.W.2d 171 (1981).

Appellant claims that she did not have an opportunity to interview her witnesses before trial. But, even so, during the trial or after the trial she would have been in a position to know what prejudice, if any, resulted from the trial court's

refusal to grant the requested continuance. The trial court's refusal to grant a continuance is proper grounds for a motion for a new trial. *Finch* v. *State, supra.*

It is significant to note that it was the appellant herself who created the alleged error by discharging her attorney. The court relieved Mr. Barker on the condition that it would not cause a delay in the trial of the case. It is noteworthy that both attorneys are representing appellant on appeal. Both agree the trial judge erred by not gleaning prejudicial error from the actions of the defendant and her attorney.

Error should not be presumed. Neither the trial court nor this court has any reason to believe that upon retrial the evidence will not be exactly the same as it was in the first trial. Net result: a reversal for no reason; a waste of judicial manpower; a delay in the administration of justice.

I am hereby authorized to state that HICKMAN, J., joins in this dissent.

DELTA OIL COMPANY *v.* John CATALANI et ux

82-43 633 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 10, 1982
[Rehearing denied June 14, 1982.]

Billy J. Hubbell, for appellant.

W. H. Drew of *Drew & Mazzanti,* for appellees.

FRANK HOLT, Justice. The appellant filed suit December 28, 1979, against the appellees seeking a judgment on appellees' promissory note in the amount of $18,760.23 and to foreclose a mortgage of even date to secure the note. The appellees raised the defenses of lack of capacity to sue, laches, estoppel, statute of limitations, usury, and failure of consideration. The chancellor found for the appellant on all issues except that the five year statute of limitations barred its suit. Ark. Stat. Ann. § 37-209 (Repl. 1962). Hence this appeal and cross-appeal.

Appellant first contends that the chancellor erred in finding that the promissory note provided for payment of interest annually with the first installment being due and

payable January 1, 1974. The note provides in pertinent part:

> FOR VALUE RECEIVED, We, the undersigned, or either of us promise to pay to the Delta Oil Company the sum of Eighteen Thousand Seven Hundred Sixty and 23/100 Dollars ($18,760.23) with interest from date at the rate of Eight per cent (8%) per annum due and payable as follows:
>
> > Due and payable in Five (5) Annual installments of $2500.00 (principal and interest) with the first installment commencing on January 1, 1975, with the outstanding balance of principal and interest being due and payable on January 1, 1980.
>
> — — — — — — — — — —
>
> It is specifically understood and agreed that if installments of interest or the principal payment due hereunder is not paid on the due date as set forth herein, that such delinquent installment shall bear interest at the rate of Ten Percent (10%) from the due date until payment is made.
>
> It is expressly agreed that in the event that default is made in the payment of any of said Note of Interest after its maturity that the holder of said Note may, at his option, declare all the remaining Note and Interest also due and payable.

The mortgage provides for the same payment schedule.

The chancellor found that the note was ambiguous with respect to the terms of payment and, after hearing testimony from the parties, also found that the appellant had exercised its option in February, 1974, to accelerate the entire indebtedness because of nonpayment of the annual interest due and payable on that date. The court specifically found "that the tenor of the note provides for annual interest payments of 8% of the principal balance due after annual maturity." Consequently, since more than five years had

elapsed before appellant instituted this action in December, 1979, it was barred by the statute of limitations.

Appellees adduced proof that the appellant, through its president, orally demanded payment of $1,500 accrued interest on February 5, 1974, and when they advised this official they could not pay the accrued interest or anything on the principal, he stated that he would foreclose on the whole note. The next day the appellees wrote a letter to the appellant, which was introduced into evidence, reiterating their inability to pay the note and accrued interest and that appellant would have to foreclose on the mortgage. They stated that they could not and would not make any payments on the note nor any of the accrued interest. They requested that appellant commence the threatened foreclosure so that "we may proceed in bankruptcy as soon as possible." The next day they consulted with an attorney about bankruptcy proceedings. Appellant denied that he had made the oral demand for payment, that he had threatened to file a foreclosure action, and, although he had occasionally discussed with them his need for payment and their inability to pay on the note, he took no formal action to accelerate the payment of the indebtedness until he filed this action in December, 1979.

Be that as it may, we are of the view that the note is not ambiguous with respect to the payment schedule. It specifically states that the principal *and interest* are due and payable in five annual installments beginning January 1, 1975, and that on January 1, 1980, (a sixth payment) the balance of the principal and interest would be due and payable. This is commonly known as a balloon note. The note provided that the appellant, at its option, had the right to accelerate payments of principal and interest only upon default of interest following its maturity. It is true that the interest accrued annually. However, the first payment of interest did not mature until January 1, 1975. Therefore, by the written terms of the payment schedule, the first interest payment was not in default until then. Consequently, appellant's action in December, 1979, was not barred by the statute of limitations. We further observe that notification by the debtors that they did not intend to pay the note did not

automatically activate the acceleration clause since this provision is for the option and benefit of the creditor. *Willett* v. *Kelley,* 203 Ark. 350, 157 S.W.2d 34 (1941); and *Hodges* v. *Taft,* 194 Ark. 259, 105 S.W.2d 605 (1937).

We deem it unnecessary to discuss appellant's other contentions for reversal.

On cross-appeal appellees assert the trial court erred in finding Delta Oil had the legal capacity to sue as it was without legal corporate existence, had terminated and changed its authorized business address and failed to continuously maintain a registered office. They further contend that pursuant to Ark. Stat. Ann. § 64-117 F (Repl. 1980), the certificate from the Secretary of State stating that the appellant was a corporation in good standing at all times pertinent to this action was insufficient to prove the corporation's legal existence. We disagree. The Secretary of State's certificate makes a *prima facie* case as to the proof of its corporate existence. § 64-503 B. The validity of this certificate was uncontroverted except for appellant's failure to file a change of address as to its registered office or agent. It appears that the requirement that a corporation maintain a registered office and agent with proper address is to make it amenable to service of process or notice of other proceedings. § 64-115. Here, the appellees have not demonstrated that they were prejudiced in any manner by the change of address of appellant's registered office and agent from one county in this state to another.

Appellees further assert the note was usurious. They claim the entire indebtedness, with interest, represented by the 1973 note was $16,438.55, not $18,760.23, the difference representing a usurious interest rate. Appellant's witness testified that on February 6, 1970, the Catalanis owed the appellant $10,856.75. This was evidenced by a promissory note. There was an additional $5,982.03 in bad checks from appellees that was not included in the 1970 note as well as $1,921.00 that appellant had paid Murphy Oil on behalf of appellees' excess over their credit limit. The 1973 note merely combined all the indebtedness into one note. Here

the chancellor found there was no evidence of usury and we cannot say his finding is clearly erroneous.

Appellees' final contention is that the appellant was guilty of laches. They assert their business records were only kept for five years and that the appellant unnecessarily delayed in bringing this action. A sufficient answer to this argument is that the appellant brought the action within the permissible time frame of appellees' note.

On direct appeal the decree is reversed and the cause remanded for proceedings consistent with this opinion. Affirmed on cross-appeal.

STEWART ELECTRIC COMPANY OF SOUTHWEST ARKANSAS, INC. *v.* MEYER SYSTEMS CORPORATION et al

82-49 632 S.W.2d 422

Supreme Court of Arkansas
Opinion delivered May 10, 1982
[Rehearing denied June 1, 1982.]

Danny P. Rodgers of *Honey & Rodgers,* for appellant.

House, Holmes & Jewell, P.A., for appellees.

DARRELL HICKMAN, Justice. This appeal concerns a dispute over a debt between three corporations. Stewart Electric, the appellant, supplied material worth $5,822.23 to a construction job at a Firestone Tire and Rubber Company plant in Prescott, Arkansas. Meyer Systems Corp., a Texas corporation, was the prime contractor and it hired Bildon Industries Inc., as general contractor, to do all electrical work. Stewart filed this suit against Meyer claiming it was liable for the debt. Bildon had gone bankrupt. Firestone simply interpleaded the amount claimed asking that it be paid to either Stewart or Meyer. The case was tried to the judge without a jury and only three witnesses testified. The only records Stewart had, thirty-two "tickets" for the job, were introduced into evidence. The trial judge found that Meyer was not liable on this open account; Meyer had not contracted for the supplies and Stewart had failed to prove by a preponderance of the evidence that Meyer, through its alleged agent, had either expressly or impliedly authorized the contract with Stewart. Denying Stewart's claim, the judge awarded the interpleaded money to Meyer. We affirm.

On appeal Stewart alleges essentially two errors: The

court was wrong in its findings, and the Wingo Act precludes Meyer from getting the money and that, therefore, the money should go to Stewart.

While the legal issue of this case is agency, that is, whether Meyer actually entered into a contract with Stewart for the material, the resolution is purely a fact question. The trial court, after hearing the witnesses, and examining the evidence, found the facts to be against Stewart. In order for us to reverse that judgment we would have to find the judge was clearly erroneous in his findings. ARCP Rule 52. The trial judge correctly stated it was Stewart's burden to prove by a preponderance of the evidence that a Meyer employee had the express or implied authority to make the contract. *Jackson* v. *M.F.A. Mutual Insurance Co.*, 169 F. Supp. 633 (W.D. Ark. 1958), *aff'd*, 271 F.2d 180 (8th Cir. 1959).

The plaintiff called only one witness, James Ellis Stewart, the president of the Stewart family corporation. Stewart said his first knowledge of the agreement was when he overheard a conversation between his father and an employee of Meyer, whose first name was Weldon. He said on the basis of that conversation an account was set up so that material could be supplied to the Firestone job. He said he called Firestone to check on Meyer, since they had had no previous dealings with the company, and was told by a woman that Meyer would be a good account. He said he understood that Meyer was not to be billed until after the job was completed. Stewart said after Meyer was billed and did not pay the account, he contacted a Mr. Keys at Meyer and he said the account would be paid. Two of the tickets were made out to Meyer, one dated August 6, 1979, and another dated August 8, 1979. The first one was signed by Weldon Geron. The rest were all made out to "Beldon Industries," or "Bildon Industries," or "Bil-don Industries." Stewart said the August 6, 1979, ticket was the first ticket issued but was dated later when the tickets were posted. The first tickets, according to dates, were three dated June 19, 1979, all made out to Bildon. Stewart also testified that Nick Grasel, the president of Meyer, assured him the account would be paid. Nick Grasel testified that Meyer was the prime contractor for Firestone; that Bildon was the general contractor for Fire-

stone and also responsible for the electrical work. He denied that Meyer ever authorized any of its representatives to obligate Meyer to Stewart, or that any had the authority to do so. He said Weldon Geron was sent by Meyer to the job site to check on the work and to assist Bildon in expediting material to the site. He denied that he ever acknowledged to Mr. Stewart that Meyer was liable on the account.

Weldon Geron testified that he was working for Meyer at the time in question and made several trips to Prescott to check on the job, pick up material, and keep the job moving. He said he had no authority to obligate Meyer for any of the equipment used by Bildon and that he did not authorize Stewart to open an account for Meyer. He said he did pick up some equipment at Stewart's and signed for it, but that when he saw a ticket made out to Meyer he told Stewart to change it, that it was a mistake because the account was Bildon's.

If an agent has the express or implied authority to bind the principal, then the principal is bound by the agent's actions. That is undisputedly the law, as both parties and the judge agreed. *Jackson* v. *M.F.A. Mutual Insurance Co., supra.* But this case involves the application of the law to the factual question of whether Geron had the express or implied authority to bind Meyer. The trial court specifically found that the appellant had failed to prove that proposition by a preponderance of the evidence. There is ample evidence to support the trial court's findings. All but two of the tickets were made out to Bildon. The tickets seem to square with Geron's testimony, and Meyer's president denied he ever assured Stewart the bill would be paid. The trial court obviously chose to believe the testimony offered by Meyer.

It is unfortunate that Bildon did not pay this account and Stewart must suffer a loss, but it does not follow that Meyer owes the account as a matter of law. The trial court, sitting as a jury, found that Stewart failed to make its case, a decision we cannot on this record overturn.

The second issue raised is one that was not presented to the trial court. It is argued the "Wingo Act" prohibits Meyer from recovering the $5,822.23 from Firestone. The Wingo

Act is Ark. Stat. Ann. § 64-1202 (Repl. 1980), and it generally prevents a foreign corporation, not authorized to do business in Arkansas, from enforcing a contract in Arkansas.

While it is alleged that Meyer was a foreign corporation not authorized to do business in Arkansas, nowhere by pleading, orally, or even in a motion after trial to dismiss the case without prejudice, did Stewart invoke the Wingo Act and ask that Meyer be prevented from collecting the money interpleaded by Firestone. That argument is raised for the first time on appeal. We do not consider such arguments. *Wilson* v. *Lester Hurst Nursery, Inc.*, 269 Ark. 19, 598 S.W.2d 407 (1980).

Affirmed.

PURTLE and HAYS, JJ., dissent.

STEELE HAYS, Justice, dissenting. I respectfully disagree with the decision in this case. I believe an injustice has occurred. Simply stated, by this decision we have permitted one company to order goods on credit from another company, receive the direct benefit of those goods and yet refuse to pay for them on the theory that the employee who ordered them had no authority to bind the purchasing company. I regard the result as clearly against the weight of the evidence and not in keeping with the law.

The trial court found in effect that Stewart Electric Co. failed to meet the burden of proving Mr. Weldon Geron, an employee of Meyer Systems Corporation, had authority to purchase electrical goods and materials by binding the credit of Meyer Systems Corporation. That holding is erroneous for two reasons: The proof shows an implied authority by Geron and even if such authority were lacking, Meyer Systems ratified his acts by accepting the benefit of those goods. Additionally, the president of Meyer Systems assured Stewart Electric the account would be paid.

In stating the facts in this dissent I have not adhered to the rule that all inferences are to be given the prevailing party because I believe a study of the entire record fully

supports this factual account and, too, I take it from the trial court's comments at the close of trial he regarded Mr. Stewart as a credible witness, as he gratuitously praised his "sincerity, honesty and integrity," at the same time making findings difficult to reconcile unless Mr. Stewart's testimony was false on a number of points.

Meyer Systems contracted with Firestone Tire and Rubber Co. to build a "carbon black system" at Firestone's Prescott plant. Meyer then hired Bildon Industries at a fixed fee to serve as general contractor to perform the concrete, mechanical and structural, plumbing and electrical work. The plan miscarried, as Bildon performed the work ineptly or belatedly, or both, and Meyer had to assume active involvement. It sent its chief draftsman, Mr. Weldon Geron, from Houston to Prescott to oversee the work. At first he commuted, but later, around June 1979, he took up residence in Prescott to "live with the job," as he termed it. Meyer's president, Mr. Nick Grasel, explained why Mr. Geron was sent to Arkansas:

> We sent him into the field because Bildon was kind of dragging with the concrete work. We wanted him to come in here and assist Bildon, and to answer any questions, and *to expedite material,* to check the work or the material as it came in, make sure there were no shortages, and if there were, *to go ahead and expedite that material, get it on the site so we could get the job done* in the time frame that we would normally or the customer would expect to get it done. (My italics.)

Thus, his express assignment was to "expedite materials" and that is what he did. In mid June, 1979, Geron called on Stewart Electric Company, a small family-owned company in Prescott, and (according to Stewart) explained the contract with Firestone and sought to buy materials on credit on behalf of Meyer Systems. Mr. James Stewart contacted Firestone and was assured Meyer was under contract and was reliable. During the next six to eight weeks Stewart Electric sold Meyer on credit nearly $6,000 in electrical supplies. Sometimes the items were picked up by Mr. Geron, at other times by employees of Bildon. On occasion, Mr. Geron went

to Texarkana where he bought electrical supplies from Dealers Electrical Supply and charged them to Stewart Electric.

Shortly after the first purchases were made Stewart was asked to write up their sales tickets under Bildon's name rather than Meyer's, so the two companies could keep the accounts separated and, thereafter, the sales tickets were written in the name of Bildon. Again according to Stewart, Meyer had asked Stewart to bill them when the job was completed so Stewart waited. In March of 1980 Mr. Stewart called Firestone and learned the job had been completed, though Firestone was withholding payment. Stewart billed Meyer and Meyer asked Stewart to bill Bildon Industries, which Stewart did as an accommodation. Bildon returned the bill with a statement the charges were made by Meyer's employees. Mr. Stewart says he called Mr. Ted Keys, president of Meyer, and that Mr. Keys promised to see the bill was paid. Witnesses for Meyer did not refute this testimony. When Meyer still did not pay, Stewart contacted Firestone for help and Firestone called Meyer. By that time Mr. Keys had been replaced by Mr. Nick Grasel, who came to Prescott to find an angry Firestone official, upset because bills for materials had not been paid. Mr. Grasel told Firestone, he says, *not* that Bildon, rather than Meyer, was responsible, but that he would see the matter was straightened out. Mr. Grasel contacted Stewart (again, *not* to say that Meyer did not owe the account) to explain that because Bildon had cost Meyer $80,000 on the job, Meyer wanted to settle with Stewart for half the amount due, which Stewart understandably refused. Caught in between, Firestone interpleaded the money it was withholding ($17,000) and Stewart and Meyer went to trial. The trial court, sitting as a jury, found that Stewart had not proved Mr. Geron's authority sufficiently. The trial court announced his findings as follows:

> Let the record reflect that it is the finding of the court that the plaintiff has not met the burden of proving, first, that there was a contract between Meyer and Stewart; that there was a representation by Mr. Weldon Geron of an authority to bind Meyer. (T. 114)

I believe the trial court found against Stewart Electric, not so much on the facts as on a misconception there was insufficient proof of a contract between Meyer and Stewart Electric or proof that Mr. Geron had expressly represented himself as having the authority to bind Meyer. I believe the proof was sufficient on both counts.

Stewart supplied to Meyer's employees electrical materials which Meyer was contractually obligated to furnish Firestone under its contract and Meyer received the direct benefit of those materials. If Bildon had failed to furnish those materials, it was Meyer's duty to do so. No express contract between Stewart and Meyer was required. When one party received and benefits from the use of goods furnished by another the law implies a contract of sale and an obligation to pay, irrespective of any express contract. See 67 Am. Jur. 2d *Sales* § 63 and 77 C.J.S *Sales* § 34 (b), where the rule is stated:

> Where, in the absence of an express contract, one person delivers goods to another under circumstances indicating that a sale is intended, and the other does not object or offer to return the goods but retains and uses them, the contract of sale will be implied.

As to whether Mr. Geron had authority to bind Meyer, it is plain he was sent to "expedite" the job and obtain the materials necessary to complete the work and the law gives an agent the implied actual authority to perform all acts necessary to the execution of his express authority. *McWilliams Auto Company* v. *Gibbons,* 197 Ark. 617, 124 S.W.2d 211 (1939); *U.S. Bedding Co.* v. *Andre,* 105 Ark. 111, 150 S.W. 413 (1912); *Roach* v. *Rector,* 93 Ark. 521, 123 S.W. 399 (1909).

A case having many similarities to the case before us is *Stewart-McGehee Const. Co.* v. *Brewster,* 176 Ark. 430, 3 S.W.2d 42 (1928), where we held that a construction foreman had implied authority to order materials on credit, notwithstanding the testimony of the president of the construction company that he had no authority to make such contracts. By putting him in charge of the work with authority to order materials he had the implied authority to

order any necessary materials for the work. The authority of an agent to bind his principal is even broader where, as here, the actions of the agent benefit the principal, especially where the third party has acted in good faith and a repudiation of the contract would result in harm and disadvantage to him. *Cleburne County Bank* v. *Butler Gin Company,* 184 Ark. 503, 42 S.W.2d 769 (1931).

Two arguments by Meyer Systems must be mentioned. It argues that with only one exception, the sales tickets introduced by Stewart are made out to Bildon rather than Meyer. But the significant fact is that the initial ticket written up on the day Mr. Geron first came to Stewart, is made out to Meyer Systems and is signed by Mr. Geron. This exhibit documents the fact the account was opened in Meyer's name and that Mr. Geron held himself out as able to bind Meyer. The ticket bears a later date, August 6, 1979, but Mr. Stewart explained how that occurred and Mr. Geron did not dispute either his explanation or that the ticket was the first charge.

Next, Meyer Systems argues that it has already paid Bildon under its contract and should not be required to pay twice for the same goods. If that were so, it might cast a different light on the evidence, but that is not an established fact, indeed, there is not one word of evidence to support the argument. Neither witness for Meyer, one of whom was its president, was even asked if Meyer had paid Bildon for the materials, or for anything else, and, thus, so far as this record is concerned Meyer has paid neither Bildon nor Stewart. Moreover, it seems unlikely in the extreme that Meyer would have fully paid a subcontractor whose performance was so poor as to necessitate Meyer's virtually taking over the job to the extent of an $80,000 loss.

I would reverse with directions to enter a judgment in behalf of appellant.

PURTLE, J., joins.

Luther PRICE, III *v.* STATE of Arkansas

CR 81-129 632 S.W.2d 429

Supreme Court of Arkansas
Opinion delivered May 10, 1982

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

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

DARRELL HICKMAN, Justice. Luther Price, III, was convicted of burglary and interference with a police officer and sentenced to forty years and twenty years imprisonment respectively. His sentence was enhanced because he had six prior felony convictions.

This case presents two issues, one involving an old question we have considered several times but one which

continues to give prosecutors and trial courts difficulty; the other involves the newly enacted procedure for sentencing a defendant with prior convictions.

The first issue on appeal is whether there was sufficient evidence to support the conviction for interference with a law enforcement officer in the performance of his duty in violation of Ark. Stat. Ann. § 41-2804 (Repl. 1977). In three previous cases we have considered this charge and in two of them we found the evidence insufficient to support that charge. In a third case we found the facts did justify the charge. In this case two men were seen entering a dwelling and a neighbor called the police. The police responded to the call of a burglary in progress and one officer went to the front door and the other officer went to the back. The officer covering the back testified that as he approached the rear corner he observed two males leaving from the back of the residence. He yelled at them to stop and one of the men turned and fired a pistol in his direction and fired a second shot in another direction. Both men continued to flee. One of the suspects was caught in the alley and the defendant, Luther Price, was found hiding in the basement of a nearby house. The officer testified that it was Luther Price who fired the pistol at him.

The State chose not to charge Luther Price with resisting arrest and aggravated assault, which is a Class D felony, or a more serious offense, but instead chose to charge him with interference with a law enforcement officer. It is our judgment that Price was improperly charged as we have carefully explained in the cases of *Breakfield* v. *State,* 263 Ark. 398, 566 S.W.2d 729 (1978), *State* v. *Bocksnick,* 268 Ark. 74, 593 S.W.2d 176 (1980), and *Gilmer* v. *State,* 269 Ark. 30, 602 S.W.2d 406 (1980). The offense of interference with a police officer was not intended to be an alternative to charging someone with resisting arrest. In the *Breakfield* case the defendant resisted arrest and was charged with interference with a police officer. We pointed out that the new criminal code had a provision for resisting arrest, Ark. Stat. Ann. § 41-2803 (Repl. 1977), and that before the new criminal code there was no such statute. In the Commentary to § 41-2803 it is noted that the offense of resisting arrest is

narrowly confined to the arrest situation; in other words, a situation where the police were resisted when trying to arrest the person charged. Interference with an officer in *other* circumstances is dealt with by §§ 41-2802 or 41-2804.

In *Bocksnick* we had an almost identical situation to that before us. The defendant had been taken to his parents' home by a marshal who knew him and did not charge him although he smelled of alcohol. Later that same evening the marshal saw the defendant carrying a rifle and demanded that he surrender it. The defendant refused and threatened to kill the marshal. No attempt at that time was made to arrest him. In the meantime the defendant went to a nearby grocery store and tried to obtain ammunition. When he later went to a nearby wooded area and was ordered to surrender, he fired two shots at the officers. We found that the officers were performing no duty except trying to arrest the defendant and that a strict construction of the penal statute could only mean that the legislature did not mean for § 41-2804, interference with a police officer, to be applied in such a situation.

In *Gilmer* v. *State, supra,* a case with facts quite different from those in *Breakfield, Bocksnick,* or in this case, we found the evidence sufficient to support a charge of interference with a police officer. There the police officer was responding to a call to invesigate a disturbance between the defendant and another person. While the officer was en route to answer the call, the officer stopped his vehicle and the defendant attempted to fire at the officer. A scuffle occurred between the officer and the defendant. The officer did not know the defendant was the subject of the call for assistance. We held that that amounted to interference with a law enforcement officer because the fracas that occurred between the officer and the defendant was totally separate from the incident the officer had originally set out to investigate.

As we held in *Gilmer* the offense of interference applies only where a police officer is interfered with in the performance of his duty by someone other than whom the officer is trying to arrest. That does not mean one resisting

arrest cannot be charged with other criminal offenses; he can, but not with the interference charge. It is inexplicable to us why the State persists in charging defendants with interference when it clearly can make a charge or charges against a defendant undoubtedly authorized by the criminal code.

The Commentary to the relevant statutes makes the distinction abundantly clear. The Commentary to Ark. Stat. Ann. § 41-2803 (resisting arrest) states:

> Code section 41-2803 is narrowly confined to the arrest situation. Interference with an officer in *other* circumstances is dealt with by §§ 41-2802 or 41-2804. [Emphasis added.]

The Commentary to Ark. Stat. Ann. § 41-2804 (interference with a law enforcement officer) states:

> Section 41-2804, which is directed at assaults on law enforcement officers, is much broader than § 41-2803. It is not limited to the arrest context but covers all assaults on officers acting within the scope of their office — *e.g.*, those engaged in executing search warrants, seizing property, or serving civil process . . .

In the case before us the officer actually testified that the defendant, Luther Price, shot at him after he told him to halt and obviously after he intended to effect an arrest. The defendant was fleeing and was resisting all efforts by the law enforcement officers to arrest him.

No doubt it is the general language of the charge of interference with the police officer that attracts the State because a liberal interpretation of the statute would allow its application to any misconduct on the part of any defendant in his relationship with an officer trying to arrest him. Such conduct would become a more serious crime. But we rejected such an interpretation in *Breakfield* and have continued to do so. Since there is no substantial evidence to support this charge, it is dismissed.

In order to eliminate any possibility of prejudice we must reduce the sentence to a minimal sentence for burglary by an habitual offender with four or more convictions, which is twenty years imprisonment. Conceivably the State might desire to retry Price on the burglary charge because he was charged as a habitual offender and he might not have received a minimum sentence. Unless the State elects to proceed with a new trial within seventeen days from the date of this decision, the judgment is modified to twenty years imprisonment for burglary as an habitual offender with four or more prior convictions.

The second issue involves an Act of the 1981 General Assembly, Ark. Stat. Ann. § 41-1005 (Supp. 1981). That statute provides that when a defendant is found guilty of a felony, the trial court, out of the hearing of the jury, shall hear evidence of the defendant's previous felony convictions, determine the number of those convictions, and instruct the jury as to that number. The argument is made that this procedure is unconstitutional because it violates ARK. CONST. art. 7, § 23 by directing the trial court to charge the jury with matters of fact. We do not reach the constitutional argument in this case because there was no dispute about the prior convictions of the defendant. When facts are undisputed, the court may properly state them to the jury. *Brown* v. *Keaton,* 232 Ark. 12, 334 S.W.2d 676 (1960); *Cox* v. *Hutto,* 619 F.2d 731 (8th Cir. 1980).

Affirmed as modified.

E. Nell KIDD, Executrix *v.* Beulah P. SPARKS

81-244 633 S.W.2d 13

Supreme Court of Arkansas
Opinion delivered May 10, 1982
[Rehearing denied June 7, 1982.*]

*DUDLEY and HAYS, JJ., would grant rehearing.

Boyce R. Davis, for appellant.

John C. Everett of *Everett & Whitlock,* for appellee.

JOHN I. PURTLE, Justice. This case involves the interpretation of a will which the testator prepared by filling in blank lines on a commercially printed will kit form. Use of such a device is at best risky, as even the most skilled probate attorney would have difficulty with the unsuitable and inept printed provisions in this will kit. The provision to be construed is set out below, with the capitalized printing of this opinion representing the portion of the will which was typed by the testator and the regular printing of this opinion representing that part of the will which was commercially printed.

> I hereby give, bequeath and devise unto BEULAH SPARKS, MY WIFE ALL OUR PERSONAL BELONGINGS EXCEPT THE RESTRICTIONS BELOW.
>
> all of my estate and property, both real and personal, of which I may die seized and possessed, wherever the same may be located or situated and of whatsoever kind or character. However, it is my desire and I hereby, direct that the following restrictions, stipulations and divisions shall be and is, a part of this, my last will and testament.
>
> TO BOB SPARKS, MY SON ALL MY TOOLS.
> TO BOB SPARKS, MY SON AND PATSY K. KIRK, MY DAUGHTER THE PROCEEDS FROM TWO REAL ESTATE ESCROW ACCOUNTS.
>
> (ESCROW BETWEEN HENRY A. GARDNER III AND M. L. SPARKS, 10 ACRES, SEC. 19 TOWNSHIP 15 NORTH RANGE 32 WEST. PAYMENT OF $200.00 PER MONTH.
> (ESCROW BETWEEN DAVID WALTON AND M. L. SPARKS. HOUSE LOCATED AT 301 EAST NORTH. PAYMENT OF $201.71 PER MONTH.)

At the time of execution of the will, the Bank of Lincoln held in escrow a promissory note, secured by a mortgage, payable to the decedent, made by Henry A. Gardner III and Linda Gardner. Approximately nine months before the testator's death this note was paid in full, by a lump sum prepayment, with the final payment being made by cashier's check in the amount of $12,405.65. With the cashier's check and his personal check in the amount of $2,594.35 the decedent purchased a $15,000 certificate of deposit in the Bank of Lincoln.

At the time of the execution of the will the Bank of Lincoln held in escrow a second promissory note and mortgage, payable to the decedent at the rate of $202.71 per month, made by David Walton and Phyllis Walton. At the date of death, $18,762.30 of principal and interest to maturity remained due.

The trial court held that the will should be construed as devising to Beulah Sparks all of the decedent's personal property except his tools and the $18,762.30 proceeds remaining due under the Walton note. The trial court held that the term "proceeds" included the balance of principal and interest payable. The Gardner note was held to be adeemed by extinction, with the result of the ademption being to pass all residuary property to Beulah Sparks, the surviving spouse, under the above-quoted language from the printed form. We affirm.

The first issue is whether the legacies to be paid from two real estate escrow accounts were adeemed. This turns on the additional question: were the legacies specific or demonstrative?

A specific legacy is the bequest of a particular thing, as distinguished from all others of the same or similar kind, and must be satisfied only by the delivery of the particular thing. *Holcomb* v. *Mullin,* 167 Ark. 622, 268 S.W. 32 (1925). A demonstrative legacy is one stated by designation only, such as a certain interest or fund from which the bequest of money, or amount of value, shall be primarily paid or satisfied. *Stifft* v. *W. B. Worthen Co.,* 177 Ark. 204, 65 S.W.2d

527 (1928). In the present case the decedent made specific legacies to his children. They were to receive the "proceeds from two real estate escrow accounts," which the testator described as being payable in installments of so much a month. Each indebtedness was described sufficiently to make them clearly specific legacies, in that anyone could understand the bequest to the children. Thus, when one of the accounts was prepaid in full, that account was no longer within the testator's description of the legacy. The will did not refer to two real estate escrow accounts, "or their proceeds," which could have been construed as an alternative reference.

A similar situation to the one under consideration existed in *Mee* v. *Cusineau, Executrix,* 213 Ark. 61, 209 S.W.2d 445 (1948). There the will stated that the testator left to a certain legatee "all of the lots owned by me, or in which I may have an equity or interest at the time of my death in the Busch Park Addition . . . " To another legatee: "I give, devise and bequeath the real estate owned by me, or in which I have an equity or interest at the time of my death, known as the 'McClendon Springs Property' . . . " A part of the last-mentioned property had been subdivided into lots which the testator had sold to various individuals prior to her death. As the lots were paid for a deed was given by the testator. At the time of her demise some of the lots had been paid out and deeds executed while others were still being paid on at the time of her death. Other portions of the McClendon Springs property, totaling 320 acres, were sold by warranty deed, which purchase was on credit, executed by promissory notes secured by a mortgage in favor of the testator. The testator released two tracts of 50 and 20 acres each from the mortgage which were conveyed by the purchaser on the same day. In our opinion in the *Mee* case we quoted with approval language from 28 R.C.L. which states:

> The rule is universal that in order to make a specific legacy effective the property bequeathed must be in existence and owned by the testator at the time of his death, and the nonexistence of property at the time of the death of a testator which has been specifically

> bequeathed by will is the familiar and almost typical form of ademption.

We also held that:

> . . . a disposition by testator in his life time, of property specifically devised operates as a revocation of the devise; and a conveyance of a part of such property operates as an ademption of the devise to the extent of the lands conveyed.

And in summing up, we said:

> So here there was an ademption as to the fifty-acre and the twenty-acre tracts of land, and as to any of the purchase money Miss Busch may have collected, but not as to the purchase money remaining unpaid at the time of her death.

The ruling of the trial judge was exactly in accord with the foregoing language. It is a fact that the testator no longer had an interest in the Gardner tract because it had been collected prior to his death. There were no proceeds to be collected from the Gardner sale at the time of the testator's death. He had received the money and converted it into other forms of property.

Common logic says that the Gardner note had been adeemed prior to the testator's death. Obviously, the testator could have placed his childrens' names on the CD if he had wanted them to receive it. The trial court seems to have looked to the intent of the testator in making its ruling. Absent obvious error we will not reverse the trial court in its holding. The paramount aim in the construction of a will is to determine and give effect to the testator's intention. We hold the Gardner property was adeemed in accordance with the reasoning and holding in *Mee* v. *Cusineau,* supra.

As to the residuary clause, the appellant contends that the trial court erred in construing the language on this printed form as containing one. The trial court was correct in looking to rules of construction, for when the testator's

intent is in doubt the court should resort to rules of construction and presumptions. *Hoyle* v. *Baddour,* 193 Ark. 233, 98 S.W.2d 959 (1936). One of these presumptions is that a person who takes the time and effort to make a will does not desire partial intestacy. *Brunk* v. *Merchants National Bank,* 217 Ark. 499, 230 S.W.2d 932 (1950). If at all possible, we will broaden or enlarge a residuary clause to avoid partial intestacy. *Galloway* v. *Darby,* 105 Ark. 558, 151 S.W. 1014 (1912). The language "I hereby give, bequeath and devise unto Beulah Sparks, my wife all our personal belongings except . . . " coupled with "all of my estate and property, both real and personal of which I may die seized and possessed, wherever same may be located or situated and of whatsoever kind or character" is sufficient to leave the residue of the estate to the surviving spouse, especially when any other construction would result in partial intestacy.

Affirmed.

HOLT, DUDLEY and HAYS, JJ., dissent.

ROBERT H. DUDLEY, Justice, dissenting. I dissent from that part of the majority opinion which holds that gifts of "*the proceeds* from two real estate escrow accounts" created specific, rather than demonstrative, legacies.

In determining whether a legacy is specific or demonstrative many courts have recognized a distinction between gifts of specific property and gifts of the proceeds of specific property. Note: "Wills — Ademption: Bequest of Proceeds of Specific Property," 5 Vand. L. Rev. 125 (1951). While our cases have not clearly set out this distinction it seems to have been followed and we have traditionally opted for the better view which is not to apply the doctrine of ademption *to a gift of the proceeds where the fund can be traced and identified in a subsequently purchased security.* This reluctance to extend the doctrine of ademption to a demonstrative legacy of "proceeds" where the funds can be traced and identified is more likely to effectuate the testator's intention. See *Mee* v. *Cusineau,* 213 Ark. 61, 209 S.W.2d 445 (1948); *Mitchell* v. *Mitchell,* 208 Ark. 478, 187 S.W.2d 163 (1945), and 5 Vand. L. Rev., supra.

If the testator had made a bequest of a particular item, as distinguished from all others of the same kind, and which could be satisfied only by the delivery of that particular thing there would be a specific legacy. *Holcomb* v. *Mullin,* 167 Ark. 622, 268 S.W. 32 (1925). However, "the proceeds from two real estate accounts" is not a specific legacy. It is a legacy by designation, a demonstrative legacy. A demonstrative legacy is one stated by designation only, such as a certain interest or fund from which the bequest of money, or amount of value, shall be primarily paid or satisfied. *Stifft* v. *W. B. Worthen Co.,* 177 Ark. 204, 65 S.W. 2d 527 (1928). The testator did not bequeath the Gardners' note, as distinguished from all other notes, and which could be satisfied only by delivery of that note. Instead, he bequeathed "the proceeds from two real estate accounts" and the Gardners' note was included within one of the accounts. Thus there was a demonstrative legacy of "the proceeds," not a specific legacy of the Gardners' note. When a testator has given a demonstrative legacy we look to the intention of the testator instead of applying the doctrine of ademption as a matter of law. *Mee* v. *Cusineau,* supra.

The Gardners' note was prepaid in full prior to the date of death of the testator. The proceeds of the earlier regular monthly payments cannot be traced and there was an obvious ademption of the proceeds to that extent, but the proceeds of the final payment can be traced by the cashier's check and identified with absolute certainty as representing $12,405.65 of the $15,000 purchase price of the certificate of deposit. The majority opinion states, "There were no proceeds to be collected from the Gardner sale at the time of the testator's death. He had received the money and converted it into other forms of property." That is exactly the point — the main issue — only the form of security was changed. The form of security was changed from the Gardners' promissory note to the bank's promissory note. In *Mitchell* v. *Mitchell,* supra, we said:

> . . . Generally speaking a change in the form of a security bequeathed does not of itself work an ademption. It must be shown that the testator intended to give

> specific securities of the form or nature mentioned in the will . . . [before there is an ademption].

In the same vein, in *Mee* v. *Cusineau,* supra, we said:

> . . . If the terms of the will show that testator contemplates some change in the form of the gift, or even a sale and reinvestment of the proceeds, and that he intended to pass *the proceeds,* or the property in which the proceeds are reinvested, to the original beneficiary, full effect will be given to such provision. *If testator gives the "proceeds" of certain property, and it appears, from the terms of the will, that he gives such proceeds even if the property is sold in his life time, the beneficiary may have the proceeds as far as they can be traced* . . . [Emphasis supplied.]

The testator stated that he intended to devise the proceeds. The greater part, or $12,405.65, of the testator's interest in the certificate of deposit is indelibly traceable to the final payment, or proceeds, of the Gardners' promissory note. The final payment on the note was not commingled with other money in any of the testator's other accounts. He simply took the certified check for final payment in the amount of $12,405.65 and added to it $2,594.35 from his checking account and purchased the $15,000 certificate of deposit. There is only a change in the form of security and there should be no extinction by ademption of that part of the certificate of deposit which $12,405.65 bears to $15,000 or 82.69 percent of the certificate.

The majority opinion is not buttressed by the statement "Obviously, the testator could have placed his children's names on the certificate of deposit if he wanted them to receive it." If the testator was familiar with our prior cases he surely thought his children would receive the demonstrative legacy which he described as "the proceeds from" the accounts. But regardless of whether he was familiar with a demonstrative legacy, if this concept is followed to its ultimate conclusion, the will would have been ineffective to pass even the original promissory notes because "he could have placed his children's names" on all of his property.

This rhetoric amounts to an ademption of the doctrine of wills rather than the application of a doctrine of partial revocation by operation of law.

I would hold that there should be no extinction by ademption as to "the proceeds" bequeathed which can be clearly traced and definitely identified in a subsequently purchased security.

I am authorized to state that Mr. Justice HOLT and Mr. Justice HAYS join in this opinion.

J. E. BASS and Nellie G. BASS *v.* Gregory J. KOLLER and Vivian Wendy KOLLER, Husband and Wife

82-51 632 S.W.2d 410

Supreme Court of Arkansas
Opinion delivered May 10, 1982

N. D. Edwards, for appellants.

William M. Cromwell of *Rose, Kinsey & Cromwell,* for appellees.

JOHN I. PURTLE, Justice. Appellees filed suit in the Circuit Court of Crawford County, Arkansas, seeking damages from appellants alleging expressed and implied warranties in that certain construction was not done in a workmanlike manner. They also alleged that a concrete parking apron extended two feet over onto the adjacent lot thereby creating a breach of the warranty deed which was executed to the appellees by the appellants. The trial court, sitting as trier of fact, found the appellees had been damaged in the amount of $594.30 for breach of expressed and implied warranties contained in the warranty deed. The court further gave the appellees judgment in the amount of $500 to compensate them for damages sustained to the driveway located at their residence.

On appeal the appellants argue (1) there is insufficient evidence to support the judgment based upon implied warranty; (2) the appellees failed to use reasonable care to mitigate damages which could have been avoided; (3) there is no evidence that title to the lot had failed or that there had been a breach of warranties in the deed; and, (4) the wrong measure of damage was used in determining damages for breach of warranty. The appellees filed a cross-appeal alleging the judgment was inadequate in view of the testimony and evidence presented to the trial court. We affirm in part and reverse and remand in part.

Appellant J. E. Bass is a builder and developer, having been in the business about 20 years. He built the house in question, including the concrete slab parking pad. Appellees obtained title to the property through a warranty deed from appellants dated February 9, 1978. The deed conveyed lot 10, Kimberling Hills II Addition to the city of Alma, Arkansas. On January 18, 1979, the appellees complained to appellants that water was washing the fill from underneath the parking pad constructed on the property. The appellants thereafter returned to the property and constructed a concrete catch basin to stop the erosion in the area where the pipe went underneath the slab to drain off surface water. Appellees added gutters and drain pipes to the house and one drain was located near the entrance to the pipe extending underneath the concrete pad. Apparently, appellees had removed the concrete basin and placed other materials in the area.

On November 28, 1978, the appellants caused a survey of lot 10 to be made and it revealed the parking pad extended two feet onto lot 9. Appellees then purchased lot 9 in order to insure the use of the last two feet of the parking pad.

Appellants argue there is insufficient evidence to support a judgment based upon implied warranty. They also argue that the pad is still in the place it was constructed and serving the purpose for which it was intended. They argue the appellees caused their own damage by not taking the necessary steps in order to prevent erosion underneath the parking pad. It is argued that had the appellees performed their duty to mitigate damage by constructing step walls as water barriers it would have cost between $30 and $50. Appellants argue that there is no evidence that title to lot 10 or any part thereof had failed and that the judgment based upon breach of warranty to real property is unsupported by any evidence. Appellants further argue that the court used the wrong measure of damages in setting the amount for breach of warranty in regard to the concrete pad extending two feet over onto another lot.

Appellees argue that appellants waived their argument for additional damages because ARCP Rule 50 (e) requires

that a motion for new trial based upon insufficiency of the evidence is waived unless it is preserved through a motion at the close of all the evidence or in a motion for new trial. Rule 50 (e) reads as follows:

> When there has been a trial by a jury, the failure of a party to file a motion for directed verdict at the conclusion of all the evidence, or a motion for judgment notwithstanding the verdict, or a motion for new trial because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict.

This is the first time we have been called upon to rule as to whether Rule 50 (e) is applicable to a nonjury trial. We are of the opinion that the rule means exactly what it says. Prior to the adoption of this rule there was a requirement that the matters stated in Rule 50 (e) applied both to a jury and nonjury trial. Therefore, we hold that the rule applies only to trials held before a jury. In specifically stating that the rule applies to a jury trial, the rule by implication excludes cases tried to the court without a jury. Therefore, the doctrine of *expressio unius est exclusio alterius* applies. We hold that the appellants did not waive the right to question the sufficiency of the evidence in this case.

Appellees also argue that ARCP Rule 59 (a) (5) requires a motion for a new trial to be made when it is thought that there has been an "error in the assessment of the amount of recovery, whether too large or too small." Having already decided that the provisions of Rule 50 (e) are inapplicable to a nonjury trial we hold that it was not error for the appellants to appeal the court's order based upon the alleged error in assessment of the amount of recovery.

As to the cross-appeal, appellees relied upon their own interpretation in regard to the rules and, therefore, abandoned any informative discussion, and in essence abandoned the cross-appeal. Hence, we will not deal with it here.

Turning to the merits of appellants' argument on appeal, the evidence clearly shows that there was no breach

of warranty in executing the deed to lot 10. It is undisputed that appellees received all of the property described in the deed conveying lot 10 to them. Since appellees were willing to accept the deed to the lot without a survey at the time of the sale, they cannot at this time prove damages merely because the parking pad extended two feet onto lot 9. There simply has been no failure in the deed to lot 10. There is no evidence that appellants warranted that the pad was constructed entirely on lot 10. Therefore, we hold that the trial court was in error in assessing damages based upon the failure of the warranties contained in the deed to lot 10.

It is a well-developed concept in Arkansas that in regard to the sufficiency of proof we are required to view the evidence in the light most favorable to appellees and are bound to affirm if any substantial evidence exists. *Hamlin Flying Service* v. *Breckenridge,* 275 Ark. 188, 628 S.W.2d 312 (1982). We cannot say as a matter of law that there was not substantial evidence to support the decision of the trial court as it relates to breach of warranties concerning the parking pad.

The judgment as to the damages for the improper installation of the drainage pipe is affirmed. The judgment as to the damages for the breach of warranty on lot 10 is reversed and dismissed. Appellees' argument on cross-appeal has been abandoned. Therefore, the case is affirmed in part and reversed in part and remanded to the trial court with directions to proceed in a manner consistent with this opinion.

Affirmed in part; reversed and remanded in part.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority has held that in a non-jury trial a party can raise the issue of the sufficiency of the evidence for the first time on appeal. I cannot agree.

In a jury trial a party who fails to question the sufficiency of the evidence in a motion for a new trial waives

his right to do so on appeal. Rule 50 (e), ARCP, Ark. Stat. Ann., Vol. 3A (Repl. 1979); *Kansas City Southern Railway Co.* v. *Short,* 75 Ark. 345, 87 S.W. 640 (1905). This rule is equally applicable to non-jury trials. *See Doup* v. *Almand,* 212 Ark. 687, 207 S.W.2d 601 (1948).

Rule 59 (a), ARCP, Ark. Stat. Ann., Vol. 3A (Repl. 1979), lists insufficient evidence as a basis for a motion for a new trial and states:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

It is clear from this language that the sufficiency of the evidence may be raised in a motion for a new trial in non-jury trials. We have repeatedly held that this Court will not consider error raised for the first time on appeal. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Clay Anthony FORD *v.* STATE of Arkansas

CR 81-104 633 S.W.2d 3

Supreme Court of Arkansas
Opinion delivered May 10, 1982
[Rehearing denied June 7, 1982.]

[redacted]

Ken Cook, Deputy Public Defender, for appellant.

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

JOHN I. PURTLE, Justice. The appellant was convicted of the crime of capital felony murder in Mississippi County Circuit Court, on a change of venue from Crittenden County. Punishment was set at death by electrocution. Appellant argues twelve points for reversal, which will be set out and discussed separately. However, we do not find reversible error in any of them and affirm the action of the trial court.

The facts in this case reveal that Sergeant Glen Bailey of the Arkansas State Police encountered the appellant driving at a highly excessive rate of speed. The officer crossed over the highway median in order to give chase and radioed for assistance. Appellant was stopped at a blockade on the exit ramp from Interstate Highway 55 into the city of Marion, Arkansas. Two police cars were in front of him and he stopped a short distance before reaching the first car. A uniformed trooper started walking toward the appellant who began to back up but discovered the original officer had blocked him in from behind and was approaching him on foot. Appellant stopped his car, got out and fired point blank into Sergeant Bailey's chest critically wounding him. The officer died soon thereafter as a result of this wound. The appellant attempted to escape on foot but was apprehended a short time later in a nearby house. At the scene the officers determined that the vehicle appellant had been driving was stolen. They found a number of stolen articles in the vehicle. They further learned that appellant was an escapee from the Tennessee Department of Correction where he had been serving time for a number of felony convictions.

The incident was given wide publicity resulting in the court granting appellant's motion for a change of venue from Crittenden County to Mississippi County.

Over the objections of the appellant the fact that he was an escapee and serving time on the other sentences was allowed to be introduced. Also, it was shown that the automobile was stolen and that various items found in the car belonged to other people. The owners were allowed to identify their property during the course of the trial. The information was also challenged and the more standard defenses normally presented in capital felony trials were argued.

We will separately discuss the arguments on appeal.

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH THE INFORMATION.

The motion to strike the indictment was based upon the Eighth Amendment prohibiting cruel and unusual punishment. This argument has been presented to the court in many cases, and we have consistently ruled that our death penalty statute is constitutional. *Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979); *Ruiz and Van Denton* v. *State,* 265 Ark. 875, 582 S.W.2d 915 (1979); *Swindler* v. *State,* 264 Ark. 107, 569 S.W.2d 120 (1978); and *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977). Appellant contended that the overlapping provisions of Ark. Stat. Ann. § 41-1501 (Repl. 1977) with Ark. Stat. Ann. §§ 41-1502 and 41-1503 (Repl. 1977) were arbitrary and discriminatory. We have also held constitutional these particular statute sections in *Wilson* v. *State,* 271 Ark. 682, 611 S.W.2d 739 (1981), and in *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980), where it was stated " . . . we find no constitutional infirmity in the overlapping of the two sections, because there is no impermissible uncertainty in the definition of the offenses."

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION CHALLENGING THE DEATH QUALIFICATION VOIR DIRE OF PROSPECTIVE JURORS.

The "death qualified" jury was approved by the United States Supreme Court in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). Since *Witherspoon* we have approved this procedure in many cases. See *Ruiz and Van Denton* v. *State,* supra; *Collins* v. *State,* supra; and *Westbrook* v. *State,* supra.

III.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO QUASH THE JURY PANEL.

The jury panel was selected by the jury wheel through a random selection process. The selection was by computer process from the list of registered voters of a voting district within Mississippi County. Additionally, prior to this trial, 300 names were again selected using the same process of jury wheel random selection. The court requested that 150 of the jurors report on the first day. Only 54 appeared. Five or six of these were black. The trial court excused a considerable number of jurors prior to the trial date. Eighteen were excused because they were 65 or older and did not wish to serve; 16 stated they were in bad health; and 12 others listed various hardships which caused the court to excuse them prior to the trial date. Several had moved from the district and a few of them were dead. There was nothing about this process which indicated an intent not to have a fair cross-section of the population of the district represented by the panel. Appellant's attorney made the statement that the state had a habit of excusing black jurors peremptorily. The panel as selected was all white. Although this could give the impression of discrimination, a closer examination reveals the selection was not in violation of the rule set out in *Swain* v. *Alabama,* 380 U.S. 202 (1965), and followed by us in *Williams* v. *State,* 254 Ark. 799, 496 S.W.2d 395 (1973). Appellant did not use the process utilized in *Waters & Adams* v. *State,* 271 Ark. 33, 607 S.W.2d 336 (1980), wherein we held the system used therein was discriminatory. There is no proof in the record that there was a conscious effort to exclude black jurors. Statistics concerning the number of blacks in Mississippi county were not presented until the appeal brief was filed. The random selection process used in this case does not guarantee that a proportionate cross-section of the

community will serve on the jury nor is there a guarantee that any proportionate number of appellant's race will be seated on the jury. *Swain* v. *Alabama,* supra; and *Williams* v. *State,* supra. If it had been shown that it was the practice of the state to automatically exclude black jurors the result may well have been different, however there was no proof as to this point.

IV.

THE TRIAL COURT ERRED BY REQUIRING DEFENDANT TO VOIR DIRE THE PROSPECTIVE JURORS BEFORE THE STATE WAS REQUIRED TO ACCEPT OR STRIKE.

Appellant sought to have the prospective jurors voir dired separately. However, the court found that there was not enough room in the courthouse to utilize this process. Although appellant thought the library in the courthouse would be adequate for this purpose, the court exercised its discretion in rejecting this suggestion.

In *Clark* v. *State,* 258 Ark. 490, 527 S.W.2d 619 (1975), we held it reversible error to require a defendant to examine all of the jurors drawn from the panel each time before the state was required to either accept or reject a juror, it being felt that this process would afford an unfair advantage to the state. However, it appears that the appellant waived the requirements of Ark. Stat. Ann. § 43-1903 (Repl. 1977) by making the suggestion that this process would be satisfactory. It may be noted that this process was utilized at the request of defense counsel after consultation with appellant. We do not overlook the fact that appellant stated he still did not waive his objection to questioning the jurors other than individually. However, the agreement to use this method was made only after consulting with the appellant, and we do not find it to be reversible error. Also, only ten of the twelve authorized peremptory challenges were exercised by appellant. See *Crutchfield* v. *State,* 251 Ark. 137, 471 S.W.2d 361 (1971); and *Stroud* v. *State,* 169 Ark. 348, 275 S.W. 669 (1925).

V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PROHIBIT JURY DISPERSAL.

It is hard to understand why this argument is presented when the appellant admits that such matters were within the discretion of the trial court. Although it may be preferable to sequester the jury, it is a matter upon which the trial court must decide. The burden of proof to show that the appellant did not receive an impartial trial because of failure to sequester the jury is upon the appellant. This burden was not met. Ark. Stat. Ann. § 43-2137 (Repl. 1979); *Nail* v. *State,* 231 Ark. 70, 328 S.W.2d 836 (1959); *Hutcherson* v. *State,* 262 Ark. 535, 558 S.W.2d 156 (1977).

VI.

THE TRIAL COURT ERRED BY ALLOWING THE MENTION OF APPELLANT'S PRIOR FELONY CONVICTIONS DURING THE STATE'S OPENING STATEMENT.

The statement made by the state was:

> Officer Brackin further continuing his investigation determined that at the time this occurred the defendant, Clay Anthony Ford, was wanted for an escape from the Memphis Community Service Center where he was serving a sentence of — completing a sentence of three years on convictions of burglary in the third degree, grand larceny and burglary in the second degree.

The court had taken into consideration the appellant's motion in limine prior to the commencement of the trial and had ruled that the state would be permitted in its case in chief to show that appellant was a prior convicted felon in regard to those convictions which he was serving at the time of his escape. Additionally, the court later held that these convictions were allowable for the purpose of showing intent. The court had made it clear that the motion in limine was granted as to any other convictions which the appellant may

have had. Since the proof showed that the appellant was serving time for these particular convictions prior to his escape, it is proper to refer to them in order to show motive or intent pursuant to Arkansas Uniform Rules of Evidence, Rule 404 (b). Relevancy of evidence is within the trial court's discretion and absent a showing of abuse of that discretion its decision will be affirmed. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W.2d 589 (1980). The admissibility of evidence must necessarily be decided on a case by case basis. Intent can seldom, if ever, be shown by direct evidence and may be proven only from circumstantial evidence. *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979). We do not interpret these offenses to be excluded under the theory set forth in *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954). We still adhere to the principle that prior convictions cannot be introduced for the purpose of showing that the accused was a bad person. We hold to the rule that evidence of other crimes may not be introduced merely for the purpose of showing the accused to be a man of bad character likely to commit the crime charged. *Umbaugh* v. *Hutto,* 486 F.2d 904, cert. denied 94 S. Ct. (1978), 416 U.S. 690 (8th Cir. Ark. 1973). Since evidence of appellant's other crimes was introduced for a proper purpose, there was no prejudicial error in allowing this material to be introduced.

VII.

THE TRIAL COURT ERRED WHEN IT COMMENTED UPON THE EVIDENCE.

At the beginning of the trial the court stated to the jury, "Ladies and gentlemen, I feel that a word of caution might be in order at this time in regard to that type and nature of evidence which has been admitted." " . . . any prior convictions or escape from the State of Tennessee, of course, has no bearing upon the question of whether or not this defendant did in truth and fact shoot and kill Sgt. Glen Bailey." Appellant objected to the trial court's comment and at his request the trial court struck its previous remark. Even if the words of caution uttered by the judge had been improper, it is apparent that the court's prompt striking of the statement cured any impropriety. We do not find this to

be a violation of Art. 7 § 23 of the Constitution of Arkansas prohibiting judges from commenting upon the evidence. There is no doubt that a trial judge is in a position of great stature in the eyes of the jury and should be extremely cautious in both conversation and candor throughout the course of a trial. Without having any intention whatsoever and perhaps unconsciously the trial court could prejudice the right of an accused by making comments upon the evidence or appearing to act in a manner favoring one side or the other. However, we do not find that such is the case here.

VIII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED A SERIES OF STATE'S WITNESSES TO IDENTIFY STOLEN PROPERTY TAKEN IN THE COMMISSION OF OTHER CRIMES UNRELATED TO THIS CHARGE AND FOR WHICH THE APPELLANT HAD NOT BEEN CHARGED.

Exercising its discretion, the trial court, over the appellant's objection, permitted evidence of stolen credit cards and other articles found at the scene of the slaying, including the vehicle, to be introduced as evidence. As we stated earlier, Rule 404 (b), Arkansas Uniform Rules of Evidence, allows the judge to admit evidence that goes to show motive or intent. It is obvious the appellant would not have wanted to be apprehended with stolen articles in his possession. Therefore, we cannot say the trial court abused its discretion in allowing the introduction of this evidence for the purpose of shedding light upon the intent of the accused. Perhaps it is unfortunate that as a side effect of the introduction of this evidence the jury could imply that appellant had committed these other crimes. However, the trial court obviously ruled that its probative value outweighed the danger of unfair prejudice. *Martin* v. *State,* 258 Ark. 529, 527 S.W.2d 903 (1975); and *Grigsby* v. *State,* 260 Ark. 499, 542 S.W.2d 275 (1976).

IX.

THE EVIDENCE REGARDING PREMEDITATION

AND DELIBERATION WAS INSUFFICIENT AS A MATTER OF LAW AND THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT.

The jury was properly instructed by the court that in order to find the appellant guilty of capital felony murder they must find that he acted with a premeditated and deliberated purpose; that he had a conscious object to cause the death; that he formed that intention before acting; and, that he must have weighed in his mind the consequences of a course of conduct as distinguished from acting upon sudden impulse without the exercise of reasoning power. The matter of premeditation and deliberation, absent a confession, can only be proven by circumstantial evidence. This state of mind may be formed on the spur of a moment. The fact that appellant alighted from his car with his pistol in his hand and fired point blank into the approaching officer's chest is rather strong evidence of his intent. We stated in *Westbrook* v. *State*, supra, "premeditation and deliberation are not required to exist for any particular length of time and may be formed almost on the spur of a moment."

X.

THAT DEFENDANT WAS PREJUDICED BY THE STATE'S IMPROPER CLOSING ARGUMENT AND THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR A MISTRIAL.

During the state's closing arguments reference was made concerning the motive for killing the officer and in that connection the state made the statement that appellant was trying to avoid apprehension for "other crimes, the escape, the burglary, the theft and possession of stolen property." Appellant timely objected to the mention of these crimes but the court denied his motion for a mistrial. The court did instruct the state not to dwell at length upon this aspect of the case. All of these items had been mentioned both at the beginning of the case and further along in the proof in chief. Therefore, they were not prejudicial as mentioned in the closing argument. Closing argument

should be confined to the questions in issue, the evidence introduced and all reasonable inferences and deductions that may be drawn therefrom. *Brewer* v. *State,* 271 Ark. 254, 608 S.W.2d 363 (1980). We have previously stated that these particular crimes were admissible under Rule 404 (b). Therefore, it was not error to mention them in the closing argument.

Appellant contends that the trial court abused its discretion when, after admitting that the court had not heard a certain portion of the argument, the court refused to listen to the reporter's transcript in order to determine what had occurred. The court also denied a motion for a mistrial at this point. A review of the transcript shows that the judge inquired as to what was said and it turned out to be the remark of the prosecuting attorney relating to the other crimes. Neither side disputed that that was the portion of the proceeding which the court did not hear. Consequently it was not prejudicial error to refuse to listen to the tape.

XI.

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF APPELLANT'S PRIOR CONVICTIONS DURING THE PENALTY PHASE OF THE TRIAL.

The prior convictions admitted during the penalty phase were convictions for larceny, burglary and receiving and concealing stolen property. These are not the same crimes that were mentioned earlier but are convictions for which the appellant had been paroled or released. We agree with the appellant that as stated in *Williams* v. *State,* 274 Ark. 9, 621 S.W.2d 686 (1981), the trial court should not submit to a jury a defendant's conviction for burglary during the penalty phase of a trial. We held that in order for an offense to be admissible as an aggravating circumstance pursuant to Ark. Stat. Ann. § 41-1303 (Repl. 1977) the felony committed must include the use or threat of violence to another person, or the creation of substantial risk of death or serious physical injury to another person. Sometimes a burglary could include this risk. We still adhere to the rule.

It was error for the court to allow evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance. Neither were these prior felonies proper for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance. We faced a similar situation in the case of *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980), wherein we stated:

> We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. Of course, counsel may object to the determination of the trial court the same as they may object to any other form of verdict.

Therefore, it was the duty of the trial court to omit the mitigating circumstance relating to appellant's lack of prior criminal history. The jury could not have found it to exist and the appellant would not have these prior felonies presented before the jury. The fact that it was shown that appellant was an escapee from the Tennessee prison where he was serving time for felony convictions had already foreclosed the possibility of the jury finding no significant history of prior criminal activity. However, in the present case the jury did not find appellant had committed the aggravating circumstance of having a prior felony involving the use of or threat of violence to another person or involving the creation of substantial risk of death or serious physical injury to another person. Neither did the jury find the mitigating circumstance that appellant had no significant history of prior criminal activity. Under the circumstances of this case we do not find the error to have been prejudicial.

XII.

THE TRIAL COURT ERRED BY DENYING WITHOUT A HEARING APPELLANT'S MOTION FOR NEW TRIAL AND SUBPOENA DUCES TECUM AS A RESULT OF MEDIA COVERAGE OF TRIAL PROCEEDINGS IN THE COURTROOM WITHOUT CONSENT OF APPELLANT AND APPELLANT'S COUNSEL.

Appellant filed a motion for new trial based on a number of grounds. Most of the grounds were matters which were previously raised and ruled upon during the course of the trial. One other ground emphasized was that the trial court allowed TV and media coverage at the sentencing stage of the trial without the consent of appellant or appellant's counsel. In reviewing the record it is unclear how much media coverage this trial was given. Appellant's objection was made at the sentencing phase of the trial and thus it is with that point which we deal.

The court, after the case had been submitted to the jury and a verdict returned fixing appellant's penalty at death by electrocution, asked the appellant, "Do you have any legal cause to show at this time why sentence should not be passed?" At this point counsel for appellant requested that the court be closed ". . . insofar as the press is concerned." The trial court denied the request. In the case of *Shiras and Arkansas Gazette Co.* v. *Britt,* 267 Ark. 97, 589 S.W.2d 18 (1979), we held that public trials are guaranteed by law, therefore the request that the court be closed to the press was properly denied. However, assuming that the appellant's counsel was referring to TV coverage, the record does not reveal the extent to which the proceeding was videotaped or covered by the television media. Canon 3 (A) (7) of the Code of Judicial Conduct prevents cameras in the courtroom without the consent of the accused. See 271 Ark. 358 (1980). Our rule has been somewhat relaxed since the date of this trial. The rule was not placed into effect to be ignored by the courts. It is possible that the rights of an accused could be prejudiced by intrusion by members of the media. Therefore, safeguards have been adopted by Canon 3 (A) (7) of the Code. A willful disobedience of this Canon would, no doubt,

be dealt with in an appropriate manner which could go so far as to cause a retrial of the case or result in other action by this court. Since the trial of the appellant had been completed and the only thing left to do was to sentence him and only one sentence was to be imposed, we cannot hold that there was any prejudice to the appellant as a result of coverage by the media without prior approval.

The trial court considered appellant's motion for a new trial and denied it on the grounds (1) that some of the matters had been previously considered and ruled upon, (2) that there was no timely objection in regard to media coverage of the trial, and (3) that appellant's motion for new trial failed to comply with Rule 36.22 of the Ark. R. Crim. Pro. which states that a motion for new trial " . . . should include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay." In light of the previous discussion and considering the trial court's reasoning, we cannot find that the trial court abused its discretion in failing to grant appellant a new trial.

XIII.

SEARCH FOR OTHER ERRORS.

In accordance with Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11 (f) of our rules we have reviewed the record in this case regarding all objections upon which the trial court ruled adversely to the appellant but which were not included in the brief herein. We have found no overruled objections which amount to reversible error.

We would call appellant's attention to the fact that in a brief to this court the abstract should be done in first person and is not to be copied verbatim from the transcript. Rule 9 (d), Rules of the Supreme Court. This seems to have added to appellant's own, as well as our difficulty in coming to a full understanding of the case; however, we have proceeded with due diligence and find that the trial court should be affirmed.

Affirmed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. The outcome of this trial was never seriously in doubt. Two eyewitnesses saw Clay Anthony Ford kill an Arkansas State Policeman in broad daylight, and the State had an abundance of other evidence which would justify any jury imposing the ultimate penalty. About all the defense could hope for in this case was to see that Ford obtained a fair trial. But the State, for some reason, had to go further and press its advantage. In my opinion it went too far. The jury was permitted to consider two items of evidence that were unnecessary, inadmissible and could only prejudice the jury.

First, it was unnecessary for the State to show what convictions Ford had that resulted in his imprisonment. These convictions were totally irrelevant to this case and inadmissible for any reason. Only the fact that he was an escapee who had been serving a sentence for a felony conviction was relevant. Evidently the trial court felt that such evidence went to motive. Weinstein defines motive as it applies in such instances as follows:

> Motive has been defined as 'supply[ing] the reason that nudges the will and prods the mind to indulge the criminal intent.' Two evidentiary steps are involved. Evidence of other crimes is admitted to show that defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act. Evidence of another crime has been admitted to show the likelihood of defendant having committed the charged crime because he needed money, sex, goods to sell, was filled with hostility, sought to conceal a previous crime, or to escape after its commission.
> 2 WEINSTEIN'S EVIDENCE par. 404[4].

In no way can it be said evidence of what crimes the convictions were for provided Ford any motive for this crime. Only the fact that he was an escapee would be relevant to motive and that was admitted.

The State was also permitted to offer other prior convictions of Ford during the sentencing stage of the trial. These convictions were offered so the defense could not say in mitigation that Ford had no prior criminal record. These convictions were in addition to those mentioned in the opening statement by the prosecuting attorney that I addressed first. This was also prejudicial error in my judgment.

These prior convictions were not admissible as an aggravating circumstance authorized by Ark. Stat. Ann. § 41-1303 (3) (Repl. 1977) because none of them involved an element of which was the use or threat of violence, the risk of death or serious injury to another. The trial judge allowed the convictions so the jury would not find as a mitigating circumstance that the defendant had no significant history of prior criminal activity. Ark. Stat. Ann. § 41-1304 (6). In my judgment this was prejudicial error because the trial judge, when he learned of this prior criminal record, simply should not have submitted that mitigating circumstance to the jury. We held in *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980) that the trial judge should omit any aggravating or mitigating circumstance that is completely unsupported by any evidence. We said:

> The aggravating and mitigating circumstances to be considered by the jury in all applicable cases are set out in the statute, and are therefore not worded or tailored to fit the particular facts of the case just tried. As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigating circumstances, regardless of the inapplicability of some of them. Ark. Stat. Ann. § 41-1303 (Repl. 1977). The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating *or*

> *mitigating circumstances that are completely unsupported by any evidence,* and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. [Emphasis added.]

The trial judge simply should not have permitted that particular mitigating circumstance to be considered by the jury. It amounts to allowing the State to show evidence of aggravation by these prior convictions; evidence that was not admissible as an aggravating circumstance.

The majority has approved by two new methods, heretofore unknown, the injection of a defendant's previous criminal record into his trial for a separate offense. Laymen often wonder why such evidence is excluded but lawyers and judges know very well why such evidence is traditionally excluded. Because it is their role to preserve our system of justice. In *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954), we said:

> No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.

That is exactly what the State was able to do in this case.

Ford should pay for the crime he committed, but our system cannot allow him to pay a price that is not fairly set by an impartial jury considering only relevant evidence in an atmosphere devoid of passion and prejudice.

I am also disturbed by the fact that the trial court did not comply with our rule on cameras in the courtroom. There is no evidence presented to us that the defendant was prejudiced because the trial court prohibited the defendant's

attorney from obtaining the video tapes in question. Since I would reverse for other reasons, I do not reach this issue.

Michael Dewayne JONES *v.* STATE of Arkansas

CR 82-44 632 S.W.2d 414

Supreme Court of Arkansas
Opinion delivered May 10, 1982

James Michael Hankins, for appellant.

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

STEELE HAYS, Justice. Appellant was convicted of a violation of Ark. Stat. Ann. § 41-2206 (5) (i) (Repl. 1977), receiving stolen property having a value of more than $100 but less than $2500. As a habitual offender he was sentenced to 20 years in prison. For reversal, he argues there was insufficient evidence to justify a finding the property had a value in excess of $100; that the trial court should have granted his motion for a directed verdict and should have declared a mistrial. We find no error and affirm the judgment.

Around 4 p.m. on October 29, 1980, Mr. Harold Walls discovered that his home at 2627 Louisiana Street, Little Rock, had been burglarized. A number of articles were missing, including three pieces of CB equipment: a Royce Base Station, a TGAD-104 microphone and a power supply. At about 5 p.m. Officer J. E. Chandler of the Little Rock Police Department stopped a Ford station wagon on West 10th Street for an expired license tag. The vehicle was occupied by appellant and his brother. Appellant was arrested on a warrant for another charge and the station wagon was impounded. Among its contents were the three articles of CB equipment; they were inventoried and stored in the property room at the police department. Appellant was subsequently charged with theft by receiving.

At trial appellant stoutly denied knowing the equipment was in the car and relied in defense on the testimony of Christopher Pickens that Pickens had won the CB equipment earlier that day in a dice game on the corner of 29th and Cumberland. Pickens explained that he had put the articles in the station wagon after winning them but had forgotten to take them when appellant dropped him at his house. The jury verdict resolved these disputed facts in favor of the State.

First, appellant contends the evidence was not sufficient to establish a value in excess of $100. The argument cannot be sustained. The owner testified the equipment had a total value of $240; that he had bought the items new some two

years earlier, paying $149 for the Royce Base Station, which was on sale, $50 for the TGAD-104 microphone and $20 for the power supply. This evidence stands unchallenged except for the unsupported argument that CB equipment has recently depreciated. However that may be, there was no evidence except that of the owner and we find it more than sufficient to establish a value in excess of $100. Our law recognizes the original cost of property as one factor the jury may consider in determining value, if not too remote in time and relevance. *Williams* v. *State,* 252 Ark. 1289, 482 S.W.2d 810 (1972); *Cowan* v. *State,* 171 Ark. 1018, 287 S.W. 201 (1926).

Appellant next asserts the State failed to prove he had possession of the property or knew it to be stolen. We disagree. Appellant testified the articles were in a pillowcase in the back of the station wagon and he wasn't even aware of their presence. Testimony by the State placed the articles in the front of the car on the floor board adjacent to the passenger side. Without more, neither location would seem conclusive as to possession; however, the trial court admitted as voluntary an oral statement by appellant that he had purchased the property from someone named Banks for $20 and that, we believe, provided the connection. It is not necessary that the State prove the accused had actual possession of stolen property, it is enough to prove he had constructive possession or the right to control. *Parker* v. *State,* 270 Ark. 3, 603 S.W.2d 393 (1980). Here, appellant's claim of ownership of property recently stolen provided the necessary element of proof to sustain the charge, absent a credible explanation for its presence.

Finally, it is insisted that a mistrial should have been declared because the jury was told of another warrant for appellant's arrest. But the argument does not stand up under scrutiny. Officer Chandler testified to having stopped the appellant for an expired license tag and stated simply, "he was subsequently arrested on a warrant and . . . " Appellant moved promptly for a mistrial which was denied, correctly we think, for the reason that the jury had no way of knowing what warrant the witness was referring to. It is clear from the proceedings in chambers, outside the presence of the jury,

that Chandler was referring to a warrant for some offense other than the one being tried (the warrant in this case not having been issued until November 6). Appellant urges strenuously that because the trial judge commented that if subsequent testimony brought out the fact that Chandler was referring to a different offense then appellant would be entitled to a mistrial. Thus, he argues, when witnesses for the State later testified the warrant on the charge of possession of the stolen CB equipment was issued on November 6, the jury could have inferred the warrant Chandler spoke of was not the one for which appellant was being tried. The argument is untenable. The jury still did not know there were two warrants, as Chandler merely said the appellant "was subsequently arrested on a warrant," which told the jury nothing of other warrants, even in the light of the later testimony. For all the jury could have known, the warrant Chandler spoke of was the warrant issued in this case. The fact that appellant's motion for a mistrial was never renewed during the course of trial is an indication that the jury was never apprised by the testimony that more than one warrant existed.

The judgment on the sentence is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Appellant was convicted of theft by receiving stolen property having a value of more than $100.00. The items in question were a base CB transmitter, a microphone and power supply. The owner testified he paid $219.00 for the property several years earlier. The only evidence touching upon the value at the time of trial was a statement from the appellant or one of his friends that he paid $20.00 for the property.

Ark. Stat. Ann. § 41-2201 (11) (a) and (b) (Repl. 1977) states that the market value of property or services is to be established at the time of the offense or if the value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense should be used. The state made no effort to meet this burden of proof. It was clearly the state's burden to show that the value of the

property was in excess of $100.00. *Lee* v. *State,* 264 Ark. 384, 571 S.W.2d 603 (1978); *Riley* v. *State,* 267 Ark. 916, 593 S.W.2d 45 (Ark. App. 1979). Since the burden was upon the state to prove the present value of the property they should have at least had the owner testify as to its value. Of course, it is possible that the state knew that his testimony would be that the aggregate value was less than $100.00. The effect of the majority opinion will be that when property is stolen the only evidence needed as to value is the property's initial purchase price, regardless of the remoteness in time of that purchase. Once again I am forced to dissent because I read our statutes as they are written. When a law has no ambiguities on its face, it is plain to me that it should be enforced as it is written. The statutes cannot be clearer in defining value and the law is clear in placing the burden on the state to prove all elements of an offense. This was simply not done in the present case.

It is also of some interest to me that the appellant was not the owner of the automobile where the property was recovered and nobody testified that the property had ever been in the physical possession of the appellant.

Winston M. HOLLOWAY *v.* STATE of Arkansas

CR 79-186 632 S.W.2d 428

Supreme Court of Arkansas
Opinion delivered May 10, 1982

James DePriest, Atty., and *Chris Biggs,* Student Counsel, Kansas Defender Project, for petitioner.

Steve Clark, Atty. Gen., for respondent.

PER CURIAM. Petitioner Winston M. Holloway was convicted by a jury of two counts of rape, one count of robbery and three counts of employing a firearm in the commission of a felony. He was sentenced to life plus 116 years imprisonment in the Arkansas Department of Correction. We affirmed. *Holloway* v. *State,* 268 Ark. 24, 594 S.W.2d 2 (1980). Petitioner has now filed a motion seeking permission to file an untimely petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. The motion is denied.

Rule 37.2 (c) provides in pertinent part:

> A petition claiming relief under this rule must be filed . . . within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void.

A second year law student, who is part of the Kansas Defender Project at the University of Kansas School of Law, has attached an affidavit to the motion in which he states that the Rule 37 petition was not timely tendered because of his miscalculations. In effect, he asserts that he was acting as informal counsel to petitioner and that petitioner should not be deprived of an opportunity to present his grounds for

relief under Rule 37 merely because his representation was inadequate. The law student's advice may have been erroneous, but it does not amount to ineffective assistance of counsel within the purview of Rule 37. The student is not a licensed attorney. There is no evidence that petitioner retained the Kansas Defender Project as his counsel or that the defender project was appointed by a court to represent the petitioner. The petitioner cites no authority that the constitutional right to effective assistance of counsel attaches to postconviction proceedings. The law student's miscalculation is therefore no different than if the miscalculation had been made by the petitioner acting pro se.

As provided in Rule 37.2 (c) *supra,* petitioner's grounds for relief may be considered, however, even though the petition was not filed within three years if a ground for relief in the petition would render the judgment of conviction absolutely void. Petitioner asserts that (1) his right to due process of law was denied because he received a more severe sentence on retrial and that his attorney was ineffective in not raising the issue on appeal; (2) his right to confront witnesses was denied when the testimony of Dr. Frueh from the petitioner's first trial was introduced; and (3) his right to due process was denied by extensive pre-trial publicity. None of the allegations is sufficient to render the judgment of conviction void under Rule 37.2 (c). Moreover, with the exception of the claim of ineffective assistance of counsel, the grounds were either raised on direct appeal or could have been so raised. Rule 37 was not intended to permit the petitioner to again present questions raised on direct appeal or to permit questions which could have been raised on appeal to be presented for the first time. *Hulsey* v. *State,* 268 Ark. 312, 595 S.W.2d 934, *reh. denied,* 268 Ark. 315, 599 S.W.2d 729 (1980).

Judgments in criminal cases must have stability and finality. Questions exhausted according to the controlling rules of procedure cannot continue to be raised in proceeding after proceeding. *Rose* v. *Lundy,* ___ U.S. ___, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Otherwise, judgments could never be carried into effect. See also, *Hulsey* v. *State,* supra.

Motions denied.

Odis Donnell THOMAS *v.* STATE of Arkansas

632 S.W.2d 427

Supreme Court of Arkansas
Opinion delivered May 10, 1982

Robert B. Wellenberger, for appellant.

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

PER CURIAM. Appellant, Odis Donnell Thomas, by his attorney, has filed for a rule on the clerk.

His attorney, Robert B. Wellenberger, 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.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Alphonso CLAYTON *v.* C. G. WAGNON

82-28 633 S.W.2d 19

Supreme Court of Arkansas
Opinion delivered May 17, 1982

Laser, Sharp & Huckabay, P.A., for appellant.

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

RICHARD B. ADKISSON, Chief Justice. The Union County Circuit Court granted a motion by appellee, Wagnon, for a

new trial after finding that the jury verdict for appellant, Clayton, was contrary to the preponderance of the evidence. On appeal, we affirm.

On the evening of April 17, 1980, appellee's daughter, who was driving an MG, and appellant, who was driving a Mercury Marquis, collided at a four-way stop intersection in El Dorado. Wagnon was attempting to make a left turn when the accident occurred.

Wagnon testified that she stopped at the intersection and put on her turn signal; she saw the headlights of a car coming toward her, but since it was not very close and since she knew that the car would have to stop at the intersection, she proceeded into the intersection. She further testified that after the collision appellant admitted to her that he ran the stop sign and told her his brakes had failed.

A witness who was in a car behind Wagnon at the time of the accident testified that the MG stopped at the stop sign but that the other vehicle did not. This witness also stated that after the accident she heard appellant tell Wagnon he was sorry and that he tried his brakes but they did not work. Two other witnesses who came to the scene of the accident immediately after the collision also testified that appellant said his brakes had failed.

Appellant testified that he pulled up to the intersection and stopped. He stated that as he proceeded through the intersection, going no more than ten or 12 miles per hour, Wagnon turned left and they collided. He stated that nothing was wrong with his car, that the brakes were as good as new and that he did not tell anyone that his brakes had failed.

The policeman who investigated the accident testified that appellant said nothing to him about his brakes failing or about any other malfunction of his vehicle. He also testified that to his knowledge there were no eyewitnesses to the accident other than the drivers.

The trial judge, in acting on a motion for a new trial

challenging the sufficiency of the evidence, is required by ARCP Rule 59 (a) (6), Ark. Stat. Ann., Vol. 3A (Repl. 1979) to set aside the jury verdict if it is against the preponderance of the evidence. However, we are amending this rule, prospectively, by per curiam order of this date to set out the more stringent rule which favors the jury verdict unless it is found to be clearly against the preponderance of the evidence. We adopt the view that the trial court has some discretion in setting aside a jury verdict, but not the broad discretion that has been heretofore recognized. The trial court is not to substitute its view of the evidence for that of the jury's.

The trial court is vested with discretion in acting on such a motion because the trial judge's opportunities for passing upon the weight of the evidence are superior to those of this Court. On appeal, the trial court will not be reversed absent an abuse of discretion. Abuse of discretion in granting a new trial means a discretion improvidently exercised, i.e., exercised thoughtlessly and without due consideration. *Freeman* v. *Morrilton Water Co.*, 274 Ark. 419, 625 S.W.2d 492 (1981). After considering the evidence in this case, we are unable to say, under our current Rule 59 (a) (6), that the trial judge exercised his discretion improvidently by granting a new trial.

Affirmed.

John H. KELLENSWORTH, Jr. *v.* STATE of Arkansas

CR 81-125 633 S.W.2d 21

Supreme Court of Arkansas
Opinion delivered May 17, 1982

L. Gene Worsham and *Beth Gladden Coulson,* for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant Kellens-

worth was found guilty of three felonies committed during a single criminal episode on June 16, 1979. The jury fixed the punishment at a 50-year term and a $10,000 fine for rape, a 5-year term for aggravated robbery, and a 5-year term for burglary. Four points for reversal are presented.

It is first argued that the court below had no jurisdiction to try the case, because a notice of appeal to this court had been filed after the trial judge denied a defense motion to dismiss on the ground of double jeopardy. The motion to dismiss was wholly without merit, as we indicated with respect to a similar motion filed by this same appellant in a different case. *Kellensworth* v. *State,* 275 Ark. 252, 631 S.W.2d 1 (1982). In the case at bar the motion to dismiss was filed less than two weeks before the scheduled date of trial. When the motion was denied, counsel filed a notice of appeal, lodged a partial transcript in this court, and insisted in the trial court, without success, that the court no longer had jurisdiction to try the case as scheduled.

The trial judge correctly denied the motion to postpone the trial for want of jurisdiction. It is true that after a trial court enters a final judgment disposing of a case on its merits, the docketing of an appeal in this court terminates the trial court's jurisdiction to reconsider the case. See *Estes* v. *Masner,* 244 Ark. 797, 427 S.W.2d 161 (1968); *Andrews* v. *Lauener,* 229 Ark. 894, 318 S.W.2d 805 (1958). But where, as here, there has been not a final judgment but only the denial of a motion to dismiss, the case is still pending in the court below and may proceed to trial unless this court issues a temporary writ of prohibition or takes some similar action. No such stay was issued in the present case.

Second, it is argued that the trial judge should have sustained the defendant's challenges for cause with respect to eight prospective jurors. It appears that during some period of time preceding Kellensworth's arrest about ten separate rapes had been committed in the southwest section of Little Rock. Before anyone had been identified as the perpetrator of any of the crimes, the police and the news media referred to the offender as the "southwest rapist." The succession of crimes received wide publicity. Apparently

when Kellensworth was taken into custody the police concluded he was the southwest rapist. Perhaps their conclusion was reported in the press. The record is not entirely clear about these matters.

During the individual voir dire of the veniremen it was brought out that eight of them had heard or read enough about the multiple rapes to suppose that Kellensworth was or might be the southwest rapist. None of those challenged for cause, however, were shown to have formed an opinion about Kellensworth's possible guilt or to possess anything except more or less vague information about the series of crimes and about accusations that may have been made. All of the eight veniremen stated in substance that they could lay aside what they had heard and try the case upon the evidence heard in the courtroom. The defense used seven of its twelve peremptory challenges to excuse the first seven of the challenged veniremen, but the eighth one became a member of the jury after the defense had exhausted its challenges.

The trial judge was right in refusing to excuse the jurors for cause. The Supreme Court has recognized the difficulty encountered in the selection of a jury to try a case that has been the subject of much discussion in the press. The Court holds that there is no requirement that jurors be totally ignorant of the facts involved: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court." *Irvin* v. *Dowd,* 366 U.S. 717 (1961), which we followed in *Swindler* v. *State,* 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied 449 U.S. 1057 (1980). Here we find no violation of the principles announced in those cases. The appellant relies primarily on *Glover* v. *State,* 248 Ark. 1260, 455 S.W.2d 670 (1970), but there the trial judge's error was in refusing to excuse veniremen who said they had formed an opinion that could be removed only by evidence. That is not the situation here.

Third, it is argued that police officers should not have been allowed to describe the prosecutrix's identification of Kellensworth at a line-up. We recently examined our earlier decisions on this point and concluded that in circumstances like those presented in the case at bar the testimony is

permitted by the Uniform Rules of Evidence. *Martin* v. *State,* 272 Ark. 376, 614 S.W.2d 512 (1981).

Fourth, the prosecutrix testified that Kellensworth entered her home and raped and robbed her at about 4:30 a.m. on June 16. Kellensworth did not testify, but both his parents testified in his defense that someone brought him home at about 2:00 a.m. that morning. They said he was so drunk that he threw up on the rugs, that they spent the rest of the night cleaning up the mess, and that their son was at home until he left at noon. They understood that Mike Dean had driven him home, but that identification is not important.

Mike Dean was called by the State as a rebuttal witness. Over objections by defense counsel, Dean testified that at an earlier trial of this same case, which ended in a mistrial, he had appeared as a defense witness and had testified that he had been drinking beer with Kellensworth on the evening before the crimes in question, that around midnight they got a fifth of tequila, that Kellensworth got drunk, and that Dean took him home. Dean further testified at the trial below that his former testimony was false, that Kellensworth had asked him to tell the story, that they had made it up together, and that he had lied to help a friend. He conceded that he had committed perjury at the first trial, but had decided to tell the truth. He made no claim that Kellensworth's parents knew that his earlier testimony was false.

It is now argued that Dean's testimony was inadmissible as improperly putting Kellensworth's character in issue, as constituting proof of a specific instance of misconduct, and as attacking the credibility of the elder Kellensworths upon a collateral issue. No authority is cited to support the argument that Dean's testimony on rebuttal was inadmissible. The testimony was so clearly admissible that we doubt if any such authority could be found.

It is settled beyond question that a party's attempt to fabricate evidence is admissible, not merely as an admission under Uniform Evidence Rule 801 (d) (2) but as proof relevant to show his own belief that his case is weak. As one

court has said, in a case involving a fabricated alibi, "fabrication of evidence of innocence is cogent evidence of guilt." *Harvey* v. *United States,* 215 F. 2d 330 (D.C. Cir., 1954). In a case similar to the present one, involving the recantation of previous testimony about a fabricated alibi, the court held that the testimony was admissible not merely in rebuttal but as part of the prosecution's case in chief, a point we do not reach. *State* v. *Thompson,* 71 S.D. 319, 24 N.W.2d 10 (1946).

Wigmore states the principle as being based upon one of the simplest of inferences:

> It has always been understood — the inference, indeed, is one of the simplest in human experience — that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

Wigmore, Evidence, § 278 (Chadbourn Rev., 1979). With particular reference to what we have here — the fabrication or manufacture of evidence by subornation and the like — Wigmore cites supporting cases from 27 jurisdictions, and none to the contrary. *Id.*, p. 137. The admissibility of Dean's testimony is not open to dispute.

Affirmed.

UNION COUNTY, Arkansas *v.* UNION COUNTY FAIR ASSOCIATION

82-53 633 S.W.2d 17

Supreme Court of Arkansas
Opinion delivered May 17, 1982

William A. McLean, for appellant.

Ian W. Vickery of *Ian W. Vickery & Associates, P.A.,* for appellee.

ROBERT H. DUDLEY, Justice. The issue in this case is whether the holder of the possibility of reverter after a determinable fee can maintain an action for waste. The Court of Appeals has certified the case to this court as a case

of significant public interest and a case of major importance. Rule 29 (4) (b) Vol. 3A (Repl. 1979).

In early 1961, appellant Union County wanted to build a hospital on a tract of land owned and occupied by appellee Union County Fair Association. On November 15, 1961, after considerable negotiations, the parties entered into an agreement by which the county would pay $57,904.00 to the association for its land. The association would use $8,500.00 of the money to purchase 26 acres from the American Creosoting Corporation for a new fairgrounds. Title to the new fairgrounds would be in appellant Union County, but "it is hereby agreed and covenanted that the . . . Association may use said property so long as a County Fair is held and the said property sights [rights] hereby created shall not forfeit unless no Fair is held for a period of at least two consecutive years." The association agreed to spend "an additional sum of at least $20,000.00 of its money on new buildings for fair purposes." The county agreed to open a street on the south line of the new fairgrounds, to place gravel on an area designated for parking and to provide a covered grandstand with a capacity for seating at least 500 persons.

Simultaneously, the association entered into a contract with T. R. Williamson for the construction of buildings on the soon-to-be acquired fairgrounds. The contracted cost of this construction was $69,404.00. Of this amount, $49,404.00 would come from the money the association would receive from the county for the old fairgrounds, and $20,000.00 would come from the association's separate funds. The county, in an unspecified capacity, also executed the construction contract. In about a month, on December 18, 1961, the American Creosoting Corporation conveyed the new fairgrounds land to Union County for the recited consideration of $8,500.00. The association, in addition to the $8,500.00 purchase price, has now expended $154,894.61 for permanent improvements to the property.

The county now objects to the association's plans to remove the grandstand in order to expand the area for the showing of cattle and hogs. The association filed suit in

chancery court asking a declaratory judgment defining the rights and interests of the parties in the fairgrounds. The county joined in asking that the rights and interests of the parties be declared and also asks that the association be enjoined from removing the grandstand.

The agreement between the county and the association, the agreement between the association and T. R. Williams which was also executed by the county and the deed from American Creosoting Corporation to the county were all executed for the same purpose and as a part of the same transaction. Instruments executed at approximately the same time, for the same purpose, in the same transaction are legally one instrument and will be construed together, in the absence of anything to indicate a contrary intention. *Gowen* v. *Sullins,* 212 Ark. 824, 208 S.W.2d 450 (1948). All of the agreements, when considered as one, express the clear intent of the parties that the association use the property "so long as a County Fair is held and the said property sights [rights] hereby created shall not forfeit unless no Fair is held for a period of at least two years," at which time the property would revert to the county. The instruments vest the association with a determinable fee. A determinable fee is ordinarily created by a provision that the grantee's estate is to continue "as long as" the property is used for a certain purpose or "until" a given event occurs, or by similar words limiting the duration of the estate. *Davis* v. *St. Joe School District of Searcy County,* 225 Ark. 700, 284 S.W.2d 635 (1955). If the limitation occurs, that is, if the association fails to conduct a county fair for two consecutive years, the determinable fee will automatically terminate and pass by reverter to the county. *Williams* v. *Kirby School District No. 32,* 207 Ark. 458, 181 S.W.2d 488 (1944). In the meantime the association's possession of the property puts third persons on notice of its rights in the property. *Clinton School District No. 1* v. *Henley,* 212 Ark. 643, 207 S.W.2d 713 (1948).

The issue then becomes whether the holder of a possibility of reverter may enjoin an act of waste which, in this case, is the proposed removal of the grandstand. In *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, 128 S.W. 581 (1910), we held that a contingent remainderman may

enjoin waste where the estate may become his at the termination of a life estate. However, the chancellor correctly noted in the present case there is no proof that the termination of the determinable fee is ever likely to occur. Instead, there is a possibility the determinable fee will endure forever, as distinguished from the remainder following the life estate in the *Watson* case, supra. The chancellor also found that the alleged waste could cause no serious damage to the property and denied the injunction. We affirm. The holder of a possibility of reverter can restrain an act of waste by the holder of a determinable fee only when it appears that there is a reasonable certainty that the fee will terminate and the waste would cause serious damage to the property. *Dees, et al* v. *Cheuvronts, et al,* 240 Ill. 486, 88 N.E. 1011 (1909). Thompson on Real Property, Vol. 4 p. 405 (Repl. 1979).

Affirmed.

Bessie LANDIS *v.* Bobby HASTINGS and Rodger P. HASTINGS

82-59 633 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered May 17, 1982

Boyett, Morgan & Millar, P.A., by: *Comer Boyett, Jr.*, for appellant.

Pollard & Cavanaugh, by: *Jerry Cavanaugh*, for appellees.

STEELE HAYS, Justice. Appellant Bessie Landis brought suit for personal injuries allegedly sustained on May 28, 1979, when a vehicle she was driving was struck by a truck driven by appellee Rodger Hastings, fifteen year old son of appellee Bobby Hastings. The jury returned a verdict for the defendants, notwithstanding Rodger Hastings' admission the collision was his fault and testimony on behalf of Mrs. Landis that she sustained permanent injuries as a result of the collision. Her motion for new trial was denied and she has appealed.

Four points are argued: the jury disregarded undisputed evidence in reaching a contrary result; the verdict was not supported by substantial evidence; the trial judge's refusal to grant a new trial was an abuse of discretion and it was error to allow the jury to consider a verdict for the defendant. We find the arguments to be without merit and we affirm.

The Landis proof was that Mrs. Landis, driving a borrowed vehicle, entered a protected intersection in Judsonia and was struck on the right rear side by the Hastings truck. The impact spun her around and into a deep ditch, knocked off her shoes, and caused damage to her vehicle in excess of $1,200. Not thinking she was injured, she drove another vehicle to Little Rock to meet her niece at the airport but by the time she arrived she was in pain and unable to drive home.

The next day Mrs. Landis consulted Dr. Sidney Tate for pain and tenderness in her neck and shoulders. Dr. Tate found motion limitation and muscle spasms; he made a diagnosis of cervical sprain and possible ligament damage. He prescribed conservative treatment of rest, muscle relaxors and later ultra sound treatments, physical therapy and use of a cervical collar. Mrs. Landis was still under Dr. Tate's care at trial two years after the accident, and he estimated pain in some degree would continue the remainder of her life. In addition to Dr. Tate, Mrs. Landis was treated by Dr. L. S. Tensuan during a visit to Pennsylvania and examined by Dr. William Steel. Her x-rays on May 29 and July 6, 1979, were read by Dr. Robert Elliott, a radiologist. Her medical bills, admitted without objection, totaled $973 as of the trial on May 12, 1981.

In defense, Rodger Hastings testified the collision was his fault. He estimated his speed at less than 10 miles per hour at impact. He said his truck moved only a few feet after striking Mrs. Landis's vehicle and sustained no damage at all. He went directly to Mrs. Landis and found her on her seat behind the wheel putting on high heel slippers. She told him she was not hurt and she walked around while waiting on the police. Hastings heard Mrs. Landis tell the police and by-standers that she was not hurt in any way. He described Mrs. Landis as upset but said he observed nothing to cause him to believe she suffered any injury. He told of having seen Mrs. Landis dancing at the Electric Cowboy some months prior to the trial. A passenger in the Hastings truck corroborated testimony that Mrs. Landis did not appear to have suffered any injury and told several people she was not hurt. Both witnesses said the area Mrs. Landis described as a "deep ditch" was a depression of about three inches.

In acting on a motion for a new trial the test to be applied by the trial court is whether the verdict is against the preponderance of the evidence. ARCP Rule 59 (a). But on review the test depends on whether the motion was granted, in which case we will affirm absent a manifest or clear abuse of discretion (*General Motors Corp.* v. *Tate,* 257 Ark. 347, 516 S.W.2d 602, 1974), whereas if the motion is denied, as here, we look only to see if the verdict is supported by

substantial evidence and, if so, we do not disturb the trial court's action. *Ferrell* v. *Whittington,* 271 Ark. 750, 610 S.W.2d 572 (1981); *Brady* v. *City of Springdale,* 246 Ark. 1103, 441 S.W.2d 81 (1969). The rule is founded on the superior position of the trial court to hear and weigh the evidence. *Ferrell, supra.*

Appellant submits that the trial judge was confused as to the test to be applied in passing on her motion, arguing that an abuse of discretion resulted. But while there may have been some initial uncertainty as to the proper test, it is clear the opposing arguments at a hearing on the motion put the issue in proper perspective and as a result the trial court advised counsel he would reread the cases and review his "detailed notes on the case." We believe his decision in the end was in accordance with the preponderance of the evidence standard. From his comments he evidently believed the evidence was such the jury could have reasonably concluded that Mrs. Landis did not sustain injuries as a result of the collision.

Next, appellant cites us to the dicta of a number of cases stating that testimony which is not substantially contradicted by other testimony, and does not seem unreasonable or improbable, may not be arbitrarily or capriciously disregarded by the jury. *General Motors Corp.* v. *Tate, supra; Missouri-Pacific Rd. Co.* v. *Ross,* 194 Ark. 877, 109 S.W.2d 1246 (1937); *St. Louis-San Francisco Ry. Co.* v. *Pace,* 193 Ark. 484, 101 S.W.2d 447 (1937); *St. Louis-San Francisco Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S.W.2d 611 (1929). These cases have a common feature, in each a verdict for the plaintiff was reversed and dismissed because of a lack of evidence to sustain it. The cases present a somewhat different evidentiary problem from the case before us and it is in that context that the cited dicta must be examined. In the *Ross* and *Pace* cases, wrongful death claims were brought against railroad companies resulting in verdicts for the plaintiff where plaintiffs' decedents were found on or near the railroad track with no eyewitness accounts of how the accidents occurred. The plaintiffs' theories of recovery were founded essentially on conjecture whereas testimony from witnesses for the railroad was uncontradicted. In *Williams*

the plaintiff was injured while a trespasser on railroad property, and the court noted an absence of any fact or circumstance in evidence substantially contradicting the testimony of the engineer that because of cars on a siding he could not see the plaintiff until nearly upon her. Thus, it was said in rationalizing a basis for reversal that testimony of witnesses, if plausible, may not be arbitrarily disregarded. Of *Tate* it can be said that here, too, the court found an absence of substantial evidence of negligence in support of the jury's verdict. The difference is to be found we think in the fact that in the cited cases the juries' disregard of evidence was arbitrary, whereas here there was a genuine dispute.

Turning to the issue of substantial evidence, it should be noted the testimony of Mrs. Landis that her injuries were caused by the collision is, of course, controverted as a matter of law. *Bittle* v. *Smith,* 254 Ark. 123, 491 S.W.2d 815 (1973). And while her claim was generally supported by the testimony of the medical witnesses we do not find their testimony to have been so certain that the jury was required to attribute her complaints to the accident. From their testimony it is clear that Mrs. Landis demonstrated evidence of traumatic injury, but whether caused by the episode on May 28, 1979, they were not able to say. Dr. Elliott admitted the trauma could have been years earlier and acknowledged he could not say the conditions he observed were caused by the accident.

It is undisputed Mrs. Landis, who is 63, had had a previous injury and chronic, long-standing degenerative disc disease with spurring and lipping of the cervical vertebrae, a condition sufficiently severe of itself to cause periodic pain. The jury may have decided her complaints were attributable to pre-existing conditions rather than to the accident. There was testimony that she stated repeatedly she was not hurt and made no complaint during the 30 minutes or so she remained at the scene. Too, the jury may have been influenced by contradictions in her testimony and the opposing evidence: Mrs. Landis denied having danced at the Electric Cowboy in contrast to Rodger Hastings's testimony he had seen her there dancing; she said her vehicle ended up in a "deep ditch," in contrast to testimony the

yards and roadway were level at the scene except for a swale no deeper than three inches and, finally, her denial that she was having pain or taking medication or tranquilizers prior to the accident was in direct conflict with the medical records of an earlier physician. Under the evidence the jury could have found for the defendant.

Appellant's remaining argument is the court should not have submitted a verdict form for the defendant to the jury, because it was admitted by Rodger Hastings that the collision was his fault. But that would have been tantamount to a directed verdict for the plaintiff and for reasons already discussed we think whether Mrs. Landis sustained an injury as a result of the collision was a disputed issue and properly submitted to the jury.

The order denying the motion for a new trial is, accordingly, affirmed.

Larry Donnell WASHINGTON *v.* STATE of Arkansas

CR 82-3 633 S.W.2d 24

Supreme Court of Arkansas
Opinion delivered May 17, 1982

Richard W. Byrd, for appellant.

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

STEELE HAYS, Justice. This appeal is from a conviction of murder in the first degree. The jury rejected appellant's plea of insanity and sentenced him to life in prison. For reversal, he argues the trial court should have declared a mistrial or directed a continuance because he was deprived of the opportunity to cross-examine the examining psychiatrist at the Arkansas State Hospital and because he was not furnished a copy of the admission diagnosis, both in violation of the court's discovery order. The arguments cannot be sustained.

Appellant was accused of the deliberate homicide of his former girl friend on October 16, 1980, by shooting her with a .22-caliber rifle. He raised the defense of mental disease or defect and was committed to the Arkansas State Hospital for examination and observation. The examining psychiatrists were instructed to file their report with the trial court with copies to defense counsel and the prosecuting attorney. Appellant filed a motion for discovery to inspect the results of any physical or mental examinations, any opinions concerning his mental condition, and all records of examination and observation made pursuant to the discovery order. Appellant was furnished a written report from the State Hospital stating that on the date of the offense he was able to appreciate the criminality of his conduct and to conform to the requirements of the law and had the capacity to assist in his own defense. The letter was signed by Dr. A. F. Rosendale as Examining Psychiatrist and by Dr. Robert B. Sheldon as Director of Forensic Psychiatry Services.

During Dr. Rosendale's testimony, it developed that the report was incorrect in that Dr. Rosendale was Director of Forensic Psychiatry Services and Dr. Sheldon the Examining Psychiatrist, but each had signed the report, in the form of a letter to the trial judge, in the wrong place. Dr. Rosendale said Dr. Sheldon was no longer at the hospital and explained the procedures of the Forensic Psychiatry Services in examining and evaluating persons accused of crime: after the examining psychiatrist had arrived at an opinion the case was reviewed by another psychiatrist, a psychologist, and a social worker and a joint opinion rendered; that appellant's admission diagnosis was "A-

typical psychosis"; that the opinion appellant was without psychosis was unanimous; that Dr. Rosendale was present at the review and approved the opinion.

Appellant contends on appeal he should have been furnished a copy of the admission diagnosis as provided in the trial court's order on discovery, and because the State Hospital report erroneously reflected Dr. Rosendale as Examining Psychiatrist rather than Dr. Sheldon, he was denied the opportunity to cross-examine Dr. Sheldon and hence, effectively deprived of the benefits of discovery intended by A.R.Cr.P. Rule 17. But neither of the arguments was presented to the trial court by motion or objection, and we have held too often for any doubt to exist that in order for questions of error to be considered on appeal, they must have been raised before the trial court by timely and proper objection. *Moore* v. *State,* 270 Ark. 592, 605 S.W.2d 445 (1980); *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980); *Allen* v. *Rankin,* 269 Ark. 517, 602 S.W.2d 673 (1980).

Appellant claims these errors are so fundamental he was denied a fair trial and notwithstanding the absence of an objection the court should have declared a mistrial or directed a continuance on its own. We disagree. There is nothing to suggest appellant would have benefited by the availability of Dr. Sheldon, as the staff diagnosis was unanimous that appellant was without psychosis. As to whether appellant was given a copy of the admission diagnosis, this, too, fails to demonstrate fundamental error. The record does not show the admission diagnosis was *not* furnished, other than by implication in a question posed by defense counsel to Dr. Rosendale asking why a copy had not been given the defense. But in a subsequent dialogue, the prosecuting attorney stated categorically he had given the admission diagnosis to the defense on April 21, 1981, and this direct assertion was never challenged by defense counsel. We take this silence to indicate he received it.

We find no reversible error and, accordingly, the judgment is affirmed.

W. O. SLAYTON, Special Administrator for the Estate of Laura Lee SLAYTON, deceased *v.* Dr. John H. BRUNNER and Virginia DWIRE

82-61 633 S.W.2d 29

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Jerry D. Pruitt, for appellant.

Phillip Malcom and *Laura A. Hensley* of *Friday, Eldredge & Clark,* for appellee Brunner.

McMillan, Turner & McCorkle, by: *Otis Turner,* for appellee Dwire.

RICHARD B. ADKISSON, Chief Justice. Appellant brought suit for medical malpractice against appellees, Dr. John Brunner and nurse Virginia Dwire, in connection with the death of Laura Lee Slayton. On appeal from an order of summary judgment in favor of appellees, we reverse and remand.

Slayton was first admitted to Ouachita Memorial Hospital in Hot Springs on August 7, 1977, for delivery of a baby by Caesarean section. Complications developed which required further surgery. She was finally discharged on October 21, 1977, with a large abdominal wound in which marlex mesh was sewn to aid in healing. On April 14, 1978,

she underwent surgery to repair a ventral hernia and to remove the marlex mesh from her abdominal wall. Appellee Brunner performed the surgery and appellee Dwire administered the anesthesia. Almost immediately after the surgery was completed Slayton suffered a cardiac arrest, with resulting brain damage. She died on April 24, 1978.

Dr. John Brunner filed a motion for summary judgment alleging that he was not negligent in the care and treatment of Laura Lee Slayton, deceased. He attached several exhibits to his motion, including affidavits from Dr. Robert Hill and Dr. A. E. Pollard. Both concluded, based on the record, that Dr. Brunner was not guilty of any negligence.

Virginia Dwire, the nurse anesthetist, filed her motion for summary judgment attaching several exhibits to her motion including affidavits from Phyllis Braden, C.R.N.A., and Dr. A. E. Pollard. Both affidavits concluded that Virginia Dwire was not guilty of any negligence in her treatment of Laura Lee Slayton.

Appellant filed a response to appellees' motion for summary judgment, attaching as an exhibit the affidavit of Dr. Robert King. Dr. King concluded in his affidavit that both Dr. Brunner and nurse Dwire were negligent in their care and treatment of Laura Lee Slayton and that this negligence was the proximate cause of her death.

Appellees argue Dr. King is incompetent to testify because his affidavit does not show that he is familiar with the standard of care of a surgeon or nurse anesthetist in Hot Springs or a similar locality on April 14, 1978. This standard is commonly referred to as the same or similar locality rule and is set out in AMI 1501.

In his affidavit Dr. King stated that he is a licensed physician practicing in Lawton, Oklahoma; that he graduated from medical school in 1974; that in 1977 he completed his residency; and that he now specializes in the practice of anesthesiology in Lawton. His affidavit also states that he is aware of the degree of skill and learning

ordinarily possessed by surgeons and nurse anesthetists in Hot Springs, Arkansas, in April, 1978.

Lawton, Oklahoma, has a population of 80,000; Hot Springs a population of about 25,000. The two hospitals in Lawton are accredited by the Joint Commission on Accreditation of Hospitals as is Ouachita Memorial Hospital. All three hospitals have board certified surgeons and nurse anesthetists. King stated that he has received patients on a referral basis from rural communities with populations of 5,000 or more and from cities of 150,000 and that he has consulted by phone with physicians practicing in cities of 5,000 to 400,000 in size.

We stated in *Gambill* v. *Stroud,* 258 Ark. 766, 531 S.W.2d 945 (1975) that an expert witness in a medical malpractice action does not need to be one who has practiced in the particular locality, or one who is intimately familiar with the practice in it in order to be qualified as an expert. In *White* v. *Mitchell,* 263 Ark. 787, 568 S.W.2d 216 (1978) an orthopedic surgeon, who practiced and taught in Phoenix, Arizona, but was a consultant at a hospital in a town with a population of 4,500 and received referral patients from rural communities, was allowed to testify as to the alleged negligence of a physician in Malvern, Arkansas. Accordingly, Dr. King is qualified to testify in this case.

Appellee Brunner argues that Dr. King, an anesthesiologist, is not qualified to testify as an expert in the specialty of surgery. However, both are medical school graduates licensed to practice in their respective states. Appellant does not allege that appellee was negligent in performing the actual surgical procedure used to repair the ventral hernia and remove the marlex mesh. Negligence is alleged in procedures performed or omitted before and after the actual surgery.

Appellees further argue that the trial court correctly granted summary judgment after finding that no issues of fact were raised because "the record did not disclose any evidence of negligence on the part of Mrs. Dwire or Dr. Brunner as the proximate cause of the death of Laura Lee

Slayton." ARCP Rule 56, Ark. Stat. Ann., Vol. 3A (Repl. 1979) provides for summary judgment if there is no genuine issue as to any material fact as shown by the pleadings and affidavits.

Although two doctors and one nurse who reviewed the record concluded in their affidavits that appellees were not negligent, the affidavit of Dr. King states that after reviewing the complaint, depositions, and records in this case, he found evidence that appellees were negligent. He specifically found evidence of negligence by the fact that appellees failed to make a complete preoperative evaluation of the patient before administering anesthesia and failed to adequately monitor Slayton prior to transferring her to the recovery room. He also found that appellees took improper steps to reverse the effects of the respiratory and cardiac arrest and that the nurse anesthetist failed to properly record the dosage of medication on the anesthesia record.

Based upon the same facts medical experts have arrived at opposite conclusions. Under such circumstances the entry of summary judgment under ARCP Rule 56 was error.

Reversed and remanded.

HOLT, J., not participating.

Regana Ann MILLSAPS and Derrell E. MILLSAPS *v.* Ramsey RINEHART, Jr.

82-62 634 S.W.2d 98

Supreme Court of Arkansas
Opinion delivered May 24, 1982
[Rehearing denied June 28, 1982.]

Guy H. Jones, Phil Stratton and *Casey Jones,* by: *Guy H. Jones,* for appellants.

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

RICHARD B. ADKISSON, Chief Justice. A jury awarded appellants, Regana and Derrell Millsaps, $1,300 as damages arising out of an automobile collision in which appellee, Ramsey Rinehart, Jr., was found negligent. The Faulkner County Circuit Court denied appellant's motion for a new trial, holding the jury verdict was supported by substantial evidence. On appeal, we affirm.

The accident occurred on August 9, 1977, in Little Rock as Mr. Millsaps was taking Mrs. Millsaps to her first day of work at Timex Corporation. The Millsapses were stopped in a line of traffic; appellee made a right turn and struck the Millsaps vehicle a grazing blow. Later that day Mrs. Millsaps went to a doctor in Conway, complaining of pain in her back and right arm; she did not see this doctor again.

Several months later she saw two orthopedic surgeons because of pain in her shoulder, back, and neck. Both

doctors encouraged Mrs. Millsaps to work and neither recommended surgery.

She first saw Dr. Dornenburg on October 4, 1977, who testified that he diagnosed her as having a possible fracture of her shoulder blade and recurring bicipital tendinitis. He also testified that he had treated Mrs. Millsaps in April, 1977, for pain in her shoulder and arm and an injury to her wrist which she had received while working for Baldwin Piano Company. She saw Dr. Dornenburg only this one time.

On October 28, 1977, she saw Dr. Lester, who testified that when he saw her she did not have bicipital tendinitis and that her shoulder X-ray was normal; however, he did find some degenerative changes and reversal of the curvature in her neck. He prescribed a mild tranquilizer, some pain medication, and certain exercises. Dr. Lester again treated Mrs. Millsaps on April 17, 1981, and found her to have some continuing ligament problems in her neck and prescribed a muscle relaxant.

After hearing the above evidence as well as testimony from Mrs. Millsaps's family and the Timex personnel director, the jury was instructed to consider the nature, extent, and duration of any injury; the pain, suffering, and mental anguish of appellant in the past and future; and the value of any salary lost. The jury then awarded Mrs. Millsaps no damages for anything except her medical expenses for which she received $1,000. Mr. Millsaps was awarded $300 for damage to his vehicle.

When a trial judge denies a motion for a new trial, the only issue on appeal is whether the verdict is supported by substantial evidence. *Ferrell* v. *Whittington,* 271 Ark. 750, 610 S.W.2d 572 (1981). Here, although there was evidence which would have justified a larger award, there is substantial evidence to support the award that was given. Mrs. Millsaps's actual medical expenses totaled $908.50. Much of the testimony concerning the duration and extent of Mrs. Millsaps's injuries and her pain and suffering came from members of her family, whose credibility was for the jury to determine. Although Mrs. Millsaps did have a job at the time

of the accident she had not actually started working. Both doctors who saw her in 1977 testified that she could work, but she did not go back to work until March 8, 1979. Under these circumstances the jury could have concluded that she had not lost any wages. When there has been more than a nominal award by the jury, as here, a new trial should not be granted solely on the inadequacy of the verdict. *McAdams* v. *Stephens,* 240 Ark. 258, 399 S.W.2d 504 (1966).

Affirmed.

John Elliott GRUZEN *v.* STATE of Arkansas

CR 81-84 634 S.W.2d 92

Supreme Court of Arkansas
Opinion delivered May 24, 1982
[Rehearing denied June 28, 1982.]

Lessenberry & Carpenter, by: *Thomas M. Carpenter;* and *Frank G. Shaw,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. Appellant, John Elliott Gruzen, was convicted of capital felony murder in connection with the kidnapping and death of 12-year-old Dana Mize of Vilonia, Arkansas. Appellant's original conviction on this charge was reversed in *Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979). On retrial, after the State waived the death penalty, appellant was given the same sentence, life imprisonment without parole. On appeal, we affirm.

The evidence at trial established that appellant, who lived in New Jersey, flew to Little Rock on April 8, 1976. That same day he rented a silver Chevelle, license number CWB 507, from Hertz Rent A Car. He then checked into the Alamo Plaza Motel in Little Rock, where he stayed several days. During this time he obtained a gun from the Square Deal Pawn Shop in North Little Rock.

On April 12 he drove to Conway and checked into the Kings Inn. The next day, as he was checking out, he asked the motel clerk where Vilonia was. The clerk gave him directions. This occurred between 3:30 and 4:00 p.m. Between 5:00 and 5:30 p.m., Randy Shannon, who lived on the Vilonia highway, saw appellant in a gray Chevrolet in front of his house, talking to the victim. She was standing beside the car. Shannon thought she was giving him directions because he noticed her pointing toward her house.

Ravel Lloyd, another Vilonia resident, testified that she also saw a man driving a gray car talking to the victim close to the Shannon residence at approximately the same time. She then saw the man open the car door, pull the victim into the car, and take off at a high speed. About 7:00 p.m. that evening the victim's family realized she was missing and began an unsuccessful search for her.

At about 2:00 p.m. on April 14 Gruzen bought a ticket for Newark, New Jersey from an Oklahoma City Amtrak ticket agent. He then turned in the rented car at the airport and returned to the train station barely in time to catch a 6:10 p.m. train.

At about 10:00 a.m. on April 16 the victim's body was discovered in a small pond outside of Vilonia. The body was

taken out of the pond around 2:00 p.m. and an autopsy was performed that afternoon at 4:30 p.m. Pathologists testified that drowning was the cause of death, although the body was bruised and scratched. They both testified that it was impossible to pinpoint the exact time of death. One estimated that she had been dead 24 hours, plus or minus eight to ten hours, and the other estimated that she had been dead 36 hours, a little more or a little less.

Various items were confiscated in a search of appellant's home in New Jersey including receipts from the trip to Arkansas, the gun which had been bought in North Little Rock and three rolls of film. The film was developed and one of the pictures was of a "Toad Suck Ferry" sign, a sign located about a mile and a half from the pond where the victim was found.

Appellant's rented car was swept and vacuumed by a criminal investigator, who found several hairs. An FBI special agent compared these hairs to a hair taken from the victim and testified that the hairs matched in all 15 of the characteristics used in comparing hair.

After viewing this evidence in the light most favorable to the State, we conclude that there was substantial evidence to support the jury's finding of guilt.

I

Appellant first argues that the charge of capital felony murder should have been reduced to murder in the first degree because in the first trial the jury determined that no aggravating circumstances existed. This issue was considered and rejected in *Wilson* v. *State,* 271 Ark. 682, 611 S.W.2d 739 (1981). There, we stated:

> Aggravating circumstances are not an element of capital murder as defined in Ark. Stat. Ann. § 41-1501, and the presence of aggravating circumstances is not necessary to support a conviction under that section.

We see no reason to depart from this ruling. Aggravating circumstances are not even to be considered where, as here,

the State has waived the death penalty. Ark. Stat. Ann. § 41-1301 (3) (Repl. 1977).

II

By pretrial motion, which was denied, appellant asked that he be granted a bifurcated trial on the issue of guilt as to commission of the acts alleged and the issue of guilt by reason of mental disease or defect (insanity). Appellant wanted a jury determination of guilt of commission, first, and then, if he was found guilty, wanted the jury to determine his guilt based on his affirmative defense of mental disease or defect pursuant to Ark. Stat. Ann. § 41-601 (1) (Repl. 1977), which provides:

> (1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged, he lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of law or to appreciate the criminality of his conduct.

Appellant argues that raising the defense of insanity forces him to admit his guilt of commission of the acts alleged and, thereby, violates the privilege against self-incrimination.

The State is not relieved of the burden of proving beyond a reasonable doubt each element of the offense charged merely because a defendant has raised the affirmative defense of mental disease or defect under Ark. Stat. Ann. § 41-601 (1). To this extent this statute does not presuppose an admission of the act in question. *See Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979); *Andrews* v. *State,* 265 Ark. 390, 578 S.W.2d 585 (1979). For this reason appellant's privilege against self-incrimination has not been violated.

Appellant is not entitled to a bifurcated trial on the issues of guilt as to commission and guilt by reason of insanity because our Rules of Criminal Procedure do not provide for such a trial. Absent a constitutional infirmity in

our procedure, appellant is not entitled to have these issues determined separately.

In any event, appellant is unable to show prejudice from the ruling of the trial court on this issue because appellant never raised the affirmative defense of mental disease or defect as permitted by statute. Appellant waived the adverse ruling on his motion for a bifurcated trial by failing to raise this defense.

III

Appellant argues that the trial court erred in allowing a State policeman to give his opinion as a lay person as to when the victim died. The policeman testified that he had been in criminal investigation work for eleven and a half years and had observed bodies that had been in the water for short periods of time as well as for a few days. He was then asked his opinion, based on his observation and experience, as to whether this victim's body had been in the water "a few days, a short time or a long time." Before he was allowed to answer, defense counsel was permitted to show, through a *voir dire* of the witness, that he had almost no scientific knowledge about determining time of death. The court then instructed the jury:

> THE COURT: Ladies and gentlemen of the jury, let me admonish you that you have heard the qualifications of the witness; you've heard the testimony of his experience and the fact that he was there on the scene. I'm going to allow him to express his opinion, and it is for you to determine what that opinion might be worth.

The witness then stated that in his opinion the victim had been in the pond several days.

Rule 701, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979) provides:

> Rule 701. Opinion testimony by lay witnesses. —If the witness is not testifying as an expert, his

testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Here, the witness's opinion was rationally based on his perception of the victim's body when it was removed from the water and on his past experience with drowned persons as a police investigator. In light of the fact that the judge gave the jury a cautionary instruction and the fact that both pathologists testified that determining time of death is not an exact science, we cannot say the judge erred in allowing this opinion.

IV

Appellant argues that the trial court erred in permitting the testimony of Ravel Lloyd, which was given at appellant's first trial, to be read into evidence at the second trial. At a hearing on this issue Lloyd's physician testified that Lloyd suffered from hallucinations and schizophrenia and was not capable of testifying. The trial judge then ruled that her previous testimony could be read into evidence under Rule 804, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), which provides:

Rule 804. Hearsay exceptions — Declarant unavailable. — (a) Definition of Unavailability. 'Unavailability as a witness' includes situations in which the declarant:

. . . .

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

. . . .

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. . . .

Appellant questions the finding that Lloyd was unavailable as a witness because of mental infirmity, arguing that only a psychologist or psychiatrist should be allowed to give such testimony. We disagree.

A licensed physician who has known and treated a patient for ten years, as here, can testify as to whether that person is mentally competent to be a witness. The doctor in this case, who had been practicing for 22 years, testified that Lloyd had become mentally unstable in the last year. It was not error for the trial court to find that Lloyd was unavailable as a witness without a psychiatrist's opinion.

Appellant further argues that the testimony should not have been admitted because appellant was mentally incapable of assisting his attorney during the first trial when the testimony was given. Appellant concludes that the use of the testimony at the second trial violated the confrontation clause of the Sixth Amendment and denied him the opportunity to develop the cross-examination of the witness as required in Rule 804 (b) (1), *supra*. However, appellant has not demonstrated how a cross-examination with appellant's assistance would differ from a cross-examination conducted without appellant's assistance. The party alleging error is required to demonstrate that prejudice did in fact exist. *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977).

V

Appellant argues that the trial court erred in not allowing him to read to the jury the statement of a key witness for the State, Randy Shannon. The prosecuting attorney had been ordered to furnish appellant the witness's statement pursuant to Ark. Stat. Ann. § 43-2011.3 (b) (Repl. 1977):

. . . .

> (b) After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the state to produce any statement (as hereinafter defined) of the witness in the possession of the state which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

After direct examination appellant obtained all of the witness's statements except one, which was not in the file. The next day appellant reviewed the State's file and found the missing statement. Appellant did not make an objection at that time; instead, he waited until the next day after both parties had rested to apprise the trial judge that the statute had been violated.

Ark. Stat. Ann. § 43-2011.3 (d) sets out the remedies for a violation of § 43-2011.3 (b):

. . . .

> (d) If the state elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion

> shall determine that the interests of justice require that a mistrial be declared.

Appellant did not ask that the testimony be stricken or that a mistrial be declared; instead, he made a motion that the statement be read to the jury.

We held in *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980) that an issue must be presented to the trial court in a timely and appropriate manner. Here, both sides had rested, and appellant had known of the error for a day before he informed the trial judge and requested corrective action. Under these circumstances we cannot say that the trial judge erred in not allowing the statement to be read to the jury.

VI

Appellant argues that the trial court should have declared a mistrial because of certain statements made by the prosecutor during closing arguments. One such statement was that Gruzen chose to drive to Oklahoma City and take a train back to New Jersey rather than fly because he could not take a gun through an airport security system. We have held that a prosecutor is free to argue any inference reasonably and legitimately deducible from the evidence. *McCroskey* v. *State,* 271 Ark. 207, 608 S.W.2d 7 (1980). Here, there was evidence indicating that Gruzen flew to Little Rock and bought a gun; this same gun was found at his home in New Jersey. The prosecutor's statement concerning why appellant chose to ride a train home is a reasonable inference deducible from this evidence and thereby permissible.

Appellant also objects to the prosecutor's statement that he and his deputy prosecutor were new to the case and only had a short time to work on it as opposed to the five years defense had had. Although this statement was improper, the judge removed any possible prejudice by immediately admonishing the jury that what is said in closing arguments is not evidence.

The third statement that appellant objects to is the prosecutor telling the jury that the whole matter began as a

result of a captain of a New Jersey county law office receiving a "confidential memorandum" which caused him to call North Little Rock to see if a little girl had been killed. At trial the captain was asked how he became involved. A bench conference followed. Counsel for both sides then agreed that the captain would not relate anything about any conversations; he would just tell that he got some information. The captain then testified that he "received some information from [another] captain of detectives [in his office] . . . inquiring about a young female that was killed someplace down in Arkansas." There can be no doubt that the jury knew from this testimony that the investigation began in New Jersey as a result of information the captain had received. The fact that the prosecutor argued to the jury that the captain received a "confidential memorandum" rather than merely "some information" is not error under the circumstances.

Appellant also argues reversible error was committed when the prosecutor questioned why the defense "had to go all the way to Fayetteville to find a pathologist to testify when 90 percent . . . are in Little Rock where he lives" and then told the jury that " . . . if you look hard enough . . . you can find someone to agree with you." While we do not condone these remarks, we cannot say that they constituted reversible error, particularly since the judge gave a cautionary instruction to the jury. The trial judge has a broad latitude for discretion in controlling the arguments of counsel and will not be reversed unless there is manifest gross abuse of that discretion. *Parker* v. *State,* 265 Ark. 315, 578 S.W.2d 206 (1979). We cannot find abuse of discretion in the trial court's ruling on this issue.

We have also examined the record for all other legal errors, as is our practice in cases of like punishment, and finding none prejudicial, affirm the conviction and punishment.

Affirmed.

James D. CARROLL and Darrell Mack COX *v.* STATE of Arkansas

CR 82-37 634 S.W.2d 99

Supreme Court of Arkansas
Opinion delivered May 24, 1982
[Rehearing denied June 28, 1982.]

Lessenberry & Carpenter, for appellants.

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

GEORGE ROSE SMITH, Justice. At about three o'clock on the morning of January 19, 1981, the appellants Carroll and Cox, truck drivers, drove a large tractor-trailer rig onto the scales of a state weigh-station near Hope. On that particular night shift the station was being manned by Charles Caldwell, a state employee with five years' experience at his job. Caldwell's examination of the bill of lading and other documents submitted to him by Carroll disclosed various discrepancies and omissions that led within an hour or so to an inspection of the contents of the trailer by three administrative officers. The trailer was found to contain not less than 248 large bales of marihuana, having a street value of well over a million dollars. This appeal results from a jury trial at which both defendants were found guilty of possession of marihuana with intent to deliver. Carroll was sentenced to ten years' imprisonment; each defendant was fined the maximum of $10,000. The Court of Appeals certified the case to us as presenting an issue of statutory construction. Rule 29 (1) (c).

The three points for reversal question the validity of the inspection of the trailer, the extent to which the prosecution was permitted to cross-examine Carroll at a suppression

hearing, and the trial court's ruling that a proffered defense witness was not qualified to testify as a handwriting expert.

First, the validity of the inspection. The Motor Carrier Act of 1955, Act 397, provides that common and contract carriers by motor vehicle, both interstate and intrastate, must be licensed by the Arkansas Transportation Commission. Ark. Stat. Ann. §§ 73-1754 *et seq.* (Repl. 1979). The Act imposes the duty of policing compliance with the statute upon enforcement officers, who have the authority to make arrests. § 73-1760 (c). This language of the statute provides specifically for the inspection of the contents of vehicles reasonably believed by the enforcement officers to be operating in violation of the Act:

> Such enforcement officers upon reasonable belief that any motor vehicle is being operated in violation of any provisions of this Act, shall be authorized to require the driver thereof to stop and exhibit the registration certificate issued for such vehicle, to submit to such enforcement officer for inspection any and all bills of lading, waybills, invoices or other evidences of the character of the lading being transported in such vehicle and to permit such officer to inspect the contents of such vehicle for the purpose of comparing same with bills of lading, waybills, invoices or other evidence of ownership or of transportation for compensation. [§ 73-1760 (c).]

The proof shows overwhelmingly that the enforcement officers had grounds for a "reasonable belief" that the appellants' rig was being operated in violation of the act. At the weigh-station Carroll submitted as his authority for driving the rig a lease from Maislin Transport of Delaware, but the lease was for a Kenworth tractor instead of the White tractor the defendants were driving. Their log books were not current, for which Carroll was placed under arrest. (The other appellant, Cox, fled soon after the vehicle was stopped and was later picked up by the police at a motel in Hope.) The bill of lading produced by Carroll was handwritten instead of the usual typing, indicated that the shipment originated in Michigan (Carroll testified at the suppression

hearing that he picked up the load in Houston) but gave only a street address for the consignee, with no city being named, did not describe the commodity being carried except as "50 pieces 12x100," and contained other defects that led Caldwell to radio for assistance from another state employee, Richard Birtcher, who arrived within ten minutes. He in turn called in a third enforcement officer, George Hamilton, who was patrolling in the vicinity. Birtcher believed, we think correctly, that he had the authority under the statute to inspect the contents of the trailer. Carroll professed not to know what was in the trailer and did not have a key to the lock on its doors; so the officers cut the lock and discovered the marihuana. We find no basis for questioning the validity of a routine inspection that turned up an unsuspected but huge quantity of drugs.

Defense counsel make no attack upon the inspection as such, but they elect instead to treat the examination of the trailer as a "search" for which a search warrant is required. No authority is cited for the implication that officers must obtain a search warrant for a routine inspection of a vehicle which they reasonably believe to be operated in violation of the Motor Carrier Act. That act is not essentially a criminal law. Its violations are punishable either by civil penalties or by fines for misdemeanors only. § 73-1775. Officer Birtcher testified: "The attorney keeps referring to a search. I never one time stated to this driver that I was going to search his truck; I was merely making a regular, routine transportation inspection of the vehicle."

Even if a search had been involved, two of the three officers testified that Carroll gave permission for the inspection and said he did not care if they cut the lock (his testimony being that he did not know what the contents were). The third officer, Birtcher, was in the scale-house office when the permission was given, but he explained: "I don't recall it. I was in the same area. I was either in the kitchen getting a cup of coffee, at the scales, or on the phone or something." The proof is convincingly clear that Carroll consented to the inspection, or to the search if it be so regarded. Finally, Carroll was not placed under arrest for having a spurious bill of lading (which he admits he had)

until the inspection had revealed the contents of the trailer. Thus the inspection accomplished its proper administrative purpose. That a criminal prosecution resulted does not vitiate the procedure or invalidate the statute.

Second, Uniform Evidence Rule 104 provides that an accused, by testifying about a preliminary matter, does not subject himself to cross-examination as to other issues in the case. At the hearing on a motion to suppress evidence about the discovery of the marihuana, Carroll testified on direct examination that he did not know the trailer contained any marihuana and thought it contained a load of plastic (even though he had picked up the locked trailer in Houston rather than in Michigan, as the spurious bill of lading recited). On cross-examination the prosecutor questioned Carroll about his knowledge of governing regulations and similar matters going to his awareness and credibility. Defense counsel objected to question after question, as not being pertinent to the motion to suppress. The credibility of the witness, however, *was* pertinent. Moreover, neither in the brief nor in the oral argument before this court have counsel pinpointed even one solitary fact that was improperly brought out by the cross-examination. In view of the total want of any showing of prejudice, the argument that the cross-examination so tainted the case that it should be reversed and dismissed does not warrant serious discussion.

Third, the trial judge ruled that a proffered defense witness, John Scott, was not qualified as a handwriting expert (to testify, according to a proffer of proof made after the jury had begun its deliberations, that neither defendant had filled in the spurious bill of lading). We have often held that the determination of an expert witness's qualifications lies largely within the discretion of the trial court and have sustained the trial judge's rejection of a proffered expert who "was unable to cite any training or experience that clearly qualified him as an expert with respect to the question at issue." *United States Fidelity & Guaranty Co.* v. *Smith,* 252 Ark. 556, 480 S.W.2d 129 (1972). The same reasoning is applicable here.

Scott, a resident of Cherokee Village, said he had lived in Arkansas for eleven years. Asked about his occupation, he answered: "I am a certified graphoanalyst, which in common terms is a handwriting expert." He had taken a correspondence course from the International Graphoanalysis Society of Chicago, which had certified him. His training consisted of studying the various mechanics of handwriting, the slant, unusual markings in the strokes, pressure brought to bear on the paper, and other basics that make up handwriting. In his twelve years of alleged experience "in questioned document work" he had testified as an expert only once, in Clinton, Iowa, and had "worked with" law enforcement officers in two Arkansas counties, but the cases did not come to trial. He had written "daily columns for our weekly newspaper" and had taught short courses on graphoanalysis. He was not a member of the Academy of Forensic Science.

The term "graphoanalysis" was apparently coined by the international society, because it is not to be found in Webster's Second or Third New International Dictionaries, the Random House Dictionary, the American Heritage Dictionary, Webster's New World Dictionary, or West's Words & Phrases. Scott indicated that graphoanalysis is an aspect of graphology, the original form of handwriting analysis, "which borders on the occult," but "graphoanalysis is much more scientific." He never did say, however, just what graphoanalysis is. Graphology, which is the study of handwriting as it reveals character and personality traits, is examined at length in the article on handwriting in the Encyclopaedia Britannica (1965). According to that article, graphology is based on the study of the mechanics of handwriting (which Scott studied in his correspondence course). It is intended primarily to relate handwriting to personality traits, but some of its advocates have also used it to predict and diagnose liver and heart disease, cancer, accident proneness, numerous psychiatric categories, and tuberculosis. The article concludes: "The question of the ultimate scientific value of graphology is unanswered." The Britannica also mentions graphology under Fortunetelling.

Our point is simply that there is nothing in the article on graphology and very little in Scott's discussion of graphoanalysis to indicate that either has any connection with comparing handwritings to determine authenticity. Scott did testify that he had read books on forensic document work, but his practical training and experience in that field have not, as we said in *U. S. F. & G., supra,* "clearly qualified him as an expert" to testify about the authenticity of a questioned document.

Apart from Scott's lack of qualifications to give expert testimony, the question whether either Carroll or Cox filled in the bill of lading is not of any real importance in the case. Neither is charged with forgery. Carroll freely admitted that the bill of lading was spurious, a fact not open to the slightest doubt. Who made it out is not a critical issue. Thus the third point for reversal is primarily of academic interest only.

The case for the jury was simple. A routine administrative inspection of the defendants' cargo revealed it to include a huge quantity of marihuana, a contraband drug, concealed by surrounding cartons of plastic. Carroll insisted all along that he knew nothing about the million-dollar cargo that had been entrusted to him in Houston by a Mr. Rivera, otherwise unidentified. The defendants put the State to its burden of proving guilt, as they were at liberty to do. After a fair trial the jury resolved the only real issue of fact, whether the defendants knowingly possessed the marihuana. The sufficiency of the evidence to support the verdict is not questioned.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Neither the Arkansas General Assembly nor the Supreme Court of Arkansas has the power to invalidate the 4th and the 14th Amendments to the Constitution of the United States of America. The majority opinion, it seems to me, has attempted to either annul or circumvent the provisions of those Amendments. The court cannot contravene the United States

Constitution through the use of misnomers. That is precisely what the majority opinion has attempted to do by substituting the word "inspection" for "search." A rose by any other name smells the same.

The locked cargo trailer, a part of an 18 wheeled rig, was parked alongside the highway and a number of law enforcement officers were present and in total control of the situation. There is absolutely no reason why these officers could not have obtained a search warrant for the cargo trailer, even if they had to wait a few hours. The cargo was secured and in the safe keeping of the officers and the driver had already been arrested and placed in custody. The actual reason for failing to obtain a search warrant pursuant to the 4th Amendment to the Constitution was summed up by the transportation officer's statement that they had authority under the Arkansas Motor Carrier Act, Ark. Stat. Ann. § 73-1754 *et seq.* (Repl. 1979), to search the cargo compartment. It is one of our most fundamental principles of government that a state statute cannot override the Constitution. If the officers had probable cause to believe the cargo trailer contained contraband then a search warrant was required before cutting the lock from the container compartment. Richard Birtcher stated, as he was breaking the lock from the cargo container, that he "didn't have any idea what was inside the sealed unit."

The answer to the Constitutional question is clearly resolved in Article 6 section 2 of the Constitution of the United States which states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The above quoted language from the Constitution needs no further explanation in relation to the facts in the case before us. Today we authorized the breaking into a person's sealed trailer without benefit of a search warrant. Tomorrow we

may authorize breaking off a lock from the front door of a citizen's home if it is suspected he has contraband therein.

The majority opinion relating to the qualifications of John Scott is most amusing. They boldly assert that John Scott was not an expert, indicating in the process that there is no particular value to the art of graphology. Yet, the majority opinion clearly sets out enough qualifications and credentials to indicate that John Scott was qualified to testify as an expert. It is my opinion that John Scott's testimony should have been admitted pursuant to Uniform Rules of Evidence, Rule 702. His testimony could have been tested by the state pursuant to Rule 703.

I still believe in a strict construction of the Constitution of the United States and submit that the search and seizure as conducted in this case clearly violated the 4th Amendment.

John P. HVASTA *v.* Jerry M. McGOUGH

82-48 633 S.W.2d 31

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Stephen Choate, for appellant.

Boyett, Morgan & Millar, P.A., by: *James "Red" Morgan,* for appellee.

FRANK HOLT, Justice. The appellee sued the appellant for alienation of the affections of his former wife, Carolyn. The appellee and Carolyn had been married seventeen years and had three minor children. The appellant and Carolyn began a clandestine affair which lasted about two years when the appellee discovered Carolyn's and appellant's relationship. The appellee and Carolyn attempted a reconciliation and after about nine months, appellee secured a divorce. The court, sitting as a jury by agreement of the parties, awarded appellee $15,000 damages and dismissed appellant's counterclaim for damages allegedly resulting from appellee's threats and harassment. Appellant first contends for reversal that the trial court erred in not granting

him a directed verdict inasmuch as the evidence failed to prove the alienation of affections.

In a suit for alienation of affections, the burden is on the plaintiff to show direct interference on the part of defendant and that not only was there infatuation of husband or wife for defendant but that the defendant, by wrongful act, was the cause of it; and the plaintiff must show a wrongful attempt on the part of the defendant to alienate the affections of plaintiff's husband or wife, and also that such an attempt was successful and without the consent of the plaintiff. *Hardy* v. *Raines,* 228 Ark. 648, 310 S.W.2d 494 (1958); *Hammond* v. *Peden,* 224 Ark. 1053, 278 S.W.2d 96 (1955); *Roach* v. *Scott,* 157 Ark. 152, 247 S.W. 1037 (1923); and 41 Am. Jur. 2d Husband and Wife § 466. The gist of an action for alienation of affection is the loss of consortium which includes the spouse's society, companionship, love, affection, and aid. *Gibson* v. *Gibson,* 244 Ark. 327, 424 S.W.2d 871 (1968).

Carolyn testified that appellant's business was located in the same building where she was employed. Shortly after they became acquainted their affair began. The appellant gave her much attention, sent her flowers, bought her gifts consisting of several items of jewelry and clothing, took her to dinner at nice restaurants, and treated her "like a queen." During this two year period, they had sexual relations about once a month and sometimes spent the night in motels. They talked of marriage. The appellant told Carolyn he loved her and wished they could get married. Appellant suggested a lawyer she could see for a divorce. She stated the gifts provided by the appellant diminished her love for her husband, the appellee. She believed she would have left him for the appellant had she known her children would be taken care of. In the back of her mind she expected a marrige out of the relationship with the appellant. She was in love with the appellant and would have married him. If it had not been for her relationship with the appellant, she and the appellee would still be married. Before meeting the appellant, she and the appellee had enjoyed a normal married relationship. When the appellee discovered her infidelity, there was a very brief separation after which she returned to

their home for a period of approximately nine months. She reaffirmed her love for the appellee. There was no resumption of her affair with the appellant. She and the appellee attempted a reconciliation which included counseling. This was unsuccessful and appellee secured a divorce from her because he was unable to forget the trauma of the past events. Carolyn has since remarried someone else.

The appellee testified that during the period his wife was having an affair she was not affectionate towards him and there "wasn't much of any" "sexual life" between them. During their attempted reconciliation they sought counseling. It did not help him since he was unable to forgive her. He secured a divorce.

The appellant denied he ever spoke in terms of endearment to Carolyn, that he ever talked of marriage or that he gave her any reason to feel that he wished a continuing relationship or anything more than a night in a motel room. The only gifts he had ever given her were those similar to ones he had given his secretary, other employees or friends. He never suggested she leave her husband.

Appellant argues that the attempted reconciliation of Carolyn and appellee, along with their testimony that during this time they still professed their love for one another indicates that the wife's affections were not alienated from her husband, but rather the husband's affections were alienated as he was unable to cope with the emotional trauma created by the affair. In *Gibson* v. *Gibson, supra,* we said: "The law presumes that there is always a possibility of reconciliation of husband and wife and this the law encourages." The evidence plainly shows the appellant, by his actions, sought to win the favor of Carolyn. He knew she was married to appellee and that they had children. Carolyn testified that during their meretricious affair her love for her husband, the appellee, diminished, she and appellant discussed marriage, he suggested a lawyer to her for a divorce, and she was in love with appellant and would have married him. Before meeting appellant, she had experienced a seventeen year normal marriage with appellee, they were the parents of three minor children, and she

would still be married to the appellee except for her relationship with appellant. The findings of a trial court, sitting as a jury, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, ARCP Ark. Stat. Ann. Vol. 3A (Repl. 1979). *Taylor* v. *Richardson Const. Co.,* 266 Ark. 447, 585 S.W.2d 934 (1979). Here, we certainly cannot say that the trial court's findings were clearly erroneous.

Appellant next contends that the trial court's award of $15,000 is not supported by the evidence and therefore is excessive. We cannot agree. In *Hammond* v. *Peden, supra,* the jury returned a verdict in favor of appellee and awarded him $25,000 for damages as a result of appellant's actions in alienating the affections of appellee's wife. There we said that since "the evidence was sufficient to sustain a judgment in some amount in favor of appellee, we know of no established rule by which to weigh in dollars and cents the value to appellee of the loss of the companionship, love, and affection of his wife and children." See also *Weber* v. *Weber,* 113 Ark. 471, 169 S.W. 318 (1914); *Alexander* v. *Johnson,* 182 Ark. 270, 31 S.W.2d 304 (1930); and *Hardy* v. *Raines, supra.* Here, it appears that the acts of the appellant were instrumental in the destruction of a reasonably normal marriage of seventeen years and the parental relationship of three minor children. Therefore, we cannot say the evidence is legally insufficient to support the finding of damages by the trial court.

Affirmed.

SUN GAS LIQUIDS COMPANY *v.* THE HELENA NATIONAL BANK

81-250 633 S.W.2d 38

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Friday, Eldredge & Clark, by: *Richard D. Taylor,* for appellant.

Mike J. Etoch, Jr., for appellee.

DARRELL HICKMAN, Justice. This is an appeal from an order denying a motion to set aside a default judgment. Based on the issues raised to the trial court, we affirm its findings.

The Helena National Bank obtained a judgment against Harold Snell, an employee of the Sun Gas Liquids Company. The Bank issued several writs of garnishment against Sun Gas and they were answered and paid. But one issued on October 15, 1980, and served on October 20th, was not answered by Sun Gas. The Bank obtained a default judgment against the company for $1,932.41. Sun Gas sought to set aside the default on only two grounds: Excusable neglect by Mrs. Dorothy Browning, Senior Secretary at the West Memphis office of Sun Gas where the writ of garnishment

was served, and the fact that the garnishment notice was not served on Sun Gas's registered agent for service in Little Rock. The Bank relied on the writ of garnishment itself which showed that it was served on Mr. Donald Weis, Agent for Service, at West Memphis, and the fact that it was, indeed, served on him. The Bank argued that Ark. Stat. Ann. § 27-347 (Repl. 1979) permitted service on a corporate agent at a branch office and Weis was that agent. Sun Gas argued that that statute was superseded by ARCP Rule 4.

The trial court held that Rule 4 had not superseded Ark. Stat. Ann. § 27-347 and, therefore, service was valid.

There was no testimony offered to the trial court, only a motion by Sun Gas to set aside the default judgment and an affidavit by Mrs. Browning to the effect that she had mailed the notice of garnishment to the home office in Pennsylvania and was only told later that it never arrived.

Of course, Mrs. Browning's affidavit does not amount to excusable neglect. *See* ARCP Rule 55 (c); *Perry* v. *Bale Chevrolet Co.*, 263 Ark. 552, 566 S.W.2d 150 (1978); *Fitzwater* v. *Harris*, 231 Ark. 173, 328 S.W.2d 501 (1959). And we agree with the trial court that ARCP Rule 4 did not supersede Ark. Stat. Ann. § 27-347. In our Per Curiam of December 18, 1978, we set out the statutes that had been superseded by the Rules of Civil Procedure and this statute is not one of them.

Sun Gas argues on appeal that Weis was not an agent, servant, or employee of a branch office as defined by the statute. But that argument was not made below and no evidence was offered to the trial court on that issue. Sun Gas also argued that the writ of garnishment form does not give notice that judgment will be entered if it is not answered. See *DeSoto, Inc.* v. *Crow*, 257 Ark. 882, 520 S.W.2d 307 (1975). Neither was this argument made to the trial court. The dissent suggests that the branch office was in Crittenden County and the service was from Phillips County, and that the statute only contemplated service in the same county that issued the summons. None of these arguments were raised to the trial court and we have consistently held that we will not consider issues raised for the first time on appeal. We do not

have the plain error rule. *Wilson* v. *Lester Hurst Nursery,* 269 Ark. 19, 598 S.W.2d 407 (1980); *City of Fort Smith* v. *Moore,* 269 Ark. 617, 599 S.W.2d 750 (1980).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent from the majority opinion for the reasons suggested by Justice Hickman in the majority opinion. Ark. Stat. Ann. § 27-347 (Repl. 1979) states:

> Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations.

It is obvious in reading the above statute that the authorization for service upon an agent or employee of any corporation applies only when the suit is brought in the county where the agent or employee is physically located. Therefore, service under the above statute is not proper.

I also agree with the appellant's contention that the writ of garnishment was null and void for failure to include the allegations and interrogatories. In *DeSoto, Inc.* v. *Crow,* 257 Ark. 882, 520 S.W.2d 307 (1975), we held that for a writ of garnishment to be valid it must give notice that failure to answer could result in a judgment against the garnishee. This was pursuant to Ark. Stat. Ann. § 29-107 (Repl. 1962). I would, therefore, reverse the trial court and dismiss the suit as to the appellant.

Norma Hicks LOWERY *v.* Pat KELLEBREW

82-25 633 S.W.2d 40

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Griffin, Rainwater & Draper, for appellant.

Holloway & Bridewell, for appellee.

DARRELL HICKMAN, Justice. Pat Kellebrew was awarded $25,000 in this slip and fall case. The only thing unusual is that Pat Kellebrew, the appellee, filed suit against his daughter, Norma Hicks Lowery, the appellant. Otherwise, it is a simple case of whether the jury chose to believe Mr. Kellebrew's evidence.

Kellebrew, age 70, testified that on January 26, 1976, his daughter called him to move a motorcycle from her carport. In doing so he slipped and fell on the concrete carport and injured himself. He said that he was knocked unconscious and when he came to in a few moments his pants had grease or oil on them. His medical expenses totalled over $3,000.

Kellebrew's sons went to Mrs. Lowery's house to help move their father. They both testified that Kellebrew's feet were lying in an oil spot in the carport, and that the oil spot had been there at least several days. James Kellebrew testified that the spot was about three feet in circumference.

Mr. Kellebrew said that before the accident he had done carpentry work, painting, and farm work, and made up to $4,000 a year doing so. He said that that was the amount he

was allowed to earn and still receive his social security benefits. He testified that he was not able to work after he was injured because of severe pain in his back and legs.

The two issues raised are whether there was substantial evidence to support the jury's verdict and whether there was sufficient evidence to support an instruction of loss of working time. In both instances it is a question of the credibility of the witnesses. The jury chose to believe Pat Kellebrew and his sons. The appellee made a prima facie case of slip and fall which the appellant failed to overcome. *Safeway Stores Inc.* v. *Waddy,* 253 Ark. 473, 486 S.W.2d 683 (1972); *Weingarten, Inc.* v. *Thompson,* 251 Ark. 914, 475 S.W.2d 697 (1972).

Affirmed.

Johnny SCROGGINS *v.* STATE of Arkansas

CR 81-131 633 S.W.2d 33

Supreme Court of Arkansas
Opinion delivered May 24, 1982

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

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

DARRELL HICKMAN, Justice. Johnny Scroggins was arrested without a warrant for two counts of aggravated robbery at his motel room in Fort Smith, Arkansas. He was registered under the name of Johnny Smith. Scroggins'

codefendant, Earl Maxwell, was with him in the motel room and apparently registered under the name of Danny Maxwell. Scroggins was convicted of two charges of aggravated robbery and sentenced to eighty-three years.

The two main issues before the trial court were whether the arrest was legal; and, if not, did that taint and make inadmissible a subsequent confession of Scroggins'. The trial court ruled for the State on those two issues. We disagree and reverse on both questions.

Scroggins and Maxwell were reported to have robbed two people that Scroggins personally knew in the early morning hours of November 1, 1980. Immediately after the robbery one of the victims, George Yonkers, reported it to the police. He knew Scroggins only as "Johnny," a friend of one of his neighbors. The neighbor, Clifta Corley, was acquainted with both Scroggins and Maxwell. They were also charged with robbing her.

Detective Mike Brooks testified that on November 3, 1980, he went to the prosecuting attorney's office to obtain a warrant for the arrest of Scroggins and Maxwell for the aggravated robbery of Yonkers and Corley. He signed an affidavit and it was dated the third of November. Brooks told two other detectives, Officers Tate and Davis, who were working the night shift, that he had obtained a warrant that morning for Scroggins' and Maxwell's arrests. Actually he had only signed an affidavit; the warrants had not been issued.

The two detectives decided that they would try to locate the pair that evening. Davis testified that when they left the station they had been told warrants were issued and that eyewitnesses had identified Scroggins and Maxwell as the robbers. (Tate was later killed in the line of duty and did not testify at the trial.) Davis said he also knew that there was an outstanding warrant against Scroggins for third degree battery but he did not have that warrant with him either. Such a warrant did exist and was dated September 18.

Working that night on a hunch the officers discovered

that a Johnny Smith and Danny Maxwell had registered at the Holiday Motel, but had checked out. A girl friend of Maxwell's had called the bus station asking for Maxwell and left a number to be called at the Holiday Motel. Checking another motel in the vicinity, the Englander, the officers discovered that a Johnny Smith and Danny Maxwell were registered there using identical addresses to those at the Holiday Motel. Officer Davis did not know that Scroggins was registered as Johnny Smith when he approached the room. Davis said that he and Tate knocked on the door and informed the occupants that they were police officers. Scroggins, whom Tate recognized, came to the door. One officer drew his pistol and asked Scroggins to open the door and come out. Scroggins did not resist. Then the officers saw Maxwell in the rear of the room and, with drawn revolvers, ordered him out. He came out. Both were arrested for aggravated robbery and taken to the police station, booked, and jailed. A jacket and two suitcases were seized from the room. Detective Tate questioned Scroggins that night but evidently the questioning stopped when Scroggins indicated he wanted an attorney. The next day at about 11:55 a.m., Officer Brooks took a detailed five page incriminating statement from Scroggins.

It is argued that the statement was inadmissible because it was not voluntarily given and was the product of an illegal arrest. We hold that the arrest was illegal because Scroggins had a fourth amendment right to expect privacy in his motel room. Absent exigent circumstances, Scroggins was not subject to arrest without a warrant, unless he consented to the arrest. The State offered no evidence of exigent circumstances. Instead it chose to argue at trial and on appeal that the officers acted in good faith and that the motel room was not the residence of Scroggins and, therefore, not subject to constitutional protection. At the time of his arrest Scroggins gave his residence as 1701 Fresno, which was not the address of the Englander Motel.

The crucial question is the legal status of the motel room. In the companion cases of *Payton* v. *New York* and *Riddick* v. *New York,* 445 U.S. 573 (1980), the United States Supreme Court unequivocally held that the fourth amend-

ment as applied to the states through the fourteenth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest absent exigent circumstances. The Court did not extend its ruling to searches or arrests occurring at a third party's home. *Payton* v. *New York, supra* at 583.

The Court has held that the fourth amendment prohibition against warrantless seizures goes to persons as well as property. *Davis* v. *Mississippi,* 394 U.S. 721 (1969). Of course it is elementary that the State must prove that a warrantless intrusion, in this case an arrest, was not in violation of the fourth amendment. In *Katz* v. *United States,* 389 U.S. 347 (1967), the Court explained that,

> . . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.

So it is the State's burden to prove that the motel room in this case was not subject to constitutional protection.

The fourth amendment protects the right one has to expect privacy in various places. While that right extends to one's home, and to the trunk of an automobile, *Sanders* v. *Arkansas,* 442 U.S. 753 (1979), it does not extend to a public place such as a common hallway in an apartment building, *U.S.* v. *Calhoun,* 542 F.2d 1094 (9th Cir. 1976), or a parking lot, *U.S.* v. *Cantu,* 557 F.2d 1173 (5th Cir. 1977) cert. denied 434 U.S. 1063 (1977).

Two cases of the United States Supreme Court have held that one's right of privacy in a hotel or motel room is protected by the fourth amendment to the United States Constitution. In *Johnson* v. *United States,* 333 U.S. 10 (1947), the Court found that the defendant's living quarters, which were in a hotel, could not be searched without a warrant absent exigent circumstances. In *Stoner* v. *California,* 376 U.S. 483 (1964), a defendant was arrested in a

hotel room and the room was searched without either a search warrant or an arrest warrant, and the search was found to be illegal. It was the government's argument that the hotel clerk consented to the search. The Court said:

> No less than a tenant of a house, or the occupant of a room in a boarding house, *McDonald* v. *United States,* 335 U.S. 451, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. *Johnson* v. *United States,* 333 U.S. 10. That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel. It follows that this search without a warrant was unlawful. Since evidence obtained through the search was admitted at the trial, the judgment must be reversed. *Mapp* v. *Ohio,* 367 U.S. 643.

Therefore, it does not matter that a hotel or motel room is not a permanent residence; one registered at a motel or hotel as a guest is protected against unreasonable searches and seizures by the fourth amendment to the United States Constitution. The fact that Scroggins was registered under a false or assumed name would not change the situation because that fact was not used by the State to justify the warrantless arrest and, therefore, in this case becomes irrelevant.

The State offers a parenthetical argument that Scroggins consented to leave the room and was actually arrested outside the room and, therefore, no *Payton* issue exists. The facts demonstrate why this argument is meritless. The officers held a gun on Scroggins and asked him to come out of the room; obviously there could be no free choice on the part of Scroggins in such a situation.

Having decided that the arrest was illegal, and necessarily that the seizure of the suitcases and jacket was illegal, we consider the separate question of the admissibility of Scroggins' confession. When an in-custody statement is challenged, the State has the burden of proving by a preponderance of evidence that it was voluntarily given. On appeal, we make an independent determination of this issue

and affirm the trial court's ruling unless it is clearly erroneous. *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981).

In this case, such a statement must be examined not only to determine if it was voluntary by the fifth amendment standards but also to make certain that the illegal arrest did not taint the statement. In the case of *Brown* v. *Illinois,* 422 U.S. 590 (1975), the United States Supreme Court enumerated three factors to be used in determining whether a prior illegal arrest has tainted any incriminating statements made after the arrest: (1) The "temporal proximity between the arrest and the confession, (2) the presence of intervening circumstances, . . . (3) the purpose and flagrancy of the official misconduct are all relevant." The Court noted that merely giving the *Miranda* warning is not sufficient to remove the taint. The Court held in *Wong Sun* v. *United States,* 371 U.S. 471 (1965) that there must be an intervening action of free will between the illegal arrest and the subsequent confession to remove the taint. *See Woodard* v. *State,* 273 Ark. 235, 617 S.W.2d 861 (1981), and *Brewer* v. *State,* 271 Ark. 810, 611 S.W.2d 179 (1981).

Applying those principles to Scroggins' confession, we conclude that the State did not meet its double burden. Scroggins testified that he was questioned on the evening of November 3rd by Detective Tate who arrested him, but that he told him he wanted a lawyer and the officer discontinued the questioning. That is not refuted and it is borne out in part by the record. At noon the next day, Detective Brooks, an officer not connected with the arrest, interviewed Scroggins and obtained a five page statement. It is undisputed that Scroggins was given his *Miranda* rights at this time. Officer Brooks had Scroggins' two suitcases before him when he questioned Scroggins. He asked Scroggins if he could search them. Scroggins admitted during his testimony that he consented to the officer examining the contents of the suitcases at that time, but he explained that Officer Tate had already searched them the night before.[1] The suitcases did

[1]Apparently Officer Tate obtained a written consent to search the suitcases the night before on the basis of some agreement between Scroggins and him as to the other charges.

contain evidence connecting Scroggins to the robberies in question. Scroggins said he asked Brooks for a lawyer and asked to make a telephone call. Brooks said he did not ask for a lawyer but he could not remember if Scroggins made a telephone call.

Once Scroggins asked for an attorney, as he did when he was first questioned, he could not be interrogated later except at his request. *Edwards* v. *Arizona,* 451 U.S. 477 (1981). It appears undisputed that the State initiated the interrogation the next day. Officer Brooks conceded that he did not obtain written consent to search the suitcases when he interrogated Scroggins, although it was departmental policy to do so.

We cannot say the officers acted in good faith. They set out to find these men during their shift without any warrants and offered no evidence of exigent circumstances requiring immediate action. The only real basis to uphold the trial court's findings would be that Scroggins was given his *Miranda* warning before the statement was taken. There is no other evidence to support a finding that the State met its burden and removed the taint of the illegal arrest. There was no intervening action of free will to remove the taint.

The other arguments raised on appeal are easily answered. First, it is argued that it was error to allow the State to cross-examine Scroggins regarding his prior convictions because he was charged as an habitual criminal and, thereby, he was forced to prove the convictions, which was the State's burden. We rejected that same argument in *Coleman* v. *State,* 256 Ark. 665, 509 S.W.2d 824 (1974).

He argues that one of his convictions was actually "court probation" and according to our decision in *English* v. *State,* 274 Ark. 304, 626 S.W.2d 191 (1981), it was not a conviction that could be used to enhance his sentence pursuant to Ark. Stat. Ann. § 41-1001 (Supp. 1981), the habitual offender statute. Scroggins' probation was not the type of court probation that we discussed in *English.* Scroggin's plea of guilty was entered and accepted and,

therefore, no error was committed in allowing this conviction to be considered by the jury.

He argues the evidence is insufficient to support the conviction for aggravated robbery of Clifta Corley. She testified that she knew Scroggins and was awakened that night by Scroggins and Maxwell who wanted money, and at first she thought they were joking. But then she changed her mind when she saw her roommate crying and Scroggins continued to point the gun at her. We find substantial evidence to support this charge of robbery.

Finally, it is argued that Scroggins' sentence to eighty-three years was excessive. We have repeatedly held that such arguments are meritless. *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982); *Osborne* v. *State,* 237 Ark. 5, 371 S.W.2d 518 (1963).

Reversed and remanded.

John B. DALRYMPLE, Barbara DALRYMPLE, THE BASELINE CORPORATION, THE DALCO CORP., and THE OCLAD CORP. *v.* Rodney FIELDS, Earlean FIELDS and Gary ROSS

81-263 633 S.W.2d 362

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Jones & Petty, for appellants.

Baim, Baim, Gunti, Mouser & Bryant and *Paul D. Capps,* for appellees.

JOHN I. PURTLE, Justice. Appellees, Rodney and Earlean Fields, rented an apartment from Gary Ross who had recently acquired the property from Dalrymple. A fire in the apartment destroyed the Fields' personal property and they filed suit to recover against Ross. Ross filed a third party complaint against Dalrymple and plaintiffs amended their complaint against Ross to recover punitive damages from Dalrymple. A jury awarded the Fields a judgment for $6,000 compensatory damages and $7,500 in punitive damages. They allocated the negligence of Ross at 15% and Dalrymple at 85%. The jury also awarded Ross $10,000 compensatory damages but no punitive damages against Dalrymple.

Dalrymple's motion for a new trial was denied, and this appeal results.

Appellants argue three points for reversal: (1) the trial court erred in denying appellants' motion for a directed verdict and for judgment notwithstanding the verdict; (2) the trial court erred in allowing proof of Dalrymple's financial status; and, (3) the trial court erred in allowing evidence of unrelated violations of the building code and regulations. We agree that there was no evidence to support a verdict for punitive damages and that Dalrymple's financial status was not properly in issue. Also, we agree that it was error to allow evidence of unrelated building code violations.

There seems to be no serious dispute but that a fire in the Fields' rented apartment, which was owned by Ross, resulted from defective wiring near a hot water heater which was encased in a crawl space and was unavailable for inspection by the Fields. The Fields were not at home at the time of the fire but upon returning home and discovering the fire Mrs. Fields, who was pregnant, became very upset and ill. Her baby was born slightly premature approximately a month later. There was evidence that she did have ailments and complaints related to the loss of their property in the fire. The suit was filed on October 1, 1979, by the Fields against Ross. They alleged he knew or should have known of the dangerous situation and that he had been notified that some irregularity existed concerning the hot water heater and their high electric bills. They alleged he took no action in regard to the situation. The complaint alleged that Ross breached the warranty of habitability by furnishing an unsafe dwelling place. Ross entered a general denial and filed a third party complaint against Baseline Corporation, Dalco Corporation and Oclad Corporation as well as John and Barbara Dalrymple. All parties agreed that the foregoing corporations and Dalrymple were one and the same. The complaint by Ross alleged negligence through unworkmanlike construction and improper maintenance and repairs. On February 18, 1981, the third party complaint was amended to allege that Dalrymple was guilty of gross and wanton conduct and negligence in complete disregard

to the consequences of human safety. It alleged a conscious knowledge on the part of Dalrymple. The Dalrymples entered a general denial. On March 2, 1981, the complaint of the Fields was amended to seek punitive as well as compensatory damages. Also, on the same date the Fields filed a complaint against the third party defendant in which they accused him of conduct giving rise to punitive damages.

We first consider whether the trial court erred in denying appellants' motion for a directed verdict on the issue of punitive damages and for a judgment notwithstanding the verdict on a motion for a new trial. Before punitive damages may be allowed it must be shown that in the absence of proof of malice or willfulness there was a wanton and conscious disregard for the rights and safety of others on the part of the tortfeasor. *Tucker* v. *Scarbrough,* 268 Ark. 736, 596 S.W.2d 4 (Ark. App. 1980). We have also quoted with approval prior decisions holding exemplary damages proper where there is an intentional violation of another's rights to his property. *Ford Motor Credit Co.* v. *Herring,* 267 Ark. 201, 589 S.W.2d 584 (1979). We hold the trial court erred in failing to direct a verdict as to the punitive damage portion of this case.

In viewing the record we do not find any evidence that either Dalrymple or Ross were guilty of activities which would give rise to exemplary damages. The issue in question was well-stated in the case of *Hodges* v. *Smith,* 175 Ark. 101, 293 S.W. 1023 (1927), which stated:

> . . . negligence alone, however gross, is not sufficient to justify the award of punitive damages. There must be some element of wantonness or such a conscious indifference to the consequences that malice might be inferred. In other words, in order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto.

Appellants also insist that the court erred in allowing the plaintiffs access to Dalrymple's financial status and allowing it to be presented to the jury. One of our leading

cases on this point is *Life & Casualty Ins. Co. of Tenn.* v. *Padgett,* 241 Ark. 353, 407 S.W.2d 728 (1966). In *Padgett* we held that where two or more defendants were sued for punitive damages the plaintiff waived his right to prove the financial condition of any one of them. In the present case the appellees did not originally sue for punitive damages but through a separate pleading at a later date they sought punitive damages against Dalrymple and Ross. We reached the same result in the case of *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W.2d 613 (1960), as well as in *Curtis* v. *Partain, Judge,* 272 Ark. 400, 614 S.W.2d 671 (1981). Therefore, it was error to allow the evidence relating to the financial worth of Dalrymple.

The plaintiffs and Ross presented evidence of several other code and ordinance violations. The ordinances, or the pertinent parts, were treated as having been introduced into evidence. However, a search of the record on appeal indicates that the ordinances or the perinent parts thereof were never introduced into the trial court's record. We have held as far back as *Pugh* v. *The City of Little Rock,* 35 Ark. 75 (1879) that parol evidence is not admissible to prove an ordinance or resolution of a city council. See also *Indemnity Ins. Company of North America* v. *Harrison,* 186 Ark. 590, 54 S.W.2d 692 (1932). These alleged violations were such things as lack of fire stops in the attic; no fire wall separating apartments; only one door to the outside from the apartment; an outside staircase and steps constructed of wood. None of these violations, or others presented during the course of the trial, had any bearing on the cause of the fire nor do they rise to that degree of manifest indifference from which malice may be inferred. We think the trial court would have erred by allowing into evidence these independent and unrelated violations even if the code or ordinances had been properly in the record. We held in *Myers* v. *Martin,* 168 Ark. 1028, 272 S.W. 856 (1925), that where the issue is one of negligence or non-negligence on the part of a person on a particular occasion, other acts of negligence are not admissible. The appellees state that the evidence of the other violations was eventually submitted to the jury by mutual agreement of all of the parties to this action. Even though the matter was submitted by agreement

of all the parties, it was after the court had overruled Dalrymple's objections to the other violations. Also, there had been a motion in limine to prevent the introduction of the other violations which had no connection with the fire. We have held that a motion in limine preserves the objection throughout the trial. *Ward* v. *State,* 272 Ark. 99, 612 S.W.2d 118 (1981).

We note appellees' objection to appellants' argument that the issue of substantial evidence was not preserved. However, ARCP Rule 50 (e) quoted by appellees states on its face that the sufficiency of the evidence is preserved when there has been a motion for a judgment notwithstanding the verdict or a motion for a new trial.

Earlean Fields claimed personal injury as a result of this incident. However, she was not injured by the fire and suffered no direct trauma or anything of that nature. We have consistently held that a claimant's right to recover for emotional distress and related injuries may be had only upon proof of the existence of willful and wanton wrongdoing on the part of the tortfeasor. *M.B.M. Co., Inc.* v. *Counce,* 268 Ark. 269, 596 S.W.2d 681 (1980). Also, AMI 1101 sets out guidelines for conduct which will give rise to punitive damages.

A review of the record indicates that the jury had ample evidence to find the appellants and Ross had breached the warranty of habitability at the Fields' rented apartment. However, we feel that by introducing evidence of Dalrymple's financial status, the jury may well have been improperly influenced in their allocation of compensatory damages. Therefore, we must remand for a new trial in accordance with this opinion.

Reversed and remanded.

THE HIP BOOT GANG, INC. *v.*
Richard W. WARRINER, Jr.

82-26 633 S.W.2d 365

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Horace Fikes, Jr., for appellant.

Baim, Baim, Gunti, Mouser & Bryant, by: *Noel F. Bryant,* for appellee.

JOHN I. PURTLE, Justice. The appellee instituted suit in the Jefferson County Circuit Court in which he sought to be declared the owner of 1500 shares of common stock of The Hip Boot Gang, Inc. The appellant answered and counterclaimed alleging that Warriner was not the owner of the 1500 shares and denied he had any interest in The Hip Boot Gang, Inc. The trial court ruled in favor of the appellee.

The appellant argues two points on appeal. First, that the court erred in ruling that the judgment in a former suit did not affect the legal title of the common stock of said corporation. Second, appellant argues that the court erred in finding that appellee was the record owner of 1500 shares of common stock of appellant.

The facts indicate that The Hip Boot Gang, Inc. was formed by Kent Rinehart, Richard W. Warriner, Jr. and Nelson Langston, Jr., each taking 1500 shares of stock in The Hip Boot Gang, Inc. Subsequently, Warriner agreed to sell Rinehart his stock in the corporation. They entered into a memorandum of agreement whereby Warriner would sell his stock to Rinehart. Five hundred dollars was paid before the agreement was drawn up and subsequently another $500.00 was paid by Rinehart on the installment note. The agreement provided that the seller would retain title of the stock of the corporation until it was paid for in full and allowed the purchaser to vote the stock in corporate matters.

Apparently Rinehart fell behind in his payments and Warriner filed suit No. 79-648-1 to collect on the promissory note which had been given as part of the consideration for the purchase of the stock. Rinehart counterclaimed arguing the note was usurious. He prayed that the debt be cancelled. The trial court agreed and held the transaction usurious and cancelled the indebtedness. No appeal was taken from the judgment between Rinehart and Warriner.

Appellant first argues that the trial court erred in failing to hold that the prior decision in case No. 79-648-1 affected legal title to the stock here in question. In *Crump* v. *Loggains,* 212 Ark. 394, 205 S.W.2d 846 (1947), we held:

> The judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit.

Likewise, failure of a party to ask for certain relief in the lower court precludes a subsequent demand for such relief absent a timely appeal or retrial of the original case. No appeal was instituted from the prior decision and it cannot now be appealed to this court. The note and indebtedness were cancelled. That was the relief sought and that was the relief granted. The first decision simply did not relieve title to the stock. However, the agreement between the purchaser and seller of the stock specifically mentioned that title to the stock remained in the seller until it was paid for.

Appellants point out that most all of the contracts we have cancelled for usury were situations wherein the purchaser was in possession of the property. However, in the present situation the buyer was not in possession of the property. The cancellation of the debt in the first trial was what it purported to be, a cancellation of the debt. Perhaps title would have been conveyed had demand for such relief been requested of the trial court. Since this matter could have been raised in the first trial between the two stock holders it cannot be raised in the present action. The appellee is still the owner of the 1500 shares of stock. We have held many times that questions within an issue which were settled, or could have been settled, were *res judicata.* See *Ozan Lumber Company* v. *Tidwell,* 213 Ark. 751, 212 S.W.2d 349 (1948).

Affirmed.

Theodis BAKER *v.* STATE of Arkansas

CR 81-132 637 S.W.2d 522

Supreme Court of Arkansas
Substituted Opinion on Rehearing
delivered July 19, 1982

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

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

DARRELL HICKMAN, Justice. We grant a rehearing on the issue of the doctor-patient privilege; and, finding no error was committed, affirm the conviction and sentence of Theodis Baker.

Theodis Baker, while in the Pulaski County jail, was treated for gonorrhea by the jail nurse. The trial court admitted into evidence the simple fact that he had been treated for gonorrhea. In our opinion in *Baker* v. *State* (May 24, 1982), we held this was error because Baker had "communicated" this information to the nurse and under Ark. Stat. Ann. § 28-1001, Rule 503 (b) (Repl. 1979), the information was privileged. Nothing Baker said to the nurse was admitted; in fact, she could recall no conversation whatsoever.

Rule 503 replaced Ark. Stat. Ann. § 28-607 (1947), which was a much stricter privilege. It read:

> Hereafter no person authorized to practic physic or surgery and no trained nurse shall be compelled to disclose *any information which he may have acquired* from his patient while attending in a professional character *and which information was necessary to*

> *enable him to prescribe as a physician or do any act for him as a surgeon or trained nurse.* [Emphasis added.]

That essentially encompasses all conceivable information a physician could have about a patient, and it was so construed. *National Benevolent Society* v. *Barker,* 155 Ark. 506, 244 S.W. 720 (1922). But Rule 503 (b) does not grant a privilege to "any information," only "communications" between the patient and doctor, and confidential ones at that. So Rule 503 is not in essence the same as the former law as we acknowledged in our opinion. It is decidedly different; it protects only confidential communications.

Rule 503 specifically includes psychotherapists and licensed psychologists in the category of "doctor." Obviously what is told to those doctors is more sensitive than that told to average practitioners. So the real protection is aimed at preventing a doctor from repeating what a patient told him in confidence. But the privilege does not go to treatment and that is all the State offered as evidence. In *Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979), a psychiatrist alerted police that a crime had been committed and indirectly enabled them to discover the defendant's identity. We found no breach of the privilege.

It would be privileged information if Baker had told the nurse in confidence who he had sexual intercourse with, but that is not the question before us. The only issue is whether treatment for gonorrhea is privileged information.

There is no element of self-incrimination involved because Baker voluntarily sought the treatment and thereby subjected himself to the privilege, its protection as well as its limitations. *See Munn* v. *State,* 257 Ark. 1057, 521 S.W.2d 535 (1975).

In our original opinion we construed Rule 503 so that it has exactly the same practical effect as the repealed statute; that is, it protects *any information* the physician collects regarding a patient by incorrectly characterizing it as communication. The legislature made a significant change by adopting a more sensible rule and on rehearing we

recognize that change. The rule not only applies to criminal cases but civil as well. *See Ragsdale* v. *State,* 245 Ark. 296, 432 S.W.2d 11 (1968).

Actually there has long been serious opposition to the existence of any such privilege. As McCormick says: "More than a century of experience with the statutes [of the states granting the privilege] has demonstrated that the privilege in the main operates not as a shield of privacy but as the protector of fraud." McCORMICK'S EVIDENCE § 105 (2d ed. 1972). Wigmore's criticism is in the same vein: "From asthma to broken ribs, from influenza to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone — by everyone except the appointed investigators of the truth," which, in this case were the jurors. *See* VIII WIGMORE ON EVIDENCE § 2380a (McNaughton rev. 1961).

Since we find the trial court made no error in admitting the evidence, the decision on rehearing is affirmed.

ADKISSON, C.J., concurs.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I strongly disagree with the granting of a rehearing and the destruction of the physician-patient privilege. I agree with the majority that the original statute was entirely too broad. It did, in effect, prevent a physician from testifying about any information he had obtained through the doctor-patient relationship. The original rule was justifiably seen as being overly broad. Uniform Rules of Evidence, Rule 503 is a very long and detailed rule. The rule's first sections define "patient," "physician" and "psychotherapist." Then section (4) reads as follows:

> A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or

persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Section (d) sets out the exceptions to the foregoing rule. For example, there is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness or examinations by order of a court or when the condition is claimed as an element of a defense. Therefore, it is plain all privilege relating to criminal matters and institutionalization for mental illness is excluded from the rule. The rule, of course, can be waived by the patient himself.

We really have under consideration here the old statute involving "any information" against the new rule which relates to "confidential communication." The appellant is the person who requested the treatment in this case. It would have been impossible for him to make a request without communicating in some manner with the party from whom he was requesting treatment. The myopic narrowness with which the majority now views confidential communications in fact destroys the rule in its entirety. If a medical technician is allowed to testify as to the description of the injuries or ailment or disease, even though the patient had requested it to remain confidential, it would in effect present a situation where there could be no "confidential communication." The situation existing here is one of the most personal types of cases that can be involved in a physician-patient relationship. To allow the state to poke its nose into

the privilege existing between the appellant and the person treating him for his condition would render the privilege meaningless. The purpose of the rule is to allow diagnosis and treatment of persons who can be confident that the intimate details of their physical or mental condition are not made public. I cannot see where the abrogation of this rule would enhance either the public interest or the criminal justice system.

The rules were very carefully thought out and were studied over a long period of time and were formulated specifically for the purpose of allowing privileged communications except for instances set out as exceptions in the rule. I feel that the sole reason for allowing in this particular communication was to enhance the state's probability of conviction. The state never claimed the matter was relevant to the defense of the crime or probative of any issue. This is not the purpose for which the rule was intended, and the state had as good a chance of conviction without this information as with it. I feel the original opinion was absolutely correct and if the present majority opinion prevails, then the rule may as well be stricken from the book. Therefore, I would deny the rehearing.

Barney MAY *v.* Louis BARG, d/b/a BARG & COMPANY

82-58 633 S.W.2d 376

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Davis & Bracey, P.A., by: *Charles E. Davis,* for appellant.

Burke & Eldridge, by: *John R. Eldridge, III,* for appellee.

ROBERT H. DUDLEY, Justice. Appellant Barney May and

Midwest Steel, Inc. executed a promissory note in the amount of $400,000.00 plus interest to appellee Louis Barg d/b/a Barg & Company. On March 9, 1981, appellee Barg filed suit against Midwest and appellant May alleging joint and several liability for the principal, interest and attorney's fees. On the next day, March 10, an attorney, who is the agent for service of Midwest, went to the sheriff's office and accepted service of process for Midwest and appellant May. A deputy sheriff testified that, upon Midwest being sued, the standard practice was to telephone the attorney and he would then come to the sheriff's office and accept service of process. Apparently Midwest Steel is owned by appellant May but the deputy sheriff did not know whether the attorney normally accepted service of process for individual appellant May. On April 2, 1981, the same attorney filed an answer for Midwest Steel and appellant. April 2 was not "... within twenty (20) days after the service ...," and the answers were not timely filed. ARCP Rule 12 (a) Ark. Stat. Ann. Vol. 3A (Repl. 1979). Appellee Barg moved to strike the answers. Midwest and appellant responded only that the motion to strike should be denied because of appellee's failure to file a brief with the motion in accordance with ARCP 78. The validity of service was not questioned by motion. Appellant May filed an amended answer alleging there had been no demand for payment and, in addition, appellant May individually filed a verified counterclaim alleging that appellee had wrongfully converted his property. Appellee subsequently filed a motion to strike and appellant did not file a responsive pleading. The trial court granted the motion to strike the answers, amended answer and counterclaim. The case was later tried on the issue of the amount of liability and the court entered judgment in the amount of $457,217.55. Only Barney May appeals. Jurisdiction to interpret the Rules of Civil Procedure is in this court. Rule 29 (1) (c). We affirm the trial court.

ARCP 4 (d) (1) provides for personal service inside the state upon an agent authorized by appointment to accept service, a method for service of process not previously authorized. Compare superseded Ark. Stat. Ann. § 27-1121 (Repl. 1962). Our rule provides that service shall be:

> (1) Upon an individual, other than an infant or an incompetent person, by delivering a copy of the summons and complaint to him personally, or if he refuses to receive it, by offering a copy thereof to him, or by leaving a copy thereof at his dwelling house or usual place of abode with some person residing therein who is at least fourteen (14) years of age or *by delivering a copy thereof to an agent authorized by appointment* or by law *to receive service of summons.* [Emphasis supplied.]

The issue is whether appellant's attorney was an agent authorized by appointment to receive summons. Two material undisputed facts establish that (1) the attorney accepted service of process and (2) the client-attorney relationship existed. Neither the appellant nor the attorney has ever indicated that the attorney was not in fact authorized to accept service; they simply maintain that appellee did not prove the authorization.

The authority of the attorney to bind his client by acceptance of process pursuant to ARCP 4 (d) (1) may be implied in law from the ostensible circumstances, although an attorney does not, by mere virtue of employment, have authority to accept service of process. The ostensible circumstances implying the authority are well defined in this case. At the hearing on the motion to strike the appellee's attorney stated, "He [appellant May's attorney] accepted service on behalf of Mr. May individually." The judge, after noting the prohibition against an attorney testifying and also trying the case, asked the attorney if he desired to testify and he responded, "I have no objection going to that. I do not intend to testify." We have stated, "Failure of a party to an action to testify as to facts peculiarly within his knowledge is a circumstance which may be looked upon with suspicion by the trier of the facts." *Starns* v. *Andre,* 243 Ark. 712 at 719, 421 S.W.2d 616 at 620 (1967), quoting *Broomfield* v. *Broomfield,* 242 Ark. 355, 413 S.W.2d 657 (1967). The failure of either the appellant or his attorney to testify gives rise to the presumption that the testimony would have been against appellant's interests. *Starns* v. *Andre,* supra. While contending that the authority of the attorney was not

established and yet offering no explanation, the appellant paradoxically contended the pleadings filed by the same attorney were valid. The trial judge's finding that ostensible circumstances were sufficient to prove appointment to receive service of summons is not clearly erroneous, therefore we affirm. ARCP 52.

In no pleading has the appellant asserted the present claim that service of process was insufficient. The trial judge, rather than holding the authority was proven, could well have held the present argument was waived because ARCP 12 (h) provides:

> (h) Waiver or Preservation of Certain Defenses.
> (1) *A defense of* lack of jurisdiction over the person, improper venue, insufficiency of process, *insufficiency of service of process,* or pendency of another action between the same parties arising out of the same transaction or occurrence *is waived* (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) *if it is neither made by motion* under this rule *nor included in a responsive pleading* or by an amendment thereof permitted by Rule 15 (a) to be made as a matter of course. [Emphasis supplied.]

The standing of the counterclaim was dependent upon the timely filing of an answer. ARCP 12 (b). See *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S.W.2d 795 (1964); *Kirkendoll* v. *Hogan,* 267 Ark. 1083, 593 S.W.2d 498 (Ark. App. 1980).

Once the trial court determined that the appellant's answer was not timely filed, the only question remaining was whether excusable neglect, unavoidable casualty or other just cause would permit the late filing of an answer. ARCP 6 (b). The appellant neither pleaded nor proved such plight.

The appellant alternatively contends that Article II, § 13 of the Constitution of Arkansas provides for due process for any defense asserted in a civil case and "fundamental standards of fairness and justice" give him the "right to enter

the lawsuit on April 2, 1981, by filing his answer." While there is no apparent merit in the argument, we do not reach it because it was not raised below. "We have held many times that the trial court must be presented with a constitutional issue before we will consider it on appeal." *Wilson* v. *Wilson,* 270 Ark. 485, 606 S.W.2d 56 (1980); but see *Matthews* v. *Bailey,* 198 Ark. 830, 131 S.W.2d 425 (1939); *Howell* v. *Howell,* 213 Ark. 298, 208 S.W.2d 22 (1948).

Affirmed.

Chester Earl RHODES *v.* STATE of Arkansas

CR 81-99 634 S.W.2d 107

Supreme Court of Arkansas
Opinion delivered May 24, 1982
[Rehearing denied June 28, 1982.*]

*ADKISSON, C.J., would grant rehearing to affirm on merits. HICKMAN and HAYS, JJ., would grant rehearing.

William L. Bost, Jr., Joan Hartman, and *Terry L. Foreman,* for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant Chester Earl Rhodes and Juanita Carr were charged with capital murder in the April 21, 1980 robbery and murder of Roland Kelley in Fayetteville in violation of Ark. Stat. Ann. § 41-1501 (Repl. 1977). Juanita Carr pleaded guilty to first degree murder, received a twenty-five year sentence and testified against the appellant. The first trial ended in a mistrial but the second trial resulted in a conviction with imposition of the death penalty.

The evidence established that Carr, then a 17-year-old prostitute, went to Roland Kelley's house in late afternoon and engaged in sexual relations. Kelley did not pay and she returned with appellant later that evening to collect from Kelley. Several witnesses saw a black couple walking toward the Kelley house and later saw a black couple leave by way of the back porch. Juanita Carr and appellant are both black. One witness, Beverly Kelley, positively identified appellant as the man she saw with Juanita Carr as the two of them walked toward, and later away from, the victim's house. Shortly after the couple left the Kelley house, he was found beaten to death. The victim's wallet and approximately $65 were missing. The wallet was later found in a lot where Juanita Carr stated she had thrown it. Juanita Carr testified that appellant had beaten the victim to death with a board which was found where she stated appellant had thrown it.

We reverse the conviction and remand the case for a new trial because of prejudicial error. That point and those which, though not error, are likely to confront the trial court upon retrial are discussed in this opinion.

Juanita Carr, the accomplice in the capital felony murder, was the direct evidentiary link between the appellant, the murder and the robbery. Her credibility was a key to the state's case and it was crucial to the appellant's case that

he be allowed to conduct as full an impeachment of the witness' credibility as the rules of evidence allow. The trial court granted the state's threshold motion and ruled that the appellant could not cross-examine Juanita Carr about previous incidents of shoplifting. The court ruled the appellant could only inquire about felony convictions within the past ten years. The appellant's attorney asserted his good faith basis for asking the question and made his proffer by stating "she has pursued . . . we know she has pursued a course of conduct over six years involving . . . thefts and devious activities, and the jury in evaluating her credibility should be made aware that she is a devious type of person." Appellant contends that the trial court erred in improperly limiting his cross-examination under Unif. Rules of Evid. 608 (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979). Because of our prior case law we agree and reverse.

Rule 608 (b) provides that "[s]pecific instances of the conduct of a witness . . . if probative of truthfulness or untruthfulness" may be inquired into on cross-examination in the discretion of the trial court. Here the instance of conduct sought to be inquired into was shoplifting. In *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979), we held that a cross-examiner, pursuant to 608 (b), may ask a witness about prior bad acts if that prior bad conduct has a bearing on the witness' character for dishonesty. We stated that 608 (b) allowed cross-examination about prior bad acts involving theft:

> For example, murder, manslaughter or assault do not *per se* relate to dishonesty. Burglary and breaking and entering would not be such misconduct unless the crime involved the element of theft. We believe that theft, as it is defined in the Arkansas Criminal Code, involves dishonesty.

Shoplifting is a form of theft and according to our language in *Gustafson,* supra, the cross-examination should have been allowed. Careful examination of the transcript reveals that appellant's trial attorney relied upon our *Gustafson* ruling in the preparation of his case. Juanita Carr's credibility was a key issue and under our prior ruling the jury

should have heard cross-examination on this issue. Because we cannot state that the appellant did not suffer prejudice as a result of the ruling we must reverse.

We have devoted much of our time in conference to the interpretation of Rules 608 (b) and 609. These rules deal with attacking or supporting the credibility of a witness by questioning about specific instances of conduct. The rules bar evidence of specific instances of conduct of a witness for the purpose of attacking or supporting credibility with two exceptions:

> (1) Specific instances are provable when they have resulted in criminal convictions and meet all of the requirements set out in Rule 609.
>
> (2) Specific instances in which there has been no criminal conviction may be inquired into on cross-examination of the principal witness, or of a witness giving an opinion of a principal's character for truthfulness, but the cross-examiner may not introduce extrinsic proof of the witness' misbehavior if the witness denies the event. Rule 608 (b).

We are satisfied that our *Gustafson,* supra, interpretation of Rule 608 (b) is too broad and we prospectively modify our interpretation of the rule to limit the inquiry on cross-examination to specific instances of misconduct clearly probative of truthfulness or untruthfulness as distinguished from conduct probative of dishonesty. McCormick views misconduct, "such as false swearing, fraud and swindling" as relevant to truthfulness. McCormick, *Evidence* § 42 at 87 (1954). Weinstein states "Rule 608 (b)) authorizes inquiry into specific instances of misconduct on cross-examination but requires that they must be 'clearly probative of truthfulness or untruthfulness,'" and gives the following illuminating footnote:

> *United States* v. *Fortes,* 619 F.2d 108 (1st Cir. 1980) (no abuse of discretion in trial court finding that sale of cocaine was not probative of truthfulness or untruthfulness; court reserved decision on whether a drug

transaction might ever be considered probative of a witness' veracity; though questions which court disallowed about witness' truthfulness in responding to investigators probing the incident surrounding his discharge as a police officer could well be probative of truthfulness and broad cross-examination of principal witness should be allowed when credibility of witness is central issue, no error where jury had been presented with much other evidence indicating witness' unreliable character and questionable trustworthiness); *United States* v. *Whitehead,* 618 F.2d 523 (4th Cir. 1980) (defendant who is lawyer testifying in his own behalf may be cross-examined about suspension from bar pursuant to Rule 608); *United States* v. *Cole,* 617 F.2d 151 (5th Cir. 1980) (cross-examination proper concerning submission to former employer of a false excuse for being absent from work); *United States* v. *Rabinowitz,* 578 F.2d 910 (2nd Cir. 1978) (evidence of witness' prior acts of sodomy on young children and consequent psychiatric treatment had too tenuous a bearing on credibility for court to find that trial judge had abused discretion in failing to admit; acts had no relevance to bias on the theory that witness needed to curry favor with DEA since more than five years had elapsed and no charges were pending); *United States* v. *Hastings,* 577 F.2d 38 (8th Cir. 1978) (drug transactions do not relate to truthfulness, citing Treatise); *United States* v. *Crippen,* 570 F.2d 535 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 837 (1980) (inquiry as to whether character witness knew that defendant's firm, an automobile agency, had routinely turned back odometers; citing Treatise); *United States* v. *Young,* 567 F.2d 799, 803 (8th Cir. 1977), *cert. denied,* 434 U.S. 1079, 98 S. Ct. 1273, 55 L. Ed. 2d 786 (1978) (trial court properly refused to allow defendant to impeach prosecution witness by cross-examining her concerning her alleged offer to pay $10,000 to have her former husband killed; proposed question was not relevant to veracity and honesty and would have been highly prejudicial, citing Treatise); *United States* v. *McClintic,* 570 F.2d 685, 690-691 (8th Cir. 1978) (cross-examination about attempted swindle proper); *Lewis* v. *Baker,* 526 F.2d 470

(2d Cir. 1975) (in suit to recover for injuries allegedly incurred while in railroad's employ, court properly admitted employment application on which plaintiff falsely stated he had not received psychiatric treatment within past five years; evidence directly relevant to party's capacity for truth-telling, citing Rule 608); *United States* v. *Byrne,* 422 F.Supp. 147, 166 (E.D. Pa. 1976), *modified,* 560 F.2d 601 (3d Cir. 1977), *cert. denied,* 434 U.S. 1045, 98 S. Ct. 890, 54 L. Ed. 2d 796 (1978) (court refused to allow cross-examination as to whether prosecution witness had issued some checks which bounced; court found the matter was not probative of truthfulness since checks often bounce where no criminal intent is involved).

Weinstein, Evidence § 608 [05] p. 608-32.

Weinstein also states at p. 608-34:

> Since Rule 608 (b) is intended to be restrictive — and was amended to ensure that it would be restrictively interpreted by trial courts — the inquiry on cross-examination should be limited to these specific modes of conduct which are generally agreed to indicate a lack of truthfulness. The rule should not be broadened to allow questions about behavior which indicates "a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness." Such an approach paves the way to an exception which will swallow the rule. It is but a small step from there to the hypothesis that all bad people are liars, an unverifiable conclusion which runs counter to the doctrine that everyone is innocent of the particular crime charged until proven guilty.

Thus, in the future with the same set of facts before us, we would hold as stated in *United States* v. *Ortega,* 561 F.2d 803 (9th Cir. 1977) that while an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness,

and cross-examination would not be allowed on specific acts of shoplifting for which there was no conviction.

The policy reasons for our prospective modification are threefold: (1) a defendant stands the possibility of conviction by reputation for unsavory but unrelated acts which have no real bearing on veracity, (2) a basic aim of Rules 608 and 609 is to offer inducements to a defendant to take the stand. Our *Gustafson* interpretation thwarts this objective, and (3) we desire to maintain an interpretation of the Uniform Rules that is reasonably consistent with other states as well as with the Federal Rules of Evidence. No other jurisdiction has interpreted the Uniform Rules or Federal Rules to allow cross-examination on specific acts of shoplifting.

The prospective application of this rule is to commence with trials had on or after the date this opinion becomes final. However, the prospective ruling will not apply to this case because it is now the law of the case that the evidence is admissible.

Appellant contends that the state's corroborating evidence, independent from that of accomplice Juanita Carr, is insufficient as a matter of law and therefore the case should be reversed and dismissed. Where the state relies on testimony from an accomplice to support a conviction, that testimony must be corroborated by other evidence which tends to connect the accused with the commission of the offense. Ark. Stat. Ann. § 43-2116 (Repl. 1977). It is unnecessary that the evidence be sufficient to sustain the conviction but the evidence must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973). This court reviews the sufficiency of the evidence by the test of whether the verdict of guilt is supported by substantial evidence, which means whether the jury could have reached its verdict without resort to speculation and conjecture. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). Where circumstantial evidence is utilized, all facets of the evidence can be considered to constitute a chain sufficient to present a question for the resolution by the jury as to the adequacy of

the corroboration. *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202, cert. den. 429 U.S. 846 (1976). The court does not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Cassell* v. *State,* supra.

On appellate review of the sufficiency of the evidence, it is necessary to ascertain only that evidence favorable to the appellee and likewise permissible to consider the testimony that tends to support the verdict of guilt. *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1970).

The evidence, when viewed in the light most favorable to appellee, constituted a chain sufficient to corroborate the accomplice's testimony. Carol Fortner and Carl Matthew Jenkins testified that they met Juanita Carr and appellant at the time and place stated by Carr. Julia Kelley testified that she saw a black couple go in the back door of the victim's house and come out running twenty minutes later. Beverly Kelley identified the appellant as the man who was with Juanita Carr going toward and away from the victim's house. This amounts to substantial evidence to corroborate the testimony of accomplice Juanita Carr and we decline, as a matter of law, to reverse and dismiss on this point.

The same photographs are likely to be introduced at a new trial. We find no error in their admission for they depict the nature, extent and location of the wounds and are relevant to the issue of intent, state of mind and corroboration of the manner of beating. *Linder* v. *State,* 273 Ark. 470, 620 S.W.2d 944 (1981).

The Attorney General has filed a motion for an award of costs pursuant to Rule 9 (e) (1). Ark. Stat. Ann. Vol. 3A (Repl. 1979). Our rule authorizes reimbursement to an appellee but we order such allowances only where there has been a clear-cut and demonstrable failure by the appellant to properly abstract matters to a fair and full consideration of the issues raised on direct appeal. *Arkota Industries, Inc.* v. *Naekel,* 274 Ark. 173, 623 S.W.2d 194 (1981).

There was such a clear failure in this case and the state is awarded attorney's fees in the amount of $550 plus printing

costs for the preparation of the supplemental abstract.

We do not address the other issues for a number of reasons. Some motions were not timely made, on other points an objection was not made, on other points there is no record because the argument is made here for the first time and some of the issues are moot because the case is remanded.

Reversed and remanded.

HICKMAN and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting in part. The majority in its opinion concedes that the defendant was entitled to cross-examine the State's main witness about her past misconduct which involved thefts over a period of six years. We do not know the exact nature of the activity because the trial judge concluded that unless there was actually a conviction a witness could not be questioned about misconduct. Of course, Ark. Stat. Ann. § 28-1001, Rule 608 (b) (Repl. 1979) clearly authorizes such questions under some circumstances.

When we first considered Rule 608 (b) en banc in *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979), we recognized that the rule permitting impeachment of a witness for prior misconduct had been restricted. That misconduct must relate to truthfulness or untruthfulness. We concluded that theft, as defined by the Arkansas Criminal Code, involved dishonesty and that in our judgment related to veracity. We relied on WEINSTEIN'S EVIDENCE, 608 [5] (1981), which related in detail the various authorities that had also concluded various types of similar dishonest acts had a bearing on veracity. That was our prerogative. We confirmed *Gustafson* in *Divanovich* v. *State,* 271 Ark. 104, 607 S.W.2d 383 (1980).

The majority opinion expresses dissatisfaction with our conclusion in *Gustafson* and are overruling it *sua sponte* prospectively. If I understand it they are holding that theft has no bearing on the character trait of honesty and

such misconduct may not be used to impeach a witness or defendant. The opinion states:

> Thus, in the future with the same set of facts before us, we would hold that while an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness, and cross-examination would not be allowed on specific acts of shoplifting for which there was no conviction.

There is, of course, no such crime as "shoplifting" in Arkansas. That is simply a nice word for a person who steals from a retail store, just as embezzlement is a fancy word for theft by a white collar worker. Our criminal code simply lumps all thefts together, categorizing thefts by the amount stolen, the way it was obtained, and perhaps the kind of property taken. *See* Ark. Stat. Ann. § 41-2203 (Repl. 1977). The distinction between the categories lies in the punishment.

The majority justifies its decision on the basis that no other jurisdiction has made such an interpretation of Rule 608 (b) like ours in *Gustafson*. To buttress the statement the majority opinion quotes parts of two pages from WEINSTEIN'S EVIDENCE par. 608 [5] (1981). The most lengthy quote is from a footnote which is not at all illuminating, as claimed, because *Gustafson* is not inconsistent with any of the decisions cited in the footnote.

The conclusory quote from WEINSTEIN'S EVIDENCE reads:

> Since Rule 608 (b) is intended to be restrictive — and was amended to ensure that it would be restrictively interpreted by trial courts — the inquiry on cross-examination should be limited to these specific modes of conduct which are generally agreed to indicate a lack of truthfulness. The rule should not be broadened to allow questions about behavior which indicates 'a disregard for the rights of others which might reasonably be expected to express itself in giving

> false testimony whenever it would be to the advantage of the witness.' Such an approach paves the way to an exception which will swallow the rule. It is but a small step from there to the hypothesis that all bad people are liars, an unverifiable conclusion which runs counter to the doctrine that everyone is innocent of the particular crime charged until proven guilty.

The majority opinion leaves out of its extensive quotation several statements from WEINSTEIN which were the basis of our decision in *Gustafson.* The majority quotes Professor McCormick's 1954 work on evidence where he stated that misconduct relevant to truthfulness would include such acts as "false swearing, fraud and swindling." The majority does not quote from WIGMORE which reads "robbery, assault and adultery do not 'directly indicate an impairment of the trait of veracity' while fraud, forgery and perjury do." 3 WIGMORE ON EVIDENCE § 982 (1940). In the original text Wigmore wrote:

> Now there is no doubt that conduct is relevant to character. An assault is relevant to indicate a violent character; a fraud is relevant to indicate a dishonest character.

Wigmore goes on to discuss two approaches courts have made to the problem:

> (1) one is that any kind of misconduct, as indicating a bad character is admissible; thus, a robbery or an assault or an adultery may be used although no others directly indicates an impairment of the trait of veracity.
>
> (2) the other attitude is entirely logical, and admits only such misconduct as indicates a lack of veracity, fraud, forgery, perjury and the like.

The majority opinion does not refer to WEINSTEIN'S quote of Dean Ladd's list on offenses which related to veracity which reads as follows:

> The group of offenses including forgery, uttering

> forged instruments, bribery, suppression of evidence, false pretenses, cheating, embezzlement, roughly disclose a type of dishonesty and unreliability characteristic of those lacking veracity.

Nor is the following paragraph referred to:

> In the federal courts, the most common kinds of convictions would include forgery, income tax frauds including bribery, bankruptcy fraud, making false statements of a variety of kinds such as those in obtaining guns or permits and perjury and false swearing. The usual variety of state crimes include forgery, bribery, false pretenses, cheating, embezzlement, swindling, false advertising, frauds on creditors, issuing bad checks or using another's credit card without authority, criminal impersonation and unlawfully concealing a will. . . . WEINSTEIN'S EVIDENCE par. 608 [5].

Is the majority limiting its holding to the short statement from McCORMICK that such misconduct only includes "false swearing, fraud and swindling"? Does a swindler tend to lie and a thief not tend to lie? Or is the majority holding that all thievery is not relevant as evidence when it makes the broad statement, ". . . we would hold that while an absence of respect for the property rights of others is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness, . . . " Evidently so. Dean Ladd in 89 U. Pa. L. Rev. 194 (1940), stated much better than I can why a jury should know a witness is a thief:

> Any classification of crimes on the basis of their relationship to credibility is difficult. Personal crimes of murder, assault, and mayhem, show a vicious disposition but not necessarily a dishonest one. *On the other hand robbery, larceny and burglary, while not showing a propensity to falsify, do dislose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness.* If the witness had no compunctions against stealing

> another's property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony. Furthermore, such criminal acts, although evidenced by a single conviction, may represent such a marked breach from sanctioned conduct that it affords a reasonable basis of future prediction upon credibility. It is quite possible that with each other the robber class hold to some code of honor, but it is unlikely that it would express itself in court proceedings if there were a motive to falsify. *The group of offenses including forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, embezzlement, roughly disclose a type of dishonest and unreliability characteristic of those lacking veracity. Not only would witnesses with such records tend to be conscience free in giving false testimony, but these crimes, being of the enlarged crimen falsi class might indicate the propensity to gain by false means and thus to falsify.* Perjury has been regarded a sufficient indication of the probability of future perjury that some legislatures in removing incompetency of the common law retained it as to perjury. Whether perjury in one case would be a stronger indication that the witness would perjure in another than the commission of other crimes in the crimen falsi group is questionable. [Emphasis added.]

After careful deliberation we decided in *Gustafson* that there was a relationship between stealing and a lack of veracity. We stated that burglary and robbery would not bear on veracity unless a theft was involved. *See People* v. *Burdine,* 99 Cal. 3rd 442, 160 Cal. Rep. 375 (1979). A jury should know if a witness or a defendant has stolen before. Evidently the majority does not believe thieves tend to lie.

Trial lawyers and judges know that often a case rests upon the statement of only one witness. Sometimes that is a witness for the State, sometimes the defendant. Our rules exist to provide the jury or judge with all the relevant information available to decide if a witness or defendant is telling the truth. The majority is denying that tool to defense

attorneys, and ultimately denying us all a valuable tool in the search for the truth.

I find no good cause to overrule *Gustafson* which is a definative decision and replace it with a decision that leaves too many questions unanswered. Neither party asked us to overrule *Gustafson;* we have not had the benefit of argument on this issue and I am convinced the action is not only precipitous but it is wrong.

HAYS, J., joins in this dissent.

Tish JENNINGS *v.* STATE of Arkansas

CR 82-23 633 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Robert S. Blatt, for petitioner.

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

ROBERT H. DUDLEY, Justice. Petitioner seeks to prohibit David Partain, Judge, from holding a trial on charges pending against her. She contends that she has not been afforded a speedy trial. On August 28, 1980, petitioner was arrested and charged with having committed a felony on June 3, 1980. She has remained lawfully at liberty on bond since her arrest. The trial judge set her trial for December 17, 1981, which was within 18 months of the date of her arrest. Prior to the trial she moved for dismissal for lack of speedy trial. Her motion was denied by the trial court. She now seeks a writ of prohibition in this court. We decline to issue the writ.

Petitioner contends that under Ark. Stat. Ann. § 43-1709 (Repl. 1977), she was entitled to be tried within three terms of court and that three terms have passed without trial. The statute cited by petitioner has been superseded by A. R. Cr. P. Article VIII, Speedy Trial, Vol. 4A (Repl. 1977 and Supp. 1981). *Matthews* v. *State,* 268 Ark. 484, 598 S.W.2d 58 (1980).

Petitioner takes cognizance of the *Matthews* decision, supra, but contends that the superseded three-term statute and the 18-month speedy trial rule, A. R. Cr. P. 28.1 (c) (Supp. 1981) are inconsistent. She argues that, as a result of the inconsistency, Ark. Stat. Ann. § 22-242 (Supp. 1981), which authorized this court to prescribe rules of criminal procedure, is an unlawful delegation of legislative authority. In *Miller* v. *State,* 262 Ark. 223, 555 S.W.2d 563 (1977), we addressed this issue and held this not to be an unlawful delegation of legislative authority. We noted the enabling act "merely recognizes and is harmonious with the court's inherent powers rather than conferring an express power." Certainly, if we have the inherent power to make the Rules of Criminal Procedure, it follows that we have the inherent power to amend those rules.

Petitioner next contends that the crime occurred on June 3, 1980, and that our speedy trial rule in effect at that

time must govern. The rule in effect on June 3, 1980, provided for a trial within three terms, A. R. Cr. P. 28.1 (c) (Repl. 1977), while the rule in effect at the time of trial, A. R. Cr. P. 28.1 (c) (Supp. 1981) provides for a trial within 18 months. If speedy trial rules were substantive law the petitioner would be correct for a trial is controlled by the substantive law in effect on the date of the commission of the crime. Art. 2, § 17, Constitution of Arkansas; *Taylor* v. *Governor,* 1 Ark. 21 (1837). However, speedy trial rules are not substantive law, they are procedural law. As stated in *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981):

> Alternatively, Cassell argues in this court that our former statute requiring an incarcerated defendant to be tried within two terms of court laid down a rule of substantive law which this court could not supersede by a rule of procedure permitting a longer delay. Ark. Stat. Ann. § 43-1708 (Repl. 1977). That statute, however, was not substantive law merely because its violation might have a substantive effect. That is true of many procedural statutes, such as a statute of limitations or a statute requiring a defendant to file an answer within 20 days after the service of summons. In criminal matters substantive law declares what acts are crimes and prescribes the punishment; procedural law provides or regulates the steps by which one who violates a criminal statute is punished. *Roberts* v. *Love,* 231 Ark. 886, 333 S.W.2d 897 (1960). Under that distinction a speedy trial statute is procedural.

Because the rule is procedural it can be validly applied to all criminal trials commencing on or after July 1, 1980.

Petitioner next contends A. R. Cr. P. 28.1 (c) (Supp. 1981) is unconstitutional because it violates the right to a speedy trial as provided in both the Sixth Amendment of the United States Constitution and Article II, § 10 of the Arkansas Constitution. Petitioner cites no federal or state case for the proposition that an 18-month speedy trial rule for one at liberty on bond is prejudicial. The 18-month period is reasonable and is consistent with the constitutional standards set out in *Barker* v. *Wingo,* 407 U.S. 514 (1972).

Petition denied.

James VANDERPOOL *v.* STATE of Arkansas

CR 82-31 633 S.W.2d 374

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Thomas A. Martin, Jr., for petitioner.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson,* Asst. Atty. Gen., for respondent.

ROBERT H. DUDLEY, Justice. The issue in this case is whether an affidavit for a search warrant must contain a statement that the facts alleged are based either on personal observation or on inferences deduced by the affiant or on hearsay. The affidavit is the sole basis upon which the search warrant was issued and our ruling is limited to that fact situation. The trial court held that the affiant need not assert

the manner of obtaining the stated information and allowed into evidence the contraband seized under authority of the search warrant. Petitioner was then convicted of manufacturing a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981). The Court of Appeals affirmed in *Vanderpool* v. *State,* 4 Ark. App. 76, 628 S.W.2d 576 (1982). We granted certiorari to review an apparent conflict in our cases. Rule 29 (1) (c).

It is the constitutionally required function of the judicial officer before whom search warrant proceedings are held to make an independent and neutral determination, based on the facts proven, of the existence of probable cause for the search. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980). The only proof given to the issuing magistrate in this case was the affidavit and it does not state whether the affiant observed the contraband or whether he obtained the information from a third person.

In *Bailey* v. *State,* 246 Ark. 362 at 365, 438 S.W.2d 321 (1969), we stated:

> If an officer swears there is contraband at a particular address there are three possibilities for the basis of his conclusion:
>
> (1) The officer has seen the illegal object or objects. In that event his affidavit should assert personal observation; or,
>
> (2) The officer "observed or perceived facts from which the presence of the equipment may reasonably be inferred. In that event the affidavit must recite the perceived facts so that the magistrate may judge the existence of probable cause"; or,
>
> (3) The officer has obtained the information from someone else, for example, an informer. In that event the warrant should not issue unless good cause is shown in the affidavit (or supporting testimony) for crediting that hearsay.

That reasoning is still perfectly valid. A magistrate must determine the reliability of the assertion in the affidavit before deciding the existence of probable cause. In order to weigh reliability the magistrate must know whether the assertion is from personal observation, perceived facts or hearsay. Thus, the basis of the assertion must be stated in the affidavit in those cases where the sole evidence is the affidavit. We reverse the Court of Appeals on this issue and remand the case for a new trial.

If a magistrate determines that an affidavit is insufficient the defect can easily be cured, if the affiant has the required good cause, by putting the affiant under oath and allowing him to testify or else allowing him to execute a supplemental affidavit under oath.

The Court of Appeals, in reaching the opposite result, relied on a sentence in our case of *Schneider* v. *State,* 269 Ark. 245, at 252, 599 S.W.2d 730 (1980) which states that any statement of fact, made as such, must be taken to be within the personal knowledge of the affiant. In *Schneider,* supra, the affiant, a detective, stated that he had personal knowledge of the illegal drug traffic in the area and that he maintained a file upon informants and their credibility. The affiant then recited:

> On February 3, 1979 (today) I spoke with William Rhodes and Phillip Bruce. Attached is a statement signed by Rhodes and which he stated to Prosecuting Attorney Ron Fields under oath that all the facts contained therein were true. (See attached statement Appendix A). Also on this date Phillip Bruce called Schneider at 782-2459 and she stated that she had a quantity of marijuana that she would sell to him at 6:30 P.M. this date. This call was recorded and the tape is attached as appendix B.
>
> Bruce stated that the buy was to take place at her house (1800 S. 16th, Ft. Smith).

The magistrate listened to the recorded telephone conversation before issuing the search warrant. In affirming

the case based on that factual situation we held that any statement of fact, made as such in the affidavit as distinguished from the exhibits attached to the affidavit, must be taken to be within the knowledge of the affiant. The sentence in *Schneider,* supra, should be read in its proper context. However, to prevent misunderstanding, the sentence is disapproved to the extent it might conflict with today's opinion.

The evidence introduced in this case was seized as the result of searches of a cabin and of an open field. The search of the open field was permissible without a warrant, *Ford* v. *State,* 264 Ark. 141, 569 S.W.2d 105 (1978), but the search of the cabin required a warrant and the warrant, in turn, required a valid affidavit.

Because we reverse and remand for a new trial on the issue of failure to state personal observation, we do not reach the other points decided by the Court of Appeals.

Reversed and remanded.

Stanley DICKSON et al *v.* E. G. RENFRO et al

81-200 634 S.W.2d 104

Supreme Court of Arkansas
Opinion delivered May 24, 1982
[Rehearing denied June 28, 1982.]

Keith, Clegg & Eckert, for appellants.

Woodward, Kinard & Epley, Ltd., and *Robert R. Wright,* for appellees.

STEPHEN P. SAWYER, Special Justice. This is the second appeal involving the within case, the first being *Dickson* v. *Renfro,* 263 Ark. 718, 569 S.W.2d 66 (1978). The facts are set out in some detail in that opinion, but may be summarized as follows:

The action involves the claim of the six appellants to an undivided two-thirds interest in a seventy-six acre tract of land in Columbia County on which a producing oil and gas well was completed in the year 1976. The action was brought in the same year by the appellants to protect their interest in royalties derived from the well. The royalties are being held by the clerk of the lower court pending the outcome of this litigation.

The appellants are the children of Carrie Dickson and Omie Lecroy, both deceased. They derive their interest for the subject property from a 1920 Warranty Deed in which Carrie Dickson and Omie Lecroy conveyed their interest to Guy Lecroy, their brother, and his wife Mattie. The deed contained the following language in the granting clause:

> "... do hereby grant, bargain, sell and convey unto the said Gus Lecroy and Mattie Lecroy, and unto their

heirs and assigns, forever, if Gus and Mattie have no heirs then to the heirs of Carrie Dickson and Omie Lecroy, the following lands . . . "

The appellees, in the main, derive their interest from Gus and Mattie Lecroy. Gus died in 1971, and Mattie died in 1979, after the first appeal.

The Chancellor did not construe the 1920 deed in this original decision because he found the appellants' claim to be barred by a 1920 foreclosure suit and by limitations and laches. On the first appeal, this court in a four to three decision, held that the purchase of this property by Gus Lecroy within ten months after one W. S. McKissack, the mortgagee in the 1928 action, obtained a commissioner's deed to it amounted to a redemption in favor of his sisters and their "heirs" and, in effect, erased the foreclosure, leaving the parties in their original position. This court then went on to construe the 1920 deed stating that the word "heirs" plainly meant children. Gus and Mattie had no children, although Mattie curiously adopted one of the appellees after the filing of the appellants' complaint. This court held that the adopted daughter who was an adult did not qualify as an "heir" within the intent of the 1920 deed. The court did not determine whether or not the appellants' estate was a contingent remainder or an executory interest but specifically stated that it did not become a possessory estate until at Gus's death in 1972, if not until Mattie's.

Since the original action was presented on motions for summary judgment filed by both sides, the court remanded the matter for further proceedings in the following language:

> "The defendant's motion for summary judgment asserts no facts suggesting that any basis for a finding of limitations or laches arose after Gus's death in 1972. That question therefore remains open, for the appellants are mistaken in arguing that when both sides file motions for summary judgment they impliedly agree that there is no issue of fact in the case. *Wood* v. *Lathrop,* 249 Ark. 376, 459 S.W.2d 808 (1970). This

opinion merely disposes of issues of law raised by the trial court's action in granting defendant's motion for summary judgment. The court expresses no opinion upon issues of fact that may be raised by either party at a trial on the merits."

After remand and trial, the chancellor reconstrued the 1920 deed holding that it conveyed a determinable fee to Gus and Mattie Lecroy as tenants by the entirety with a possibility of reverter as opposed to a remainder or executory interest and further held, in a letter opinion, that the holders of a possibility of reverter have a cause of action when it becomes reasonably probable that their interest will become possessory. The court then held that the statute of limitation began to run in 1963 or 1964 when Gus and Mattie conveyed the property to third parties, when Gus and Mattie were seventy (70) years of age or older and had no children, and thus appellants' claim was barred by adverse possession and laches. Accordingly, all oil royalties were awarded to appellees.

On this appeal, the appellants contend that the issues decided by the chancellor were treated in this court's original opinion and the doctrine of "law of the case" applies. In this regard, the chancellor, after remand, made a finding that only two matters previously decided by this court constituted "law of the case", to-wit:

(1) When Gus Lecroy purchased from McKissack his purchase amounted to a redemption.

(2) In the 1920 deed, the words "heirs" in the phrase; "if Gus and Mattie have no heirs" means children.

It is the position of this court that the issue of the construction of deed was decided in the previous appeal and that the doctrine of law of the case applies. See *St. Louis Southwestern Railway Co.* v. *Jackson,* 246 Ark. 268, 438 S.W.2d 41 (1969). As indicated above, we previously held that any interest of Carrie and Omie did not become a possessory estate until Gus's death, if not until Mattie's. Even if the interest of appellants was only a possibility of

reverter, appellees cite no case, nor did the chancellor, which would indicate that they would have a cause of action for possession when it became "reasonably probable that their interest would become possessory". To the contrary, it has been held that the holder of possibility of reverter after a determinable fee has no estate in the property. See 28 Am. Jur. 2d, Estates, Sec. 27. It has been held that the holders of the possibility of reverter have no such present estate or ownership as would entitle them to protect their rights by proceeding under a statute dealing with situations where title and ownership of land are so uncertain as to render them defective and preclude sale or lease. See 28 Am. Jur. 2d, Estates, Sec. 185.

In any event, this court holds that the appellants here would have no possessory right and could not have asserted any cause of action for possession until at least the year 1972, when Gus died.

The appellees, on remand, called numerous witnesses and introduced various conveyances by Gus and Mattie and their successors in title since 1929. The chancellor held that Gus executed many acts of absolute ownership of the property, which were adverse to his sisters' interest, for more than thirty years and that Carrie and Omie had at least constructive notice of these acts. The chancellor noted that Gus conveyed, by warranty deed, forty acres to the Eldridges in 1963 and thirty six acres to the Renfros in 1964, and, as previously stated, held that the statute of limitations began to run as of the date of these deeds. However, because of the foregoing decision, these facts become irrelevant because the statute of limitations could not begin to run until Gus's death in 1972. This action was originally filed in 1976, long before the running of the statute of limitations which would bring into play the doctrine of adverse possession. In addition, there is nothing in the record that would indicate any of the appellants were guilty of any actions which could be construed as laches since Gus's death, there being no change in the parties' status after that time. Accordingly, the decision of the chancellor is herein overruled with the instruction to reinstate the interest of the appellants in the

land herein involved as heirs of Carrie Dickson and Omie Lecroy.

There remains the question of disposition of the oil royalties being held in this matter.

The appellants argue that if their estate became possessory in 1972 when Gus Lecroy died then there is no question that they are entitled to all of the royalties from the oil production, which began in June, 1976. They contend that it is only if they were not entitled to possession until Mattie's death in 1979 that the issue comes into question. They point out that the courts have held that an owner of a life estate is entitled to only the income from the royalties themselves, the royalties being a substituted corpus which must be preserved for the owner of the future interest until it comes possessory.

Appellees, on the other hand, argue that the estate, if any, of the appellants' is that of an executory limitation after a determinable fee, citing Williams and Meyers *Oil and Gas Law*, Vol. 2, Sec. 515 in which it is stated that the owner of a defeasible fee interest may develop or lease land without joinder of the owner of any subsequent interest and without the necessity of an accounting.

Appellees counter with the argument that the court, in its previous appeal, held that it did not need to determine whether appellees' estate is a contingent remainder or executory interest, for in either case it did not become a possessory estate at least until Gus's death, if not Mattie's. The appellees also argue that it is irrelevant whether appellees' estate is characterized as a contingent remainder, executory interest or an executory limitation for, in any event, there is an inherent duty not to commit waste.

In the previous appeal, this court held that the "heirs" in the limitation in the involved deed meant the children of Gus and Mattie. Accordingly, it is this court's view that upon the death of Gus in 1972, the estate terminated, and appellants' interest became possessory. Under this view, it is

obvious that appellants are entitled to the entire royalty interest.

Even if we held that the estate did not become possessory until Mattie's death in 1979, it is our opinion that she had a duty not to commit waste, particularly under the circumstances presented in this case, where the appellees were aware at the time of the beginning of the production that Gus had died, and the owner of the present estate, Mattie, had no possible right to destroy the appellants' future interest in this property by having children with Gus. See, for example, 28 Am. Jur. 2d, Estates, Sec. 372 and Restatement, Property, Sec. 193.

Accordingly, it is this court's position that regardless of how appellants' interest is characterized, they would be entitled to all of the royalties produced.

This case is reversed and remanded with directions to enter an order consistent with the decision herein.

Reversed and remanded.

HOLT, J., not participating.

Janice ATTWOOD, Individually and as Mother and Next Friend of Richard Breck ATTWOOD *v.* The Estate of Richard Breckenridge ATTWOOD

81-177 633 S.W.2d 366

Supreme Court of Arkansas
Opinion delivered May 24, 1982

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

Coleman, Gantt, Ramsay & Cox, by: *Martin G. Gilbert,* for appellee.

JOHN W. BARRON, JR., Special Justice. Janice Attwood, individually and as mother and next friend of Richard Breck Attwood, brings this appeal contending that the court below erred in dismissing her complaint against the estate of Richard Breckenridge Attwood. The suit was dismissed

pursuant to Arkansas Rules of Civil Procedure, Rule 12 (b) (6) for failure to state facts upon which relief can be granted. The lower court found that the family immunity doctrine was a bar to the claim asserted in the complaint.

In her complaint, appellant pled that she and Richard Breckenridge Attwood were divorce some time prior to July 3, 1979 and that he had visitation rights with respect to their child, Richard Breck Attwood. Appellant further pled that on July 3, 1979, Richard Breckenridge Attwood became willfully and intentionally intoxicated and drove a vehicle while so intoxicated with the child as a passenger and also drove at a speed greatly in excess of the posted speed limit, thereby causing the vehicle to leave the roadway and overturn, killing himself and injuring the child, Richard Breck Attwood.

On appeal, appellant urges reversal on two grounds:

> (1) The family immunity doctrine violates the constitutional rights of unemancipated minors to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that it precludes minor children from suing their parents for injuries caused by the negligence of the parents;
>
> (2) The automobile accident in which Richard Breck Attwood was injured resulted not from the voluntary negligence of the father but from the father's willful, reckless and intentional actions and as such the family immunity doctrine is inapplicable.

As we have held many times that we do not rule on constitutional questions if the litigation can otherwise be resolved, we first consider the second of appellant's two points for reversal. *County of Searcy* v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968).

Appellee's motion to dismiss, filed pursuant to Arkansas Rules of Civil Procedure, Rule 12 (b) (6), is essentially the same as filing a demurrer before enactment of the new

rules. A demurrer admits any well pled fact. *Files* v. *Hill,* 268 Ark. 106, 594 S.W.2d 836 (1980); *L. A. Green Seed Company of Arkansas* v. *Williams,* 246 Ark. 463, 438 S.W.2d 717 (1969). We, therefore, assume for purposes of resolving the issues presented herein that the facts recited in the complaint are true.

This appeal again brings into focus the family immunity or parental immunity doctrine. This Court in *Rambo* v. *Rambo,* 195 Ark. 832, 114 S.W.2d 468 (1938), held that an unemancipated minor child could not sue a parent for an involuntary tort. The court reasoned that to permit such a suit would interfere with the parent's authority over the child and would, therefore, encourage disobedience. This in turn would interfere with the family harmony. When next called upon to rule on this doctrine, this Court refused to extend the doctrine to include an intentional tort committed by an adoptive father on his adopted son. *Brown* v. *Cole,* 198 Ark. 417, 129 S.W.2d 245 (1939). Recently, this Court was presented with the question of whether the family immunity doctrine should bar recovery by an unemancipated minor from one standing in loco parentis for injuries resulting from an unintentional tort. *Thomas* v. *Inmon,* 268 Ark. 221, 594 S.W.2d 853 (1980). In reaffirming the doctrine, this Court stated:

> "We are not persuaded by appellant's contention that the family immunity doctrine has become a legal anachronism. Nor do we believe that the policy considerations of family harmony and prevention of collusion and fraud are no longer valid. Although more than 40 years have elapsed since *Rambo* we still believe in the sanctity of the family unit. . . . "

This Court has stated its belief that it approves of the so-called family immunity doctrine because it promotes family harmony, preserves discipline and prevents fraud and collusion. It should be pointed out, however, that since *Leach* v. *Leach,* 227 Ark. 599, 300 S.W.2d 15 (1957) spouses have been permitted to sue each other for unintentional torts. In that case, this Court expressly rejected the argument that preservation of family harmony required the prohibition of

suits between spouses. It is interesting to note that the Arkansas Legislature has never seen fit to change the law permitting such suits. It is also noteworthy that brothers can sue sisters and adult or emancipated children can sue their parents. So perhaps more appropriately this should be called the parental immunity doctrine.

A review of cases in various jurisdictions around the country pertaining to the parental immunity doctrine reveals that there has been a change in the philosophy of this country and that the right of the individual to be free from injury is perhaps paramount in many instances to the reasons behind the parental immunity doctrine. *Rigdon* v. *Rigdon,* 465 S.W.2d 921 (Ky. 1970). This was stated in *Black* v. *Solmitz,* 409 A.2d 634 (Me. 1979) in the following manner:

> "The strong trend against across the board application of a rule of parental immunity in tort cases reflects a growing recognition that such a sweeping application results in excessive protection of the interests favored by the rule in derogation of the general principle that there should be no wrong without a remedy."

That such a trend has mushroomed is evidenced by the fact that thirteen states have now abrogated the doctrine at least insofar as motor vehicle accidents are concerned.[1] Other jurisdictions that have been confronted with the doctrine for the first time have refused to apply the doctrine to automobile negligence cases. *Wood* v. *Wood,* 135 Vt. 119, 370 A.2d 191 (1977); *Rupert* v. *Stienne,* 90 Nev. 397, 528 P.2d 1013 (1974); *Hebel* v. *Hebel,* 435 P.2d 8 (Alas. 1967). Some states have repudiated the doctrine in non automobile related cases. *Gibson* v. *Gibson,* 3 Cal. 3d 914, 479 P.2d 648

---

[1]*Lee* v. *Comer,* 224 S.E.2d 721 (W. Va. 1976); *Williams* v. *Williams,* 369 A.2d 669 (Del. 1976); *Sorensen* v. *Sorensen,* 369 Mass. 350, 339 N.E.2d 907 (1975); *Plumley* v. *Klein,* 388 Mich. 1, 199 N.W.2d 169 (1972); *Falco* v. *Pados,* 444 Pa. 372, 282 A.2d 351 (1971); *Rigdon* v. *Rigdon,* 465 S.W.2d 921 (Ky. 1971); *Smith* v. *Kauffman,* 212 Va. 181, 183 S.E.2d 190 (1971); *Streenz* v. *Streenz,* 106 Ariz. 86, 471 P.2d 282 (1970): *Gelbman* v. *Gelbman,* 23 N.Y.2d 434, 245 N.E.2d 192 (1969); *France* v. *APA Transport Corp.,* 56 N.J. 500, 267 A.2d 490 (1968); *Silesky* v. *Kelman,* 281 Minn. 431, 161 N.W.2d 631 (1968); *Nuelle* v. *Wells,* 154 N.W.2d 364 (N.D. 1967); *Briere* v. *Briere,* 107 N.H. 432, 224 A.2d 588 (1966).

(1971); *Peterson* v. *Honolulu,* 51 Haw. 484, 462 P.2d 1007 (1969). State legislatures in Connecticut, North Carolina and South Carolina have enacted statutes abrogating the doctrine in automobile negligence cases.[2] Recently the Restatement (Second) of Torts § 895 G (1979) adopted the following language:

> "(1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.
>
> (2) Repudiation of general tort immunity does not establish liability for an act or omission that because of the parent child relationship is otherwise privileged or is not tortious."

Over the years many exceptions have been made to the rule thereby eroding it further. For example, it does not apply to chidren of legal age or those who are already emancipated at the time of the tort. *Lancaster* v. *Lancaster,* 213 Miss. 536, 57 So.2d 302 (1952).[3] The doctrine is not applied to the unemancipated child who sues his parent for injury to his property or for adjudication of his property rights under a deed or will. *Signs* v. *Signs,* 156 Ohio St. 566, 103 N.E.2d 743 (1952). Another well recognized exception involves negligent and injurious acts by a father while acting in the course of his business or vocation. *Felderhoff* v. *Felderhoff,* 473 S.W.2d 928 (Tex. 1971); *Stevens* v. *Murphy,* 69 Wash. 2d 939, 421 P.2d 668 (1966); *Dunlap* v. *Dunlap,* 84 N.H. 352, 150 A. 905 (1930). Many states have recognized that a child may be permitted to sue the estate of the negligent parent if the parent died as a result of the same accident that injured the child on the basis that the reasons which may have justified barring the child's remedy against a living parent lose much of their force when the parent child relationship is terminated by death.[4] In *Rodebaugh* v. *Grand*

[2]Conn. Gen. Stat. Ann. § 52-572C (Supp. 1979); N.C. Gen. Stat. § 1-539.21 (Supp. 1977); S.C. Code 1976, Section 15-5-210.

[3]It would seem, however, that a suit by an adult child against a parent would be just as disruptive as one by a minor child.

[4]*Johnson* v. *Meyers,* 2 Ill. App. 3rd 844, 277 N.E.2d 778 (1972); *Thurman* v. *Etherton,* 459 S.W.2d 402 (Ky. 1970); *Dean* v. *Smith,* 106 N.H. 314, 211 A.2d 410 (1965); *Palcsey* v. *Tepper,* 71 N.J. Super. 294, 176 A.2d 818 (1962) (dictum); *Brennecke* v. *Kilpatrick,* 336 S.W.2d 68 (Mo. 1960).

Trunk W.R.R. Co., 4 Mich. App. 559, 145 N.W.2d 401 (1966), the Court elected to follow what it called the "Wisconsin" rule which permits children to recover damages for injuries resulting from acts outside the parental relationship, but yet not subject parents to legal action for ordinary and common failures in performance of parental duties. We feel that we should be aware of the present state of the law while deciding this case.

In addressing the issue presented herein, we assume the following allegations to be true. Appellant and the child's father were divorced and the father was exercising his visitation privilege. While so doing, he willfully and intentionally became intoxicated and drove his vehicle while so intoxicated with his child as a passenger and did drive at a speed greatly in excess of the speed limit and of what was prudent and thereby caused the vehicle to leave the roadway and overturn, causing his death and injury to the child. Certainly these allegations if true are tantamount to willful and wanton conduct. This brings us to the issue at hand. That is, should the parental immunity doctrine preclude a child from suing his parent for willful and wanton conduct? This Court in *Ellis* v. *Ferguson,* 238 Ark. 776, 385 S.W.2d 154 (1964) described such conduct as follows:

> "It is not necessary to prove the defendant deliberately intended to injure the person. It is enough if it is shown that indifferent to consequences the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff. *There is a constructive intention as to the consequences which entering into the willful, intentional act the law imputes to the offender* and in this way a charge which otherwise would be mere negligence becomes by reason of a reckless disregard or probable consequences a willful wrong." (emphasis added)

Willful and wanton conduct is also defined in AMI Civil 2d 401 as follows:

> " . . . that the person knew or reasonably should have

> known in the light of the surrounding circumstances that his conduct would naturally or probably result in injury and that he continued such conduct in reckless disregard of consequences."

The issue of whether the parental immunity doctrine should bar a suit by an unemancipated minor against a parent for a willful tort is one of first impression in Arkansas, but has been addressed in other jurisdictions. Every case we have found has made such conduct an exception to the parental immunity doctrine.[5] Thus, in *Hoffman, supra,* the court held that a parent who takes a child in an automobile with him and drives while he is intoxicated is temporarily abdicating his parental responsibility and, consequently, is not entitled to parental immunity which has as its purpose the encouragement of the performance of those responsibilities. In *Cowgill, supra,* the court made the following comments:

> "The question that confronts us is whether the father was acting in his capacity as a parent when he took the course which brought death . . . to his son. . . . Before solving the problem let us suppose that a father, while drunk, brutally beats his daughter or seizing a gun shoots her. Should we say that in acting in such a drunken manner, he was exercising a parental function or would it not be more in keeping with the enlightened views of the day to declare that his drunken action was outside the scope of his parental prerogatives. To hold that such drunken action is within the scope of parental authority would outlaw the child and close all courtrooms to her. . . . the mantle of parent nonliability was never intended for a case such as this." as this."

---

[5]*Oldman* v. *Bartshe,* 480 P.2d 99 (Wyo. 1971); *Rigdon, supra; Groves* v. *Groves,* 158 S.W.2d 710 (W. Va. 1968); *Rodebaugh, supra; Hoffman* v. *Tracy,* 67 Wash. 2d 31, 406 P.2d 323 (1965); *Stevens* v. *Murphy,* 69 Wash. 2d 939, 421 P.2d 668 (1957); *Nudd* v. *Matsoukas,* 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Aboussie* v. *Aboussie,* 270 S.W.2d 636 (Tex. Civ. App. 1954) (dictum); *Wright* v. *Wright,* 85 Ga. App. 721, 70 S.W.2d 152 (1952) and *Cowgill* v. *Boock,* 189 Ore. 282, 218 P.2d 445 (1950).

The issue of preserving the right of the parent to discipline his minor children was addressed in *Emery* v. *Emery,* 45 Cal. 2d 421, 289 P.2d 218 (1955). That court noted that the parent's right to discipline his minor children is the basic policy behind the rule. In commenting on this, the court stated as follows:

> "Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions but that discretion does not include the right willfully to inflict personal injuries beyond the limits of reasonable parental discipline. ... While it may seem repugnant to allow a minor to sue his parents, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's willful or malicious conduct. A child, like every other individual, has a right to freedom from such injury."

We believe this to be an excellent statement as to the limits of a parent's right to discipline.

In *Nudd, supra,* it was acknowledged that for the sake of family harmony, suits for negligence should be prohibited but that public policy also required that suits for willful and wanton misconduct should be permitted. The court stated its position as follows:

> "To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress without any corresponding social benefit for an injury long recognized at common law."

The fact that willfullness has to be proven should preclude fraud or collusion from being a problem. We think it is clear that a willful tort is beyond the scope of the parental immunity doctrine as it is applied in Arkansas. This Court in *Ellis, supra,* stated that if a person perpetrates a willful tort which injures a person, a constructive intent to injure the person will be imputed. That case also points out

that willful conduct is more than mere negligence. This distinction is also described in *Cowgill, supra,* where the court stated:

> "Negligence and serious and willful misconduct are entirely different in kind. The latter involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."

The court then met the challenge of the argument that to permit such a suit would disrupt the harmony of the family by stating as follows:

> "By the wrongful conduct of the father in overstepping the bounds of the family relationship, the peace, security and tranquility of the home had already been disrupted. *When the reason for the rule ceases, the rule itself ceases.*" (emphasis added)

For the reasons stated above, we conclude that an unemancipated minor may sue his parent for a willful tort.

The judgment is reversed and remanded.

ADKISSON, C.J., GEORGE ROSE SMITH and HICKMAN, JJ., dissent.

HOLT, J., not participating.

GEORGE ROSE SMITH, Justice, dissenting. Our only three precedents discussing the family immunity doctrine have adhered to a simple and clear distinction: A child can maintain a suit against his parent or against a person *in loco parentis* for an intentional or voluntary injury to the child, but not for an unintentional or involuntary injury. In the pioneer case, involving simple negligence, we held the action was not maintainable. *Rambo* v. *Rambo,* 195 Ark. 832, 114 S.W.2d 468 (1938). In the next instance we upheld an action based upon an adoptive father's having deliberately poisoned his adoptive son — an intentional tort. *Brown* v.

Cole, 198 Ark. 417, 129 S.W.2d 245, 122 A.L.R. 1348 (1939). In the third case, involving mere negligence, we refused to abandon the family immunity doctrine despite arguments similar to those now presented. *Thomas* v. *Inmon,* 268 Ark. 221, 594 S.W.2d 853 (1980).

In today's opinion the present majority quotes in support of its conclusion dictum from one Arkansas case —dictum because it was a guest statute case presenting only simple negligence, with the judgment being reversed and the cause being dismissed. *Ellis* v. *Ferguson,* 238 Ark. 776, 385 S.W.2d 154 (1964). But the controlling distinction laid down by our two guest statutes is not that between unintentional and intentional torts. Instead, it is the difference between simple negligence and willful and wanton misconduct in disregard of the rights of others. Ark. Stat. Ann. §§ 75-913 and -915 (Repl. 1979). For that reason guest statute cases should not be even persuasive precedents with regard to the family immunity rule.

In the case at bar we can feel sure from the record before us that this father did not drive his car with the intention of killing himself and injuring his child. Had the father lived it is doubtful that any cause of action against him would have been asserted in behalf of his injured son. That is so because the family immunity rule fairly represents the attitude that prevails within the overwhelming majority of American families — an attitude so firmly held that even human greed will not induce the members of the family to engage in the mockery of a collusive lawsuit having as its sole purpose the enrichment of the family and its lawyers at the expense of an insurance company. Here, however, the situation is not typical, because the father is dead. Even so, the decision may become a precedent, a precedent so fundamentally wrong and so contrary to our prior cases that I cannot let it go into the books without protesting it as best I can.

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

Charles E. LEWIS *v.* STATE of Arkansas

633 S.W.2d 371

Supreme Court of Arkansas
Opinion delivered May 24, 1982

Petitioner, *pro se.*

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

PER CURIAM. On March 16, 1981 Charles E. Lewis was convicted of possession of a controlled substance with intent to deliver. He was sentenced to a ten-year term of imprisonment and fined $2,000. He was represented at trial by Robert F. Morehead, who has never been relieved as counsel of record in the case.

Lewis, acting pro se, has filed a motion for belated appeal in which he alleges that his attorney was aware of his desire to appeal but failed to file the record in this Court. Lewis also requests that his appeal bond be reinstated and that an attorney other than Mr. Morehead be appointed to represent him on appeal.

In an affidavit filed in response to the motion, the attorney concedes that he told Lewis to get the record from the court reporter and take it to the Supreme Court Clerk. Instead, Lewis mailed the record to the attorney who then attempted to file it. Since the record was not complete, however, it was not accepted by the Clerk. Apparently, the record was subsequently completed by the court reporter but

no further attempt was made to lodge it with this Court. The attorney implies that he did not seek to file the record again because his client could not decide at that point whether he wanted to pursue the appeal.

It is the duty of the attorney to see that the record on appeal is properly maintained and timely filed. Attorney Morehead's affidavit gives no good reason for his failure to lodge the record. This Court will accept an appeal in a criminal case where to do otherwise could be a denial of the appellant's constitutional right to effective assistance of counsel. *Moore* v. *State,* 267 Ark. 548, 592 S.W.2d 450 (1980). In this case, we must conclude that the record was not lodged by virtue of the attorney's error and grant Lewis' pro se motion for belated appeal. See, our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases.

Appellant's request to have Mr. Morehead relieved as counsel and his request to have the appeal bond reinstated are denied.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion for Belated Appeal granted.

Dr. Neil HINSLEY *v.* ARKANSAS STATE BOARD OF DENTAL EXAMINERS

81-193 633 S.W.2d 696

Supreme Court of Arkansas
Opinion delivered June 1, 1982

Kaplan, Hollingsworth, Brewer & Bilheimer, for appellant.

William H. Trice, III, for appellee.

RICHARD B. ADKISSON, Chief Justice. The Arkansas State Board of Dental Examiners (hereinafter the Board) suspended the license of appellant, Dr. Neil Hinsley, for one year and 90 days after finding that he had practiced dentistry under a false name and had permitted unlicensed persons under his supervision and control to practice dentistry. The Pulaski County Circuit Court sustained the Board; on appeal, we reverse.

The Board charged appellant with violating Ark. Stat. Ann. § 72-559 and § 72-560 (7) (Repl. 1979) but found him "guilty" of violating Board rules and regulations. In its order of April 9, 1981, the Board specifically found that:

> Neil Hinsley is guilty of violating Article 12, Section I of the Rules and Regulations of the Arkansas State Board of Dental Examiners in that he practiced under a name other than a name which he is licensed to

> practice, and as such is to have his license to practice dentistry suspended for a period of 90 days. It is further found that Neil Hinsley is guilty of violating Article 12, Section E of the Rules and Regulations of the Arkansas State Board of Dental Examiners in that he aided or abetted an unlicensed person to practice dentistry in the state of Arkansas and as such he will have his license to practice dentistry in the state of Arkansas suspended for a period of one year. It is further found that the two periods of suspension of his license to practice dentistry, referred to above, will be consecutive in nature, and that the total amount of suspension will be one year and ninety days from the date of this order.

The only issue on appeal is whether there is substantial evidence to support the Board's finding that appellant was "guilty" of violating these rules and regulations. Testimony at the hearings before the Board revealed that the alleged incidents of misconduct occurred before the effective date of the rules. Mr. Trice, attorney for the Board, admitted that these rules did not go into effect until September 1, 1980, and that "The statutes are all that need to be considered in this case . . . "

It is a fundamental element of due process that a rule, the violation of which would cause a person to lose a valuable property right, must be in existence before it can be violated. There is not, nor could there be, substantial evidence to support the Board's finding that its nonexisting rules were violated.

We cannot assume that the Board intended to find appellant "guilty" of violating Ark. Stat. Ann. § 72-559 and § 72-560 (7) when the Board's order plainly states otherwise. We do not reach the issue of whether or not the Board could have suspended Dr. Hinsley's license had it found that he had violated Ark. Stat. Ann. § 72-559 which provides for a fine of from $50 to $500 upon conviction.

Reversed.

Luther HALL *v.* STATE of Arkansas

CR 81-130 634 S.W.2d 115

Supreme Court of Arkansas
Opinion delivered June 1, 1982
[Rehearing denied June 28, 1982.]

Robert A. Newcomb, for appellant.

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

GEORGE ROSE SMITH, Justice. On June 16, 1980, Luther Hall acted as a lookout while his two accomplices killed Leonard Jones and Carl Jackson by shooting them repeatedly while they were tied up in the trunk of a car. After that the three men decided to rob Rosemary Bogard and killed her in the course of that felony.

Hall was first tried separately for the capital murder of Jones and Jackson, was found guilty, and was sentenced to life imprisonment without parole, the State having waived the death penalty. About 70 days later Hall was tried for the capital felony murder of Rosemary Bogard, was found guilty of second degree murder, and was sentenced as an habitual criminal to 30 years' imprisonment, to run consecutively to the life sentence. The first case was appealed to this court. The second case was transferred to us and consolidated with the first one, because related issues with regard to Hall's confession are involved. Four points for reversal are presented.

First, it is argued that Hall's confession should have been excluded as having been involuntary. Hall was arrested on a warrant one Friday morning and after having been warned of his rights was interrogated for some time, but he made no statement. He was not questioned on Saturday or Sunday. On Monday morning he was taken before the municipal court, where the judge again explained his rights and explained the charges and the right to appointed counsel. Hall said that he would retain his own counsel. Upon being returned to the jail Hall said he wanted to make a statement, apparently to give his side of the occurrences as opposed to that of the other two suspects. After being informed of his rights for still a third time Hall made a detailed confession, which was tape recorded. The statement

covered both criminal episodes, but only that part relating to the killing of Jones and Jackson was eventually read to the jury at the first trial.

The voluntariness of the confession turned almost entirely upon matters of credibility. No physical mistreatment of any kind is alleged, but there were conflicts in the testimony about whether Hall was allowed to make telephone calls or was promised leniency. Having given due weight to the trial judge's advantageous position in the resolution of such conflicts, we cannot say his decision was clearly erroneous. *Harvey* v. *State,* 272 Ark. 19, 611 S.W.2d 762 (1981).

Second, at the close of the State's proof defense counsel moved for a directed verdict because of a supposed fatal variance between the information and the proof, in that the information charged that the defendants, with the purpose of causing the death of "another" person (instead of "any" person, as the statute reads, Ark. Stat. Ann. § 41-1501 [c] [Repl. 1977]), caused the death of Jones and Jackson. The trivial variance in wording had no prejudicial effect whatever upon Hall's substantial rights and does not call for serious discussion. For more than a century it has been the state's policy to disregard such defects. Ark. Stat. Ann. § 43-1012 (Repl. 1977).

Third, since the decision in *Jackson* v. *Denno,* 378 U.S. 368 (1964), the trial judge determines the voluntariness of a confession after an in-chambers hearing and is not required to resubmit that issue to the jury. *Walker* v. *State,* 253 Ark. 676, 488 S.W.2d 40 (1972); *Brown* v. *State,* 239 Ark. 909, 395 S.W.2d 344 (1965), cert. denied 384 U.S. 1016 (1966). Consequently, as explained in AMCI 200, Comment, the Arkansas model criminal jury instructions do not include an instruction with respect to confessions, because the weight and credibility of the testimony are matters to be argued by counsel.

Nevertheless, the trial judge is free to submit the issue of voluntariness to the jury if he thinks it to be appropriate. Here the trial judge said he was submitting the issue because

he was asked to do so by the prosecution and by the defense. As between the two instructions that were offered, he gave the State's instruction after modifying it to include an explanation that the presumption that an in-custody confession is involuntary must be overcome by the State by a preponderance of the evidence.

The two tendered instructions were substantially similar, but it is argued that the State's instruction, given by the court, was defective in two respects: First, it did not specifically refer to a promise of leniency. It did, however, refer to any promise or favor, which was certainly sufficient to enable counsel to argue the matter to the jury. Second, it did not tell the jury that the requirement of voluntariness is based upon the constitutional privilege against self-incrimination. We find it impossible to believe that the inclusion of such an abstract statement of the source of law would have had any effect upon the jury's deliberations.

Fourth, even though the same confession was introduced in both cases after the trial judge had determined its voluntariness at a *Denno* hearing preceding the first trial, it is insisted that he should have conducted a second *Denno* hearing at the second trial for a second determination of the same question. In denying the motion for another hearing the trial judge said: "Apparently from what I'm told there would be no difference in the testimony, there would be no new evidence, no new witnesses, and it would simply be an exercise in futility — really an endurance contest — to hear the same thing I've spent a day listening to already. . . . I'm going to order that a transcript of the Denno hearing held in the previous case . . . be made a part of the record in this case."

We find no abuse of the trial court's discretion. The first *Denno* hearing had consumed almost a day. Fourteen witnesses, including a police officer from another county, had testified. If defense counsel had any new matter to offer, witnesses could have been called to supplement the original proof. No such offer was made. Following our practice of giving a commonsense interpretation to statutes, we cannot construe the pertinent statute as mandatory in the circum-

stances now presented. Ark. Stat. Ann. § 43-2105; and see *Henderson* v. *Russell,* 267 Ark. 140, 589 S.W.2d 565 (1979); *Ark. State Hwy. Commn.* v. *Mabry,* 229 Ark. 261, 315 S.W. 2d 900 (1958).

We discern no prejudicial error in the various other objections and rulings that have been brought to our attention.

Affirmed.

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

JOHN I. PURTLE, Justice, dissenting. I dissent from the majority opinion only as to the admission of appellant's statement into evidence. It is a fundamental principle that a custodial statement is considered involuntary and the state has the burden of proving it was voluntarily, knowingly and intelligently made after the accused has been informed of his constitutional rights.

In the present case the appellant states, and the record shows, that he was apprehended on a Friday morning and held in either the maximum security section of the jail or in the interview room until the following Monday morning. He alleged he was denied the right to make a telephone call during these three or four days. In the ordinary course of business the Pulaski County jail keeps a record which would show whether appellant was allowed to make a telephone call and where he was kept during the time he was in custody. Unfortunately, the Pulaski County jail's records for the critical days were missing at the time of trial on June 15, 1981. Mr. Ron Routh, the jail administrator, had said that the records for the maximum security section of the jail had existed as late as April of 1981. The missing records would have clearly established the testimony of one side or the other.

Appellant further stated he was promised that the number of charges would be reduced if he gave a statement. He gave a statement and some charges were dropped.

Under the circumstances I do not believe the confession was voluntary.

ADKISSON, C.J., joins in this dissent.

FIRST AMERICAN NATIONAL BANK
v. COFFEY-CLIFTON, INC.

82-65 633 S.W.2d 704

Supreme Court of Arkansas
Opinion delivered June 1, 1982

Blevins & Pierce, by: *Robert E. Marston,* for appellant.

Brazil, Roberts & Clawson, by: *Charles E. Clawson, Jr.,* for appellee.

FRANK HOLT, Justice. Appellant brought this action for the collection of a third party's debt which had been guaranteed by the appellees. In March, 1979, Ruth Millien purchased a used mobile home from the appellee and executed a conditional sales security agreement for the balance of the indebtedness. Thereupon, the appellee assigned with recourse its rights in the agreement to the appellant. In conjunction therewith, the appellee executed a guaranty agreement promising payment of any balance due in the event Millien defaulted. Millien became delinquent in her payments and filed for bankruptcy after the effective date of the 1978 Federal Bankruptcy Act. This default triggered an acceleration clause in the security agreement causing the balance of $3,273.61 to become due and payable. The bankruptcy court found the property to have a value of $2,000 and approved a payment plan for Millien as a bankrupt. The appellant then filed this action to enforce the guaranty agreement when the appellee refused to pay the balance due.

Appellee responded that the appellant was estopped to assert its rights pursuant to the appellee's guaranty of the indebtedness, because appellant failed to participate or make any effort to preserve its interest at the bankruptcy hearing. All material facts were stipulated and no testimony was presented. Based upon the pleadings, the interrogatories, exhibits, and the stipulation, appellant moved for a summary judgment which the court denied. The court found that the appellant had complied with the provisions of appellee's guaranty, and appellee had failed to honor it; even so, the trial court held that the Federal Bankruptcy Act is unconstitutional as applied here; that the act deprived the appellee of property without due process of the law and interfered with the contractual relationship of the parties. The court ordered that any losses suffered by the appellant and the appellee be borne equally.

We first consider appellant's contention that the Federal Bankruptcy Act has not unconstitutionally interfered with the contractual relationship existing between appellant and appellee. In other words it is inapplicable. We agree. A guaranty is a collateral undertaking by one person to answer for the payment of a debt of another. *Gulf Refining Co.* v. *Williams Roofing Co.,* 208 Ark. 362, 186 S.W.2d 790 (1945); 38 Am. Jur. 2d Guaranty § 2. A guarantor is one who makes a contract, distinct from the principal obligation, to be collaterally liable to the creditor if the principal fails to perform. Williston on Contracts 3rd, § 1211 (1967). The undertaking of the principal debtor is independent of the promise of the guarantor. *Coombs* v. *Heers,* 366 F. Supp. 851 (D.C. Nev. 1973). Upon default of the principal debtor and satisfaction of conditions precedent to liability, promise of guarantor becomes absolute. *National Bank of Washington* v. *Equity Investors,* 506 P.2d 20 (Wash. 1973); *Ranier Nat. Bank* v. *Lewis,* 635 P.2d 153 (Wash. App. 1981). For a guarantor to become liable under a guaranty of payment, there need only be a failure of the primary obligor to make payment. *In re Waters,* 8 B.R. 163 (1981).

Here, it is undisputed that the principal debtor, Millien, defaulted owing a balance on her contract of $3,273.61; appellee is the guarantor of Millien's loan as alleged by the appellant; and that all conditions precedent to appellee's liability have been satisfied. 11 U.S.C.A. § 524 (e) (1978) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." The committee commentary or notes with respect to this section state that the "discharge of the debtor does not affect co-debtors or guarantors." In *Johnston* v. *Missouri Pacific Railroad Co., Thompson, Trustee,* 203 Ark. 1036, 160 S.W.2d 39 (1942), construing 11 U.S.C.A. § 34 (1898), which is the predecessor and similar to § 524 (e) *supra,* we reiterated: "The rights of the creditor against third partes liable jointly with the bankrupt or secondarily for him are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge." Here, the appellant is not seeking to collect from the principal debtor, Millien. Rather, appellant is proceeding against a separate entity, the appellee, as the guarantor of that indebtedness.

The very purpose of a guaranty agreement is to provide an alternate source of payment in the event of default. In our view the Bankruptcy Act is plainly not applicable to the facts in this case.

We deem it unnecessary to reach or discuss appellant's other contentions concerning the constitutionality of the Bankruptcy Act.

Reversed and remanded with directions to render a summary judgment as sought by the appellant.

Reversed and remanded.

Keith Michael GLOVER *v.* STATE of Arkansas

CR 82-5 633 S.W.2d 706

Supreme Court of Arkansas
Opinion delivered June 1, 1982

William R. Simpson, Jr., Public Defender, by: *Richard E. Holiman,* Deputy Public Defender, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant was convicted of aggravated robbery and theft for the March 13, 1980 robbery of the McDonald's restaurant at 5000 West Markham in Little Rock. For the aggravated robbery he was sentenced to 40 years imprisonment and was assessed a $5,000.00 fine and for the theft he was sentenced to 10 years imprisonment and was assessed a $5,000.00 fine. Jurisdiction is in this court under Rule 29 (1) (b). The sole designated point for reversal is whether the trial court committed error in admitting identification evidence from a pre-arrest lineup. We affirm the trial court.

The evidence established that appellant and an accomplice forced their way into the restaurant after closing hours while two employees were cleaning the interior of the building. They forced one of the employees to call a night manager, who had a key to open the safe, and tricked him into driving to the restaurant. The aggravated robbery and theft then occurred. Appellant and the accomplice were clearly observed by the employees for approximately 25 minutes. The police report described one of the robbers, who was later identified as appellant, as a white male, being twenty-five years old, standing six feet two inches tall, weighing one hundred sixty-five pounds, having blue eyes and light brown hair, being clean shaven and identifying in detail his clothing. Five days after the robbery appellant was placed in a pre-arrest lineup and was positively identified by two of the employees.

The appellant questions the validity of the identification procedure. There are usually two procedural steps involving identification evidence. First, the trial judge examines the procedure used at the lineup to determine if the evidence is admissible. Second, after the evidence has been ruled admissible, the jury weighs the reliability of the identification evidence under the instructions of the court. The appellant contends that the trial judge committed error in the first step and should not have admitted the identification evidence because it was (1) impermissibly suggestive and (2) was not relevant. We affirm the trial court.

The Supreme Court of the United States has ruled that a state criminal court is not required by the Due Process Clause of the Fourteenth Amendment to conduct a hearing out of the jury's presence whenever a defendant contends that a witness' identification was arrived at improperly. *Watkins* v. *Sanders,* 449 U.S. 341 (1981). Even though such a procedure is not constitutionally required we emphasize the prudence of such a hearing especially when, as here, the defendant has filed a motion to suppress. See *Wright* v. *State,* 258 Ark. 651, 528 S.W.2d 905 (1975).

At a hearing on a motion to suppress the trial judge must first determine the reliability of identification. The

judge must look to the totality of the circumstances to see if there is a likelihood of misidentification. *Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980). If there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the criminal, then the procedure is so undermined it violates due process. *Foster* v. *California,* 294 U.S. 440 (1969). It is the reliability of the evidence that is the linchpin in determining its admissibility. *Matthews* v. *State,* 275 Ark. 1, 627 S.W.2d 20 (1982). We do not reverse a trial judge's ruling on the admissibility of identification evidence unless it is clearly erroneous because it is a ruling on a mixed question of law and fact. *Beed* v. *State,* supra.

We have articulated several factors to be considered in assessing reliability. They include: prior opportunity of the victims to observe the crime and its perpetrator; the lapse of time between the crime and the lineup procedures; discrepancies between descriptions given the police and the defendant's actual description; the occurrence of pretrial misidentification; the certainty of the witness in identifying the accused; the facts and circumstances regarding the identification and all matters relating to the identification. *James and Elliott* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1980).

The lineup in this case was conducted on March 18, 1980, which was only five days after the robbery. The participants in the lineup, other than appellant, included two persons from lockup and three police officers. All were dressed in plain clothes. All were white males of approximately the same age. Although one of the participants was a little short of six feet, all were near the same height. Five had long or longish brown hair and the sixth had average length hair. At least two, and possibly three had a moustache but otherwise were clean shaven. Both police officers testified that they did not suggest who should be identified. The participants in the lineup may be fairly said to resemble the appellant.

Appellant contends that he did not have a moustache and yet two or three of those in the lineup had moustaches.

That factor is not sufficient to establish that the lineup was impermissibly suggestive, especially since the police had the description of appellant and his accomplice. One was described as being clean shaven without a moustache and the other clean shaven with a moustache. Until the appellant was identified the police had no way of knowing which alleged robber was being placed in the lineup.

We cannot say that the trial judge was clearly erroneous in holding that the lineup procedure was not impermissibly suggestive.

In appellant's second contention he admits that he was positively identified at trial and therefore, he argues, the extrajudicial identification was not relevant. We have frequently held that a prosecuting witness may testify that he saw or identified the defendant before or after the offense. *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980); *Bishop* v. *State,* 236 Ark. 12, 364 S.W.2d 676 (1963); *French* v. *State,* 231 Ark. 677, 331 S.W.2d 863 (1960); *Birones* v. *State,* 105 Ark. 82, 150 S.W. 416 (1912). The pre-information identification is relevant.

Affirmed.

STATE of Arkansas *v.* W. T. VOWELL

CR 82-41 634 S.W.2d 118

Supreme Court of Arkansas
Opinion delivered June 1, 1982
[Rehearing denied June 28, 1982.]

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

Rhine, Rhine & Young, by: *Robert E. Young,* for respondent.

ROBERT H. DUDLEY, Justice. The Court of Appeals reversed and remanded respondent's conviction for first degree battery. *Vowell* v. *State,* 274 Ark. App. 150, 628 S.W.2d 599 (1982). The reversal was based upon two points of statutory interpretation. We granted certiorari pursuant to Rules 29 (6) (a) and 29 (1) (c) to review (1) whether voir dire was conducted in accordance with Ark. Stat. Ann. § 43-1903 (Repl. 1977), and (2) whether there was error in admitting

evidence pursuant to Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979).

At trial, the respondent Vowell moved that the State and the respondent voir dire each prospective juror one at a time and, at the conclusion of individual voir dire, the State and then the respondent exercise their peremptory challenges. The trial court denied the motion and ruled that the State could conduct voir dire on three jurors at a time and the respondent could conduct individual voir dire. The Court of Appeals held that § 43-1903 requires that voir dire be conducted upon one prospective juror and that juror be accepted or rejected before the next juror be examined. We reverse the holding of the Court of Appeals because the respondent has shown no prejudice, even though an erroneous voir dire procedure may have been used. In his designation of the record for appeal the respondent specifically excluded voir dire questioning. As a result, we do not know whether either party exercised a peremptory challenge.

Before the State can gain an unfair advantage by the procedure used at trial it must exercise a peremptory challenge. Since the record does not reflect peremptory challenges, if any, the respondent has not demonstrated prejudice. In Arkansas we have long held that a judgment of conviction will be reversed for prejudicial errors only. *Lee* v. *State,* 73 Ark. 148, 83 S.W. 916 (1904). That is still the law. We do not reverse for non-prejudicial errors. *Brown* v. *State,* 262 Ark. 298, 556 S.W.2d 418 (1977). We have often applied this principle to jury selection. *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980); *Satterfield* v. *State,* 252 Ark. 747, 483 S.W.2d 171 (1972); *Green* v. *State,* 223 Ark. 761, 270 S.W.2d 895 (1954). Thus, we reverse the Court of Appeals on this point.

The evidence indicated the respondent had been drinking most of the day and was driving in an intoxicated condition when his automobile crossed the center line of a highway and collided with the victim's vehicle. The respondent took the stand and testified on direct examination that the wreck was an accident caused by a mechanical

malfunction of his automobile. The trial court allowed the State to cross-examine him about three convictions within the past twenty-six months for driving while under the influence of intoxicants in violation of Ark. Stat. Ann. § 75-1027 (Repl. 1977) and allowed the State to cross-examine him about driving while his license was revoked. The Court of Appeals held the questions on cross-examination were improper. We reverse the holding of the Court of Appeals on this issue and hold that the cross-examination was proper.

Rule 404 (b) is as follows:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The respondent was charged with causing serious physical injury "under circumstances manifesting extreme indifference to the value of human life." Ark. Stat. Ann. § 41-1601 (1) (c) (Repl. 1977). The quoted phrase is not more specifically defined in the Criminal Code, but it is in the nature of a culpable mental state, *Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977), and therefore is akin to "intent," for the proof of which evidence of other offenses is admissible under Rule 404 (b).

Pursuant to Rule 404 (b) the evidence of the three convictions for driving while under the influence of intoxicants and the fact respondent was driving while his license was revoked were admissible on cross-examination to prove the warning quality of the other convictions and to infer that the respondent must have arrived at a mental state inconsistent with mistake and consistent with the culpable mental state of causing serious physical injury "under circumstances manifesting extreme indifference to the value of human life."

Because of its disposition of the case, the Court of

Appeals did not rule on respondent's point alleging that the trial court committed error in failing to grant a directed verdict. Because of our holding, we have found it necessary to examine the point and we find the evidence was sufficient to support the conviction. We find no reversible error in the other five points raised.

Reversed and the judgment of conviction is affirmed.

HICKMAN and PURTLE, JJ., concur.

DARRELL HICKMAN, Justice, concurring. I concur with the result. I have not changed the view I expressed in *Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977). Therefore, I can find no "intent" or culpable mental state in the charge of first degree battery. I feel the prior convictions were admissible simply to rebut Vowell's statement that the vehicular collision was an accident. See Ark. Stat. Ann. § 28-1001, Rule 404 (b); *Enriquez* v. *U.S.,* 188 F.2d 313 (9th Cir. 1951).

PURTLE, J., joins in this concurrence.

William WORCH and Carolyn WORCH
v. William Webb KELLY

82-60 633 S.W.2d 697

Supreme Court of Arkansas
Opinion delivered June 1, 1982

Don R. Brown of *Lambert & Brown,* for appellants.

Thompson & Arnold, for appellee.

STEELE HAYS, Justice. This suit was brought by William Kelly, appellee, to rescind a contract to purchase appellants' 80 acre farm in Sharp County. Shortly before trial the regular chancellor recused himself and the parties entered into a stipulation pursuant to Act 357 of 1981 agreeing that Chancellor Carl B. McSpadden would sit as temporary judge and would hear the case in Fulton County. Act 357 permits the parties in civil cases to stipulate to the appointment of a temporary judge who shall be compensated by the parties. Following trial the chancellor found appellants Worches failed to deliver possession on April 30, 1981, as agreed, and therefore Kelly was entitled to a rescission of the contract and the return of his earnest monty of $12,500.00.

Appellants argue four points for reversal: First, Act 357 of 1981 is unconstitutional, rendering the decree in this case void; second, the decree is also void because the trial was held outside the judicial boundaries of Sharp County; third, the chancellor erred in holding the Worches breached the contract of sale; and fourth, the chancellor erred in not finding the provision for possession on April 30 was waived. We affirm the chancellor.

The first two points were not raised at trial and consequently will not be considered on appeal. *Wilson* v. *Wilson,* 270 Ark. 485, 606 S.W.2d 56 (1980); *Harris* v. *Byers,* 212 Ark. 1026, 208 S.W.2d 991 (1948). Further, appellants were not required to enter into the stipulation for a special chancellor, or to agree to try the case outside the district in which the suit was pending, but having chosen to do so for reasons they found sufficient, they cannot now repudiate their agreement because the result was not to their liking.

The third argument is the chancellor erred in finding a breach of contract by the Worches. Under the written contract executed April 11, 1981, Kelly was required to deposit $500.00 as earnest money and was entitled to possession on April 30, 1981. The contract fixed the closing

date as April 22, contingent upon Kelly's obtaining a loan from Federal Land Bank. There was testimony that on the day before the agreed closing Kelly had a telephone conversation with the real estate broker handling the sale, Mr. Cruthis, who told Kelly the Federal Land Bank loan had not yet been approved and that the Worches were having difficulty moving out. He suggested Mr. Kelly put up an additional $12,000.00 toward the purchase price to expedite their moving. Mr. Kelly was anxious to get possession by April 30, and on April 22 he gave Mr. Cruthis $12,000.00 upon the assurance, according to Kelly, that possession would be surrendered by April 30.

On April 30 Kelly called Cruthis and learned the loan had still not come through and was told they could not close nor could he take possession. With that, Kelly informed Cruthis he was no longer interested in purchasing the property and demanded his money back. A few days later Kelly consulted a lawyer as to how to rescind the contract and recover the $12,500.00 he had deposited with Cruthis. Around May 12 Kelly's lawyer called Cruthis and asked if clear title could be obtained that day. After checking with the title company Cruthis told him a title commitment could be issued that day.

The Worches contend there was no breach and the chancellor erred in finding that the $12,000.00 payment was made to insure possession by April 30, and also in finding there was a failure to deliver possession. These determinations were findings of fact properly within the province of the trial court and will not be set aside unless clearly erroneous. ARCP Rule 52. The evidence to support these findings is substantial. Mr. Kelly's testimony that the additional $12,000.00 payment was made to insure possession by April 30 was corroborated at trial by other testimony and by circumstantial evidence. The evidence is uncontroverted that Mr. Cruthis knew possession was important to Mr. Kelly and that on April 30 Mr. Cruthis told Mr. Kelly he could not take possession because the loan had not yet been approved. The Worches argue they did not fail to deliver possession because Kelly did not demand possession directly from them but only through the broker. However, they had

not vacated the property on April 30 and Mr. Worch said he left it up to Mr. Cruthis, who handled the negotiations between Mr. Kelly and the Worches. Mr. Cruthis testified the April 30 closing was not meant to be definite, but was merely a "target date, more or less." But Mr. Cruthis prepared the contract and the provision for possession was clear and absolute. If it was meant to be conditioned on closing, it would have been easy to say so, but it did not and the chancellor found a material breach of contract by the Sellers. The chancellor also construed the circumstances surrounding the $12,000.00 advance as making the time of delivery "the essence" of the contract with respect to performance and we concur in that view.

Finally, appellants argue the telephone inquiry by Mr. Kelly's lawyer about clear title waived the provision in the contract making the time of delivery of possession essential. We disagree. We are not convinced that a single telephone call to ask if Sellers could furnish a clear title should be construed as a waiver in the face of Mr. Kelly's unequivocal renunciation of the sale at the time of the Sellers' breach, but whatever may be said of the argument, it was not raised by the pleadings as required by ARCP Rule 8 (c), nor presented to the trial court.

The decree of the chancellor is affirmed.

Charles E. GRIFFIN *v.* STATE of Arkansas

CR 82-67 633 S.W.2d 708

Supreme Court of Arkansas
Opinion delivered June 1, 1982

Jesse L. Kearney of *Kearney Law Offices,* for appellant.

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

STEELE HAYS, Justice. This is the second appeal of appellant's conviction of class A felony kidnapping (Ark. Stat. Ann. § 41-1702) and his sentencing pursuant to the Arkansas habitual offender statute (Ark. Stat. Ann. § 41-1001 [Repl. 1977]). Appellant was sentenced in a bifurcated trial to 25 years. In the first appeal, *Griffin* v. *State,* 2 Ark. App. 145, 617 S.W.2d 21 (1981), the Court of Appeals found the evidence sufficient to support the conviction but held the punishment should have been imposed under the class C felony provision rather than the class A provision. Ark. Stat. Ann. § 41-1702 (2). In remanding for resentencing the court stated at 148:

> The trial court's error in this instance had no bearing upon the jury's determination of guilt or innocence. It affected only the extent of the punishment to be imposed. We have a choice among several

> corrective measures, *viz.*, we may reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for assessment of penalty or grant a new trial. *Clark* v. *State,* 246 Ark. 876, 440 S.W.2d 205 (1969). *In this case, we choose to remand the case to the trial court for imposition of the penalty.* (Our italics.)

On remand, the trial court imposed a 15 year sentence, the maximum provided for a class C felony under the habitual offender statute.

In this appeal, appellant contends he is entitled to a new trial and the trial court erred in sentencing him to an extended term of 15 years. We disagree. On remand, the trial court merely followed the instructions of the Court of Appeals by fixing the sentence within the limits provided for a class C felony where the Arkansas habitual offender statute (Ark. Stat. Ann. § 41-1001 [1] [c]) applies, that is, 15 years. The Court of Appeals did not direct a new trial and the circuit judge was not bound to provide one.

Citing *Estes & Colburn* v. *State,* 258 Ark. 597, 528 S.W.2d 138 (1975), appellant also contends he should have received either the minimum sentence (3 years) for a class C felony under the Arkansas habitual offender statutes, or a new trial. He relies on *Mathis* v. *State,* 267 Ark. 904, 591 S.W.2d 279 (1979), for the proposition that he has the choice of having the presiding judge impose the punishment or have a new trial.

But both arguments must fail, as our review is limited to the record before the trial court in the resentencing stage of this case. We do not consider arguments settled by the opinion of the Court of Appeals in the first appeal. No petition for review or rehearing was filed and consequently the Court of Appeals opinion is res judicata. Matters decided in one appeal become the law of the case and govern the reviewing court upon a second appeal. *Wilson* v. *Rodgers,* 256 Ark. 276, 507 S.W.2d 508 (1974); *International Harvester Co.* v. *Burks Motors,* 252 Ark. 816, 481 S.W.2d 351 (1972).

We will not reverse the trial court on remand from the Court of Appeals where its actions in resentencing were in accordance with the directive of the Arkansas Court of Appeals.

Affirmed.

HANDY DAN IMPROVEMENT CENTER, INC. et al
v. Charles G. ADAMS et al

81-233 633 S.W.2d 699

Supreme Court of Arkansas
Opinion delivered June 1, 1982

Rose Law Firm, for appellant Handy Dan.

Owens, McHaney & Calhoun, for appellant The Kroger Co.

House, Holmes & Jewell, P.A., for appellant Safeway Stores, Inc.

Wright, Lindsey & Jennings, for appellant Skaggs.

Tucker & Cuffman, for appellee Adams.

Steve Clark, Atty. Gen., by: *R. B. Friedlander,* Asst. Atty. Gen., for appellees.

CHARLES B. ROSCOPF, Special Justice. This case concerns the constitutionality of the Sunday closing law, Ark. Act 135 of 1965 (codified as Ark. Stat. Ann. Sections 41-3852 through 41-3863 [Repl. 1977]). The Plaintiffs, seven private individuals and five retail establishments residing and doing business in Pulaski County, brought this action to enjoin the Defendants, five competing retail establishments, from engaging in retail sales on Sunday in violation of the act. The attorney general was made a party to this action as required by Ark. Stat. Ann. Section 34-2510 (Repl. 1962).

While the Sunday closing law is a criminal law providing criminal penalties, Section 7 declares the Sunday sale of prohibited articles to be a public nuisance subject to injunctive action. The Defendants filed Answers challenging the constitutionality of the act.

After a trial of the issues, the chancellor found that all of the Defendants were in violation of the Sunday closing law and that the law was constitutional. The Defendants were permanently enjoined from selling the prohibited articles on Sunday.

The issue on appeal is whether Act 135 of 1965 is constitutional. The questions presented are (1) whether the Sunday closing law is so vague that it fails to give reasonable notice of the forbidden conduct and therefore violates due process as guaranteed by the U.S. Constitution, Amendment XIV, and the Arkansas Constitution, Article 2, Section 8; (2) whether the classifications within the law deny equal protection as guaranteed by the U.S. Constitution, Article XIV, and the Arkansas Constitution, Article 2, Section 3; (3) whether the enforcement of the act amounted to constitutionally prohibited discriminatory enforcement, and (4) whether the trial court erred by enjoining all of the Defendants' stores in the County.

It should be made quite clear at this point that Appellants do not invoke the religious establishment challenge which is so often connected with Sunday closing cases.

Before the questions raised are discussed, it is appropriate to consider the presumptions and burdens of proof involved in cases which challenge the constitutionality of legislative acts. This Court has always held that before it may strike down an act of the legislature on the basis of unconstitutionality, it must clearly appear that the act is at variance with the Constitution. An act of the legislature is presumed to be constitutional, and any doubt on the question of constitutionality must be resolved in favor of the act. *Davis Warehouse Company* v. *Bowles,* 321 U.S. 144, 64 S. Ct. 474, 88 L. Ed. 635 (1943); *Baratti* v. *Koser Gin Co.,* 206 Ark. 813, 177 S.W.2d 750 (1944); *Bush* v. *Martineau,* 174 Ark.

214, 295 S.W. 9 (1927); *State* v. *Moore,* 76 Ark. 197, 88 S.W. 881 (1905). Further, the party who alleges the unconstitutionality of a statute has the burden of proving that claim. *State ex. rel. Kimberlite Diamond Mining and Washing Company* v. *Hodges,* 114 Ark. 155, 169 S.W. 942 (1914); and *Rice* v. *Lonoke-Cabot Road Improvement District No. 11,* 142 Ark. 454, 221 S.W. 179 (1920).

The arguments pressed by the Appellants are not new in the area of Sunday closing cases, and the tests prescribed are well established. Four landmark Sunday closing cases, relied on heavily by the Appellees, were decided by the U.S. Supreme Court in 1961. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley,* 366 U.S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961); *Braunfeld* v. *Brown,* 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); and *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961). A fairly recent scoreboard on Sunday closing cases has been conveniently compiled in *Caldor's Inc.* v. *Bedding Barn, Inc.,* 177 Conn. 304, 417 A.2d 343 (1979).

It will be seen from these cases that in applying the tests and interpreting the cases, each case is controlled to a great extent by statutory development over many decades, sometimes centuries. This accounts, in part, for the wide diversity of results reached in different jurisdictions. State cases decided since *McGowan, supra,* and the other 1961 landmark cases continue to be divided. This is because the precedential value of these landmark cases is limited by the particular legislative schemes involved. The constitutional challenges made by the Appellants are not new to this court either, and likewise the language of the ordinance or act being considered must be carefully scrutinized in the process of case interpretation.

Sunday closing laws have their roots in the very earliest stages of human history. Justice Wood in *Rosenbaum* v. *State,* 131 Ark. 251, 199 S.W. 388 (1917) recites a classic statement of the evolution of the original Arkansas Sunday closing laws. *See, e.g., Two Guys From Harrison, Inc.* v.

Furman, 32 N.J. 199, 160 A.2d 265 (1960): Note, "Sunday Closing Laws in The United States: An Unconstitutional Anachronism", 11 Suffolk U. L. Rev. 1106 (1977).

Contained in our Revised Statutes adopted in 1837 were comprehensive Sabbath Breaking Laws that prohibited not only all sales on Sunday but also all labor on Sunday with some minor exceptions for acts of daily necessity and charity. Rev. Stat., ch. 44, div. 7, Art. II. Justice Wood in *Rosenbaum, supra,* points out that these Sabbath Breaking Laws are almost a literal copy of an act adopted during the reign of Charles II. Incredibly, these Sunday laws stayed on our books almost unchanged until the labor proscription section (Ark. Stat. Ann. Section 41-3801 [1947]) was repealed by Ark. Act 554 of 1953 and the sales proscription section (Ark. Stat. Ann. Section 41-3802 [1947]) was repealed by Ark. Act 367 of 1957. From 1957 until the enactment of Ark. Act 135 of 1965, Arkansas had no Sunday closing laws applicable generally to the entire state. It is important to note that the Sunday closing laws which were effective in Arkansas from 1837 to 1957 prohibited the retail of "any goods, wares and merchandise" on Sunday with the only exception being "charity or necessity on the part of the customer". This brief statutory history is included in order that Act 135 may be considered in the proper historical perspective.

We will consider the questions presented in the order set out above. First, we will discuss Appellants' contention that Act 135 is unconstitutionally vague. The core provision of this act is Section 2 (Ark. Stat. Ann. Section 41-3853 [Repl. 1977]), which provides that it shall be unlawful to sell or offer to sell on Sunday the following commodities: (1) clothing and wearing apparel; (2) clothing accessories; (3) household utensils, glassware and china; (4) home, business or office furniture; (5) mechanical or electrical household or office appliances; (6) hardware, tools and paints; (7) building and lumber supply materials; (8) jewelry, silverware, watches and clocks; (9) luggage and leather goods; (10) musical instruments and recordings; (11) radios and television sets, receivers, record players, recording devices and components and parts therefor; (12) lawnmowers and other

manual and power driven outdoor gardening equipment; (13) cameras, projectors and parts and equipment therefor (except film, flashbulbs and batteries); and (14) linens, yard goods, trimmings and sewing supplies.

It is fundamental that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. *Connally* v. *General Construction Company,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1925). The rationale behind this rule was clearly expressed in *Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972):

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The most recent Arkansas case involving the point is *Davis* v. *Smith,* 266 Ark. 112, 583 S.W.2d 37 (1979), which reiterates the due process requirements in the criminal law field as in *Grayned, supra,* and cites *Papa Christou* v. *City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), and *Herndon* v. *Lowry,* 301 U.S. 243, 57 S. Ct. 732, 81 L. Ed. 1066 (1937). It is against these basic rules of fair play that Act 135 must be tested.

The facts for the most part are undisputed. The Plaintiffs proved the unlawful sale of prohibited articles and explained the effects on their businesses of such sales on Sunday when Plaintiffs were closed. They offered excerpts from the minutes of the Board of Directors of the City of Little Rock which instructed the city manager to put blue

laws last on the priority list of enforcement. The Defendants offered store managers and clerks to show their inability to identify clearly articles prohibited by the act and to show the pervasive confusion which exists in the interpretation of Section 2 of Act 135. Walter E. Simpson, Chief of the Little Rock Police Department, called by the Defendants, testified that enforcement of the act had been sporadic and that "usually a couple of times a year we take enforcement action". He confirmed the testimony of other witnesses that identification of prohibited articles had been rendered more difficult since 1977 and 1978 by reason of the development of large full-service stores which sell thousands of different articles. In this connection store managers testified that they had for sale fifty thousand to seventy thousand articles and that only a cursory survey revealed that scores of articles could not be identified as prohibited or permitted. Simpson candidly admitted that only articles in clear violation were purchased when enforcement action was taken and that there were three categories of articles, those clearly prohibited, those clearly permitted, and those not clearly defined as either prohibited or permitted. In the latter category, he stated, were hundreds and hundreds of articles.

From a cursory reading of the fourteen prohibited categories it would seem that a man of common intelligence could steer a safe course on the side of lawful sales, but a studied analysis quickly reveals that the prohibitions are vague and do not meet constitutional standards. Indeed, the act raises more questions than it answers. For example, are yard sprinklers and high pressure hoses within the category "other manual and power driven outdoor gardening equipment"? Can a merchant sell an electronic strobe light for a camera, which performs the same function as a permitted flashbulb? Is a slide viewer within the category of "cameras, projectors and parts and equipment therefor"? Is a non-musical comedy phonograph record within the classification of "musical instruments and recordings"? Is the sale of a toy drum prohibited, even though sales of toys are not? Does "china" include paper, plastic or crockery dishes, or only items (whatever their purpose) made of highly fired translucent porcelain? Are artists' paints, oils, acrylics, water colors, etc. prohibited under the category

"paints"? Does "paints" include wood stains and fingernail polish? Is a portable outdoor barbecue grill, with or without a motor-driven rotisserie unit, within the category of "household appliances"? A fertile mind, with seventy thousand articles to work with and only fourteen categories in which to place them, could no doubt extend this list of perplexities ad infinitum.

It can be seen that public confusion as to the meaning of this act is well justified. That same lack of understanding exists even with law enforcement personnel. If the top law enforcement officer in the largest city in the state cannot definitely identify the prohibited articles, how can it be argued that the act is not vague? Citizens of this state are guaranteed, both under the U.S. and Arkansas Constitutions, the right to clear notice and fair warning of prohibited conduct before they can be subjected to loss of liberty. Act 135 does not satisfy the basic principle that no man shall be held criminally responsible for conduct which he could not reasonably understand to be prohibited. From the record herein and from the argument of counsel it would clearly appear that the ordinary citizen is incapable of determining what is prohibited and what is not under Act 135.

Appellees make a vigorous argument that the issues presented in this case have already been decided contrary to the contentions of Appellants in the following cases: *H. V. Hickenbothan* v. *Williams,* 227 Ark. 126, 296 S.W.2d 897 (1957); *Green Star Supermarkets, Inc.* v. *Stacy,* 242 Ark. 54, 411 S.W.2d 871 (1967); *Lockwood* v. *State,* 249 Ark. 941, 462 S.W.2d 465 (1971); *Bill Dyer Supply Company, Inc.* v. *State,* 255 Ark. 613, 502 S.W.2d 496 (1973).

Act 135 has been before this court only one time before. *Bill Dyer, supra.* The issue of vagueness was not considered in *Bill Dyer,* and the case provides no precedent on this issue. *Hickenbothan, Green Star,* and *Lockwood, supra,* had under consideration the early Sunday closing law and city ordinances which provided an entirely different legislative scheme than Act 135. These schemes generally provided for the prohibition of all Sunday sales with certain well-defined exemptions. Such schemes are not vague for they clearly and

specifically define the commodity exempted. Act 135 prohibits the sale of fourteen broad categories of articles and then provides certain exemptions. In effect, it creates two classes of exempt articles, those not included in the prohibition and those included in the specific exemptions. This difference, in our view, clearly distinguishes not only the Arkansas cases cited by Appellees but also *McGowan, supra.* Moreover, the vagueness issue, though discussed in *McGowan,* was finally not considered because it was not properly raised in the Maryland Court of Appeals.

A statute similar to Act 135 prohibiting Sunday sales of a broad category of commodities was tested for vagueness and found wanting in *State* v. *Target Stores, Inc.,* 279 Minn. 447, 156 N.W.2d 908 (1968).

The Connecticut and Utah Sunday closing laws were tested for vagueness in *State of Connecticut* v. *Anonymous,* 33 Conn. Super. 55, 364 A.2d 244 (1976); *State* v. *Anonymous,* 33 Conn. Super. 141, 366 A.2d 200 (1976); and *Skaggs Drug Centers, Inc.* v. *Ashley,* 26 Utah 2d 38, 484 P.2d 723 (1971). In these cases the statutes were so riddled with exceptions that the Courts held that they were not sufficiently intelligible to pass the vagueness test.

This court holds that Appellants have clearly demonstrated that Act 135 fails to meet the minimal requirements of due process in regard to vagueness and that both of the evils inherent in vague laws, as mentioned in *Grayned, supra,* are present in Act 135.

The second question presented is whether Act 135 denies equal protection of the law. This issue was considered by this court in *Bill Dyer, supra,* albeit perfunctorily. The rules involved in testing Sunday closing laws were fully discussed in the 1961 landmark cases of *McGowan, Krown Kosher, Two Guys,* and *Braunfeld, supra,* and have been further developed in the scoreboard of cases referred to in *Caldor, supra.* As will be seen, state cases go both ways on the equal protection challenge. In *Bill Dyer* this court found that on its face Act 135 did not contravene equal protection, but held that the constitutional challenge failed for want of

proof. In light of the strong presumptions favoring constitutionality, we must likewise hold that Appellants have not clearly demonstrated, to the extent necessary, that Act 135 violates the equal protection clauses of either the U.S. or Arkansas Constitutions.

Chief Justice Warren established the broad perimeters of state discretion in the following language in *McGowan, supra*:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the States' objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

We simply hold on this issue that Appellants have not borne the strong burden required of them sufficient to overturn Act 135.

In light of our conclusion that Act 135 is unconstitutionally vague, it is not necessary for us to address questions 3 and 4 raised by the Appellants. Act 135 contains a severability clause, but we find that all of its provisions are so mutually connected with and dependent on Section 2 that the legislature would not have adopted the residue independently. The act is not severable and the entire act must fall on account of the invalidity of Section 2. *Pryor* v. *Lowe*, 258 Ark. 188, 523 S.W.2d 199 (1975); *Borchert* v. *State*, 248 Ark. 1043, 460 S.W.2d 28 (1970).

For the reasons stated, the Decree of the Chancery Court

is reversed and the action remanded with directions to enter a Decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

GEORGE ROSE SMITH, J., not participating.

Gerald BAKER et al *v.* Frank MANN et al

82-64 634 S.W.2d 125

Supreme Court of Arkansas
Opinion delivered June 7, 1982

E. Alvin Schay, for appellants.

Michael Rainwater of *Gill, Skokos, Simpson, Buford & Owen,* for appellees.

GEORGE ROSE SMITH, Justice. This action for libel was brought by the four appellants — a former police chief and

three former part-time police officers of the city of Shannon Hills. All four of the plaintiffs had left the city's employment by January 1, 1981. The six defendants — the mayor and five of the six members of the city council — are essentially the incoming city administration that took office on that date. At the close of the plaintiffs' case the trial judge directed a verdict for the defendants on the ground that they were immune from liability. The judgment recites that the court found no substantial evidence to support the plaintiffs' allegations.

The assertion of libel is based upon a letter sent by the six defendants to the prosecuting attorney on February 20, 1981. We quote the body of the letter:

> We, the undersigned city council members of Shannon Hills, Saline County, Arkansas, respectfully request you order a state police investigation of the following conditions at Shannon Hills, Arkansas:
>
> 1. Missing public records, specifically police records, have been removed from the files. Records which former Police Chief Willie Gerald Baker had previously shown to present council members and Mayor Max Foster, are no longer in the file. They were removed before the present administration assumed office on January 1, 1981.
>
> 2. Attorney John Hall of Little Rock, alleges that over 100 guns and other weapons were confiscated by the former police department. If these allegations are correct, all of these weapons are missing.
>
> 3. Numerous and sundry reports of confiscation of illegal drugs and drug paraphernalia by the late police department have been authenticated, specifically noted in the city court records. No record of disposition of those drugs and paraphernalia is on hand. Former Police Chief Baker has alleged that the drugs were "flushed down the toilet," however, other knowledgeable individuals have indicated that such was not the case. Under either condition, the drugs and paraphernalia were not disposed of as prescribed by state law.
>
> 4. Many "hard copy" of tickets are on hand in the

file, and in some cases both copies of the ticket were on hand. Since the "hard copy" should be given to the offender, the presence of this copy in the file could well indicate mishandling of bond and fine monies.

5. Missing police equipment is obvious. Vouchers for purchase of equipment are on hand, but the equipment is missing.

6. Informal contact with two former members of the police department revealed a willingness on their part to turn state's evidence and/or cooperate with state police officials to resolve the problems.

In view of item 6, expedient action to conduct a thorough investigation of these allegations is essential to the health and welfare of all the citizens of Shannon Hills, especially the aforementioned members of the police force.

The letter is signed by Max Foster as mayor and by the others as aldermen.

Gerald Baker was police chief from August 1979 until January 1, 1981. The other three plaintiffs each worked for from five to fourteen months as part-time policemen. No one testified about the size of the police force; so it is impossible to determine how many other policemen were formerly employed in the department. Each of the four plaintiffs testified that he himself had not been guilty of any wrongdoing. They did not deny that some records and equipment might be missing. Baker said that he had flushed cocaine down the commode, but he had made a record of it in a folder that was in the files when he last saw it. The plaintiffs said that only a few guns had been confiscated, not as many as ten.

We hold that in the circumstances the letter was conditionally privileged. It was sent by public officers to another public officer, the prosecuting attorney, and pertained to public property and to the conduct of former public employees. In *McClain* v. *Anderson,* 246 Ark. 638, 439 S.W.2d 296 (1969), we held that school board members were conditionally privileged in discussing the conduct of a school teacher, at a meeting at which her discharge was

being considered. In *Thiel* v. *Dove,* 229 Ark. 601, 317 S.W.2d 121 (1958), we held that a witness to a city policeman's asserted misconduct was conditionally privileged in testifying about the matter during the city police committee's investigation and at a public city council hearing. We noted in *Thiel* that "the committee and the council were discharging a public duty in inquiring into Rogers' fitness to act as a policeman, and in the public interest it was desirable that they have as much information as possible about the incident."

In the present case the mayor and aldermen were discharging a public duty in asking the prosecuting attorney to initiate an investigation of former public employees' possible mishandling of public records, public property, and public funds. We do not see that it makes any difference that the letter was taken around by one alderman for the others' signatures instead of being signed at a council meeting. In either situation the defendants were acting in the public interest.

Both *McClain* and *Thiel* state that a conditional privilege is lost if a defamatory statement is made by one who knows it to be untrue or who is motivated by malice rather than by the public interest that created the privilege. Here neither basis for the loss of the privilege was established by the plaintiffs' proof. Hardly any statement in the letter is actually shown to have been untrue. Each plaintiff testified primarily about his own conduct, not that of others. Records and equipment were in fact missing. Drugs and drug paraphernalia had in fact been destroyed. Hard copies of tickets were in fact on hand. It is not shown whether Hall did or did not make the statement about 100 guns. Moreover, even if falsity could arguably be said to have been established, there is no showing that the six defendants knew any of the statements to be untrue.

Nor is it shown that the sending of the letter was actuated by malice. Except for the reference to Baker, which was true, the letter did not name anyone. If the mayor and aldermen believed, as they apparently did, that an investigation was appropriate, their communication to the prose-

cuting attorney could not have served its purpose without some description of the areas to be inquired into. We find no substantial evidence that would have justified the jury in concluding that the six defendants were motivated by actual malice in sending the letter.

Affirmed.

Floyd Junior COTTON, a/k/a Junior COTTON and Bud COTTON *v.* STATE of Arkansas

CR 81-48 634 S.W.2d 127

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Terry Jones of *Jones & Reynolds,* for appellant.

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

FRANK HOLT, Justice. The appellant was charged by information with capital felony murder. A jury found him guilty of first degree murder and assessed his punishment at life imprisonment. Appellant first asserts the trial court erred in permitting the prosecuting attorney to argue, in the presence of the jury, the merits of admitting testimony concerning a polygraph test taken by a defense witness.

During cross-examination by the state of Dorothy Taylor, widow of the victim and sister of the appellant, the following exchange occurred:

> (Prosecuting attorney): Okay. Is there any particular reason why on July 27th of '78, eight months later, you felt compelled to come in and give these stories?
>
> (Reporter's Note: Mr. Butcher [Taylor's counsel] talking with Dorothy Taylor off the record.)
>
> Ms. Taylor: At the time I came in and told you about the drugs and the beatings and stuff and you-all were wanting me to take a polygraph test, and I agree that I had not been honest with you, so I told you about the beatings and the drugs and the other thing and then I took the polygraph test.

(Prosecuting attorney): All right. Did you pass the polygraph test?

(Defense counsel): Objection.

(Prosecuting attorney): Your Honor, this was a totally uncalled for response after advice of counsel, and if she's gonna talk about taking a polygraph test then I'd like to get the results in.

The Court: Well, the Court will admonish the Jury to ignore any reference to a polygraph test. Under the present state of the law and the state of the art, the law does not consider polygraph examinations to be reliable and any — anything concerning a polygraph test will be ignored primarily because of the fact that a man is being charged with a crime here and we're not going to go into polygraphs so let's get off of that and go on to something else.

It is well recognized that any reference to a polygraph test in the absence of agreement or other justifiable circumstances would constitute error. *Van Cleave* v. *State,* 268 Ark. 514, 598 S.W.2d 65 (1980); *Roleson* v. *State,* 272 Ark. 346, 614 S.W.2d 656 (1981); and *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978).

The appellant argues this exchange had an adverse and prejudicial impact on his defense witness' credibility. However, the witness, after conferring with her personal counsel, initiated the subject by making the unsolicited statement that she had taken a polygraph test. The question by the state as to the result of the test was improper. However, the appellant promptly objected to the state's question, which was never answered. The court, *sua sponte,* immediately admonished the jury to disregard any reference to the test. Apparently the court's admonition was acceptable to the appellant inasmuch as he made no objection nor asked for a mistrial. No prejudicial error is demonstrated.

Appellant asserts that the trial court's admonishment to the jury was unclear, equivocal, and did not remove the taint

of the episode. We cannot agree. Apparently, appellant did not perceive the court's admonition as being deficient since he did not ask for a clarification nor object to the adequacy of the admonishment.

Appellant's final contention for reversal is that the trial court erred in admitting into evidence two color photographs of the victim. He argues that the photographs were more inflammatory than informative, and they were not corroborative of any issue. He insists there was no question as to the identity of the victim, the scene where he was found, nor that an autopsy was performed. Further, appellant was willing to stipulate that the victim suffered gunshot wounds.

Ordinarily, photographs are admissible if they have any relevance. *Lacy* v. *State,* 272 Ark. 333, 614 S.W.2d 235 (1981); and *Robinson* v. *State,* 269 Ark. 90, 598 S.W.2d 421 (1980). In order for a photograph, asserted to be inflammatory, to be excluded, the prejudice must outweigh the probative value. *Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979); *Campbell* v. *State,* 265 Ark. 77, 576 S.W.2d 938 (1979); and Ark. Stat. Ann. § 28-1001, Rule 403 (Repl. 1979). Neither is a photograph inadmissible because it is cumulative or unnecessary due to admitted or other proven facts. *Prunty* v. *State,* 271 Ark. 77, 607 S.W.2d 374 (1980); and *Spillers* v. *State,* 272 Ark. 212, 613 S.W.2d 387 (1981). Finally, the decision to admit photographs lies within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981); *Gruzen* v. *State, supra,* and *Robinson* v. *State, supra.*

Here, one photograph corroborated the witness' identification of the victim and also could fairly give rise to the inference that, after the victim suffered three fatal gunshot wounds to the head, the body was dragged to the location where it was found. The second photograph depicts a "slit" in the victim's chin, the nature and location of which were described by the state medical examiner as resulting from a blow by a blunt instrument. In our view, the nature, extent and location of the deep gash were relevant to the questions

of intent and state of mind of the appellant. Appellant's willingness to agree that the victim suffered gunshot wounds did not relieve the state of its burden of proving every element of first degree murder which included premeditation, deliberation and intent beyond any reasonable doubt. We find no abuse of discretion.

Pursuant to Supreme Court Rule 11 (f), Ark. Stat. Ann. Vol. 3A (Repl. 1977), we have reviewed the transcript for rulings adverse to appellant and find no error prejudicial to his rights.

Affirmed.

Maria J. WALTERS and Cristina WALTERS
v. Ola Jean LEWIS et al

81-262 634 S.W.2d 129

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Terry R. Kirkpatrick, for appellants.

Walter B. Cox of *Davis, Cox & Wright,* for appellees.

JOHN I. PURTLE, Justice. The Washington County Chancery Court dismissed appellants' complaint wherein they sought to have the estate of the decedent, Walter G. Walters, recovered and partitioned for their benefit as widow and sole surviving child.

Maria Walters, as widow, and Cristina Walters, as only surviving child of Walter G. Walters argue three points on appeal. First, they allege the chancellor erred in applying Ark. Stat. Ann. § 62-2902.1 to the facts of this case. Second, they contend that the court erred in finding the above statute barred their claim even if it was applicable. Third, it was argued that the court erred in dismissing the purchasers of the decedent's land from the case.

The facts reveal that Maria and Walter G. Walters were married in Guadalajara, Mexico on December 23, 1964, residing there for a number of years. Decedent adopted his wife's daughter, Cristina, on May 17, 1967, while all three still lived in Mexico. The family visited Mr. Walters' relatives in Washington County, Arkansas on a fairly regular basis until December 1969 when the decedent returned to the United States to renew his visa. However, he never returned to Mexico. Plaintiffs and the decedent corresponded fairly regularly at first but later only sporadically. Through the Walters' various visits in this country the appellees were all aware that Maria and Walter were married and represented themselves to be man and wife.

On February 23, 1976, Walter G. Walters died intestate in Washington County, Arkansas. About March 16, 1976, Ola Jean Lewis, sister of the decedent, filed an action in probate which resulted in her appointment as personal representative of the decedent's estate. She listed only the brothers, sisters, nieces and nephews of the decedent as his surviving relatives. She listed neither Maria nor Cristina as relatives although she knew that Walter and Maria had been married in Mexico. She had Maria's address, which was the same since she married Walter in 1964. On October 5, 1976, Ola Jean Lewis caused the distribution of the estate and had it closed. Prior to closing the estate she sold property to her relatives, the Groces, for the sum of $8,000. She had obtained permission of the court to sell the property. The appellants were not notified of the closing of the estate.

Christmas, 1977, Maria sent Walter a Christmas card. It was returned to her in Mexico with the written notation on the envelope, "deceased." The envelope bore a Guadalajara

postmark dated January 11, 1978. Shortly thereafter Maria wrote Ola Jean Lewis a letter inquiring about Walter. Maria claimed she wrote several letters in 1978 and denied receiving any response. Ola Jean Lewis admitted she received one letter from Maria but decided not to answer because she didn't think Maria had shown enough interest in the decedent. Sometime in July, 1979, Maria was able to go to Chicago to visit a relative, and while there she applied for social security benefits as the widow of Walter G. Walters. She presented the returned Christmas card to the authorities and explained she had written the Bureau of Vital Statistics of the State of Arkansas and requested a death certificate if one was on file. This action was taken at the request of the American Consul in Mexico. A three dollar check was enclosed with the request for the death certificate but neither the certificate nor the money were ever returned. There is no question but that on March 31, 1980, Maria learned that Walter was dead. This is the date she commenced receiving social security widow's benefits. In October of 1980, appellant was able to go to Washington County, Arkansas where she learned that her late husband's estate had been distributed to his relatives. She filed the present suit on January 23, 1981 and the court rendered its decision on August 31, 1981, finding constructive fraud on the part of appellee, and dismissing appellants' complaint due to the running of the statute of limitations.

We first consider the question of whether Ark. Stat. Ann. § 62-2902.1 (c) (Supp. 1981), Ark. Stat. Ann. § 62-2912 (Repl. 1971), or Ark. Stat. Ann. § 37-213 (Repl. 1962) applies to the facts in this situation. Under the foregoing statutes we find that the claim of the appellants is not barred. We so find because the personal representative breached her duty of trust and was guilty of fraud in: 1) failing to notify the appellants of Walter's death, 2) failing to disclose to appellants her appointment as personal representative, and 3) failing to advise appellants when the estate was closed. Further, appellee, Ola Jean Lewis, perpetrated a fraud upon the court by leaving appellants' names off the list of heirs as required by her position of administratrix to the estate. We find no basis for the excuse used that she thought Maria had divorced Walters. Maria had lived at the same address all of

the time since the administratrix had become acquainted with her. She even admitted receiving a letter from Maria Walters sometime in 1978 but decided not to answer it.

We agree that the statute of limitations must commence to run at some time. Therefore we look to prior decisions for guidance in this area. We considered a matter relating to the tolling of a statute of limitations based on grounds of fraud in *Williams* v. *Purdy,* 223 Ark. 275, 265 S.W.2d 534 (1954), where we stated:

> Mere ignorance of one's rights does not prevent the operation of the statute of limitations, but where the ignorance is produced by affirmative and fraudulent acts of concealment, the statute of limitations does not begin to run until the fraud is discovered.

Silence on the part of one who is under no duty to speak will not prevent the statute from running. However, if there is some positive act of fraud which would conceal a plaintiff's cause of action then the statute is tolled, *Williams* v. *Purdy,* supra. There must be some affirmative action on the part of the person charged with fraud before the statute will be tolled. *Nicklaus* v. *McClure,* 244 Ark. 23, 423 S.W.2d 562 (1968). In the case of *Wrinkles* v. *Brown,* 217 Ark. 393, 230 S.W.2d 39 (1950) we stated:

> The cases hold that in actions to recover money paid because of fraud, the cause of action accrued when the fraud was discovered, or should have been discovered, with the exercise of reasonable diligence.

We find that the personal representative committed fraud by failing to notify the appellants of her appointment and by not listing them as heirs on her petition for letters of administration. We think the appellants were put on notice requiring them to investigate the matter in January of 1978 when the Christmas card was returned with "deceased" written on the envelope. Maria immediately wrote the presonal represenative who intentionally refused to respond. She contacted the American Consulate in Mexico and was told to write the Bureau of Vital Statistics in Little

Rock. She did not receive a death certificate nor was her money refunded. We think she used due diligence in investigating Walter's death after having been put on notice that he may have been dead. She received no cooperation from the people who were in the best position to assist her. Maria Walters was able to get to Chicago in July of 1979 at which time she applied for social security benefits as the widow of Walter G. Walters, perhaps with the idea in mind that this would resolve once and for all the question of whether he was deceased. We think she had learned at this time or learned during this proceeding that her husband was dead. She would have known positively that he was dead in March of 1980 when she received a social security check as the surviving widow.

In essence, this is a suit for damages based on the fraudulent actions and inactions of the personal representative of the estate. We find that there was a duty on the part of the personal representative to notify the appellants of her appointment and of the closing of the estate. We also hold that there was a duty on the part of the appellants to verify the death of the decedent. We think that these duties on the part of the respective parties were resolved in July, 1979, when Maria applied for social security benefits. The fact that she did not actually learn of the distribution of the estate until October 1980 may be attributed to her failure to proceed in a more reasonable manner. Since we hold that the statute of limitations commenced to run in July of 1979 when the fraud was discovered the appellants were well within the time limits in filing their action pursuant to any of the foregoing statutes.

Appellants also argue that the court erred in dismissing the purchasers of the real property from the action. We agree with the chancellor's holding in regard to this portion of the case because the purchasers were in no way responsible for the fraudulent acts of the personal representative and, from the record as we see it, were bona fide purchasers for value, without notice of a defect in the title.

The case is remanded to the trial court with directions to enter the appropriate judgment against the personal repre-

sentative and her surety, Fidelity and Deposit Company. The decree as to all other defendants is affirmed.

Affirmed in part, reversed in part, and remanded.

BANK OF YELLVILLE, CITIZENS BANK & TRUST COMPANY OF FLIPPIN, and FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF HARRISON *v.* FIRST AMERICAN SAVINGS & LOAN ASSOCIATION and ARKANSAS SAVINGS & LOAN ASSOCIATION BOARD

82-76 634 S.W.2d 122

Supreme Court of Arkansas
Opinion delivered June 7, 1982

James W. Lance, for appellant First Federal Savings and Loan Association of Harrison.

Hermann Ivester, for appellants Bank of Yellville and Citizens Bank and Trust Company of Flippin.

Lee Thalheimer, Savings and Loan Board Supervisor; *Kelley & Luffman;* and *Gill, Skokos, Simpson, Buford & Owen,* for appellees.

JOHN I. PURTLE, Justice. This appeal is from a Pulaski Circuit Court decree which affirmed the ruling of the Arkansas Savings & Loan Association Board in granting a charter to First American Savings and Loan Association. The appellant argues that there was not substantial evidence to support the board's findings and that the board's findings as required by Ark. Stat. Ann. § 67-1824 (2) and (5) (Repl. 1980) are not accompanied by concise and explicit statements of underlying facts supporting the findings. We disagree with the appellant on both points.

A group of people in Marion County filed an application with the Arkansas Savings and Loan Board to charter an organization called First American Savings and Loan Association. The Bank of Yellville, Citizens Bank and Trust of Flippin, and First Federal Savings and Loan Association of Harrison protested the petition for a charter. The board held extensive evidentiary hearings and considered a number of depositions at the hearing on April 15, 1980. At the conclusion of the hearing the board voted, 3 to 1, to approve the application. The board made findings of fact which were included in the order of June 18, 1980. The protesting parties petitioned for a rehearing which was granted and held on October 10, 1980. An order was issued by the board on December 15, 1980, adopting findings of fact in support of the board's decision. Appellants appealed to the Circuit Court of Pulaski County which entered an order upholding the board on August 21, 1981. This appeal is from the order of the Pulaski County Circuit Court.

We will consider all of appellants' points at the same time. The argument is so interwoven that we deem it to be in the interest of clarity and brevity to address them together. In considering cases involving a charter application for a bank or savings and loan association we review the evidence to

determine if it is substantial enough to support the decision of the board. Cases supporting this standard of review are: *First State Building & Loan Assn.* v. *Arkansas S. & L. Assn. Board,* 261 Ark. 482, 549 S.W.2d 274 (1977); *Northwest S. & L. Assn.* v. *Fayetteville S. & L. Assn.,* 262 Ark. 840, 562 S.W.2d 40 (1978) and *Independence S. & L. Assn.* v. *Citizens Federal S. & L. Assn.,* 265 Ark. 203, 577 S.W.2d 390 (1979); *Arkansas S. & L. Board* v. *Central Arkansas S. & L. Assn.,* 260 Ark. 58, 538 S.W.2d 505 (1976).

We will now consider whether there was substantial evidence to support the decision of the board in the case before us. The present case is not unlike *Independence S. & L. Assn.* v. *Citizens Federal S. & L. Assn.,* supra, wherein we observed that there was conflicting evidence. We found that some of the board's specific findings of underlying facts were weak and possibly could not support the board's conclusion. Nevertheless we held that there was enough substantial evidence to support the finding of the board. The appellants' dissatisfaction involves whether the board fulfilled its obligation under the provisions of Ark. Stat. Ann. § 67-1824. Appellants argue that there was not substantial evidence to support the board's findings as required by the above statute. The order of the Arkansas Savings and Loan Association Board dated December 15, 1980, includes the findings upon which the order is based. The findings are contained in ten pages and seem to us to adequately support the conclusion reached by the board. We are not unmindful that the appellants strenuously argue that two of the proposed directors or officers of First American Savings and Loan Association did not meet requirement (2) of Ark. Stat. Ann. § 67-1824, alleging that they fraudulently obtained subscriber signatures. It is true that some eight of the 229 alleged subscribers to the new institution said they had signed the papers without full knowledge of what was contained therein. Admittedly there is some evidence which would support a decision contrary to the action of the board. The board heard and observed the witnesses as they testified. The credibility and weight to be accorded witnesses is the prerogative of the board and not that of reviewing courts.

Appellees have set forth the names and qualifications of the organizers of the proposed institution. Without going into the lengthy details of each of the arguments we note that the board found that all of the organizers were of good character, responsible, and generally fit to perform the duties involved in a savings and loan association. One had been a municipal judge, prosecuting attorney, state representative, and circuit judge. Another had managed a hardware company for 25 years and served as chief of the volunteer fire department and as a member of the Yellville Planning Commission. Additionally, one was president and chief executive officer of the largest industry in the county and had served 11 years on the school board. Another was a practicing dentist who also operated a turkey farm. One owned a real estate company, had served on the County Quorum Court, was president of the local chamber of commerce and was a member of the board of directors of the Bank of Yellville. Finally, one of the organizers had been named man of the year by his local chamber of commerce in 1977. He was one of the organizers of the Citizens Bank of Flippin and had served seven years as secretary and vice chairman of the bank's board of directors. All of the organizers had other qualifications which we will not mention here. About 16 witnesses appeared on behalf of the appellee savings and loan association at the board hearing and all testified favorably. The witnesses included the Mayor of Yellville as well as the Superintendent of the Yellville and Summit School District. Many other prominent witnesses testified.

There is no requirement that the board's findings of fact be stated separate from the order by the board. *Citizens Bank* v. *Arkansas State Banking Board,* 271 Ark. 703, 610 S.W.2d 257 (1981). The order in the present case was circulated to all board members who were given an opportunity to make any changes in the finding of facts. Since the primary purpose of the underlying facts is to assist the courts in understanding the case, we believe the findings in the present case are adequate for that purpose. *Arkansas S. & L. Board* v. *Central Arkansas S. & L. Assn.,* 256 Ark. 846, 510 S.W.2d 872 (1974). Without going through each and every requirement which must be found by the board before a charter is granted, we

can see from a careful review of the record that the board considered each organizer's background and determined that none of the proposed directors or officers had an affiliation with another financial institution, or closely related business, which would affect the independence of the proposed association. We recognize that this was a hard fought case and feelings obviously ran high on both sides. Nevertheless, we find there is substantial evidence to support the decision of the board as affirmed in the circuit court.

Affirmed.

HOLT and HAYS, JJ., not participating.

Dessie WARREN and Sylvia KYLE *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

82-79 634 S.W.2d 133

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Zolper & Everett, by: *Michael Everett,* for appellants.

Barrett, Wheatley, Smith & Deacon, by: *Jack Deacon,* for appellee.

JOHN I. PURTLE, Justice. At the close of the plaintiffs' testimony in a personal injury suit the trial court directed a verdict in favor of the appellee (defendant). The only argument presented on appeal is that the court erred in granting the motion for a directed verdict at the close of the plaintiffs' case. We disagree with the appellants' contention and affirm the judgment of the trial court.

Plaintiffs, Dessie Warren and Sylvia Kyle, sisters and residents of Poinsett County, were injured about 10:00 p.m. on May 5, 1980, when an automobile driven by Sylvia Kyle collided with the wheels of a flat car sitting on a railroad track which crossed Judd Smith Road in Crittenden County, Arkansas. The automobile was damaged and the passenger, Dessie Warren, was seriously injured.

Mrs. Kyle stated she was familiar with the road and knew the railroad crossing was there. She admitted seeing what looked like a board across the road. She told her sister that she had never seen that before and her sister replied that it might be a detour sign. In any event, they did not attempt to stop until they were within 100 feet of the flat car at which time Mrs. Kyle hit her brakes and the automobile "slid casually into the wheel." There was a crossing signal sign on the other side of the railroad tracks which both appellants had seen before. The driver testified her headlights were working properly, she had good brakes and her vision was good. There was no oncoming traffic meeting her nor any traffic signals beyond the track to indicate that vehicular travel was controlled. The appellant driver said she was driving very slowly and indicated that her speed was in the neighborhood of 30 miles per hour. The windows of the automobile were up and it was a clear night. Mrs. Kyle was looking for the railroad track because she was familiar with the area and knew it was nearby. She admitted knowing a crossbuck sign was located at the crossing. Dessie Warren, the passenger, testified essentially the same as her sister had testified. One of her statements regarding Mrs. Kyle's actions was, "She was driving slow, because we were trying to figure out what we were going to hit."

Although not impossible, the cases have been few and

far between in allowing a recovery by someone running into a stopped train. A case relied on heavily by the appellants is *Missouri Pacific Railroad Co.* v. *Purdy,* 263 Ark. 654, 567 S.W.2d 92 (1978). The *Purdy* case is cited by the appellants for the proposition that it is not a settled rule of law that a plaintiff can never recover when running into a parked train. This is still the law; however, the facts of the present case do not constitute the situation described in *Purdy.*

The other case relied upon by the appellants is *Hawkins* v. *Missouri Pacific Railroad Co.,* 217 Ark. 42, 228 S.W.2d 642 (1950). In *Hawkins* the trial court directed a verdict for the defendant just as occurred in the present case. However, we reversed on the theory that there was sufficient evidence to permit a jury to find negligence in the defendant and a lesser degree of negligence in the plaintiff who drove his automobile into the side of a standing freight train at a railroad crossing during the night. In *Hawkins* the accident occurred about 2:00 a.m., November 11, 1948, in Paragrould, Arkansas. The facts reveal that the crossing was a 90 degree one such as exists in the present case and it was a nighttime accident. Both Hawkins and his driver stated they were facing an oncoming car which had its lights on bright and blinded them somewhat. Also, they saw an operating traffic light in the middle of the street ahead of them on the other side of the tracks. They said they thought they had an unobstructed view down the highway, that there were no active signals at the crossing and that there was no brakeman or anyone to warn them that the boxcar was across the tracks. The boxcar had the doors on both sides open. Also, the track was elevated some two to three feet thereby causing meeting traffic to be somewhat hindered by the lights of an approaching vehicle. The *Hawkins* decision stated:

> In the instant case we believe there was evidence from which the jurors might reasonably have found that the defendant through its employees failed to exercise the care which an ordinary prudent man would have exercised under the same or similar circumstances. The time of night, the lights visible across the track, the open space in the line of an autoist's vision above the raised tracks and beneath the bottoms of the stopped

> freight cars, the wide open doors of the boxcar through which lights across the track shone while the boxcar stood motionless and silent, the absence of active crossing signals of any kind, the absence of guard or watchman, the fact that this was on a principal street in the business section of a goodsized city, and the fact that the train was then moved a distance down the track with neither sign nor signal given — all this was included in the evidence and if believed by the jury would indicate that defendant created, unintentionally but perhaps carelessly, something like a trap for unwary night drivers . . .

We do not see *Hawkins* v. *Missouri Pacific Railroad Co.*, supra, as being comparable with the present case to the extent that the appellants should be allowed a recovery. The two ladies both saw the flat car on the track and wondered what it was doing there. One of them thought it was probably a board and the other one said she just wondered what it was they were going to run into. Therefore, both of them admitted failure to use proper care and that they were negligent to the extent of being responsible for this accident. The court made the judgment that the plaintiffs' evidence would not support a judgment against the defendant. A review of the evidence presented shows that the court's ruling was correct and was not an abuse of discretion. Therefore, we agree with the trial court and affirm this judgment.

Affirmed.

Theresa Lynn HILL, Sherry Laverne LEDFORD,
Marsha Gail OVERTON and Dayna J. SNYDER
v. STATE of Arkansas

CR 81-135 634 S.W.2d 120

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Robert E. Irwin of *Irwin & Kennedy* and *Bullock, Harding & McCormick,* for appellants.

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

ROBERT H. DUDLEY, Justice. The appellants, four girls ranging in age from sixteen to twenty, were charged with the aggravated robbery of Louis Daniels at the New Hope Grocery in Pope County in February, 1981. A jury found all four guilty and fixed the sentence of each at six years. The applicable statute, Ark. Stat. Ann. § 41-2102 (Supp. 1981), provides a minimum mandatory sentence of six years without suspension of execution of sentence. The jury added to its verdict form the phrase, "we the jury recommend leniency according to the Court's judgment by consideration of the partial suspension." No details of the aggravated robbery are known to this court as none of the evidence has been designated to be a part of the record. The record before us consists of only the instructions, requests for instructions and rulings of the trial court with regard to the constitutionality of the mandatory serving of sentences. Jurisdiction is vested in this court pursuant to Rule 29 (1) (c) as one of the issues involves the constitutionality of an act of the General Assembly. We uphold the constitutionality of the act and affirm the trial court.

The trial court instructed the jury only on the offense of aggravated robbery. Appellants contend that the trial court erred in refusing to instruct on lesser included offenses and they argue that theft and robbery are lesser included offenses.

Our general rule on instructing the jury on lesser included offenses was stated in *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972):

> * * * We have consistently held that a trial court commits reversible error when it refuses to give a correct instruction defining a lesser included offense and its punishment when there is testimony on which the defendant might be found guilty of the lesser rather than the greater offense. (Citing cases.) * * *

The questions in this case become; are theft and robbery lesser included offenses within aggravated robbery and, if so,

is there evidence upon which appellants might be found guilty of the lesser rather than the greater offense? Theft is not a lesser offense included within the definition of aggravated robbery. *Higgins* v. *State,* 270 Ark. 19, 603 S.W.2d 401 (1980), Hence no additional discussion of the need for an instruction on theft is necessary. However, robbery is a lesser offense included within the definition of aggravated robbery as those offenses are defined in the Arkansas Criminal Code of 1976. Ark. Stat. Ann. §§ 41-2102 and 41-2103 (Supp. 1981). *Hamilton* v. *State,* 262 Ark. 366 at 373, 556 S.W.2d 884 (1977). If there is any evidence to support the giving of the instruction on the lesser included offense, it must be given. *Sargent* v. *State,* 272 Ark. 336, 614 S.W.2d 503 (1981). But, if there is no rational basis for acquitting appellants of aggravated robbery and convicting them of the lesser offense of robbery, the lesser instruction need not be given. Ark. Stat. Ann. § 41-105 (3) (Repl. 1977); *Hamilton* v. *State,* supra. In this case the trial judge, in refusing the instruction on the lesser included offense, commented that he was going to give only the aggravated robbery instruction "because there is no question — there is no conflict in the testimony that a deadly weapon was used . . . " The statement is conclusive of the fact that there was no rational basis for acquitting appellants of aggravated robbery and convicting them of robbery because none of the evidence given at trial has been made a part of the record on appeal. Thus, we affirm on the issue of instructing the jury.

Appellants next contend that a statute containing a mandatory minimum sentence with a provision prohibiting the suspension of execution of the sentence is an unconstitutional legislative usurpation of judicial powers. The relevant portions of § 41-2102 are:

> (3) (a) Upon . . . being found guilty . . . of aggravated robbery . . . such person shall be imprisoned for not less than six (6) years;
> (4) The sentences provided for . . . are mandatory and shall not be subject to suspension.

The trial court ruled that the statute made the imposition of the sentence mandatory and that he could not

suspend execution of sentence even though the jury had recommended partial suspension. The trial court was correct in its ruling for we have long held that courts have no inherent authority to suspend indefinitely the execution of a sentence. In *Davis* v. *State,* 169 Ark. 932, 277 S.W. 5 (1925), we stated:

> It is evident that, when a court undertakes on its own motion to suspend a sentence indefinitely, it really refuses to enforce the punishment provided by statute, unless it shall at some future time conclude that it is proper to do so. The power to exercise discretion as to the enforcement of the punishment provided by law and pronounced by the court is vested in the Governor.
>
> We are therefore of the opinion that the circuit court in each instance erred in holding that it had inherent power or any power at all to suspend the execution of the sentence during the good behavior of the defendant. ***

We have consistently held that statutory authority is necessary for a court to suspend the execution of a pronounced sentence. *Joiner* v. *State,* 94 Ark. 198, 126 S.W. 723 (1910); *Wolfe* v. *State,* 102 Ark. 295, 144 S.W. 208 (1912); *Davis* v. *State,* supra; *Stocks* v. *State,* 171 Ark. 835, 286 S.W. 975 (1926); *Denham* v. *State,* 180 Ark. 382, 21 S.W.2d 608 (1929); *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980). We decline to overrule these cases. The power to grant or withhold the authority of trial judges to suspend the execution of a pronounced sentence properly lies within the General Assembly.

Appellants' final argument is that during the course of the trial the judge expressed doubts about the constitutionality of the act but, at the time of sentencing, upheld the act. This does not constitute reversible error for a trial judge is at liberty to reconsider earlier rulings. *Arnold, Sheriff* v. *State, ex rel Burton,* 220 Ark. 25, 245 S.W.2d 818 (1952); *Nance* v. *Flaugh,* 221 Ark. 352, 253 S.W.2d 207 (1952). In addition, on the abbreviated record before us, no prejudice can be demonstrated. In Arkansas we have long held that a

judgment of conviction will be reversed for prejudicial errors only. *Lee* v. *State,* 73 Ark. 148, 83 S.W. 916 (1904). This is still the law. We do not reverse for non-prejudicial errors. *Brown* v. *State,* 262 Ark. 298, 556 S.W.2d 418 (1977).

Affirmed.

DILLARD DEPARTMENT STORES, INC.
v. Donnie R. FELTON

82-56 634 S.W.2d 135

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Wright, Lindsey & Jennings, for appellant.

Lanny K. Solloway, for appellee.

STEELE HAYS, Justice. Appellee was formerly employed at a warehouse of appellant Dillard Department Stores, Inc., and brings this action for defamation based on statements by supervisory employees of Dillard accusing him of theft. The trial court sitting with a jury awarded appellee $2,000 compensatory damages and $5,000 punitive damages. For reversal, appellant contends, first, the defamatory statements relied upon by the appellee did not exceed the

qualified privilege existing under the law and there was no substantial evidence that the statements were made with express or implied malice; and second, the evidence does not support an award of punitive damages. We sustain the argument with respect to punitive damages but affirm the judgment as to compensatory damages.

Stating the facts most favorably to the appellee: On June 28, 1981, at quitting time, a Dillard security officer observed a box of Dillard merchandise in appellee's car in the parking lot. Appellee was unable to produce a sales receipt, as required of employees who make cash purchases from the company. The following morning he was called to the office of the warehouse supervisor, George Burger. Mr. Burger, Emory Martin, appellee's immediate supervisor, and the appellee were present. Mr. Burger asked appellee to explain his possession of the merchandise without a sales receipt and his having been seen leaving the warehouse with the merchandise by an unauthorized exit. Appellee's response was that the exit rule was not enforced and that he had bought the articles the previous week at a company warehouse sale and had left them in Mr. Martin's office over the weekend. He said the merchandise and sales receipt were in a Dillard's sack but somehow during the interval the sack was destroyed and the receipt lost. Mr. Burger said, "I think you're a liar and a thief." He told appellee he had received an anonymous telephone call that appellee had been attempting to sell two stereo speakers missing from the warehouse, suggesting the evidence might justify criminal prosecution. At this point appellee became angry and walked out of the meeting. Outside Burger's office as he was leaving, appellee told a fellow employee, Alonzo Waller, that he had been accused "of taking some things." When Mr. Martin came out of Burger's office, Waller asked him what had happened and in the presence of several employees Martin said appellee had been fired because he had been caught stealing.

Sometime later appellee's wife called Mr. Martin to ask why appellee was fired. She testified Mr. Martin said all he knew was "there was an anonymous phone call about some speakers that Ronnie was selling and that there was nothing he could do. . . . "

Appellee went immediately to the Employment Security Division to seek unemployment benefits. Appellee testified he told an unidentified woman interviewing him, "... I was fired and accused of theft and dishonesty." When the ESD interviewer called Mr. Burger to verify appellee's termination, Burger testified: ... "She said, 'I want to verify that Mr. Felton was fired for alleged theft' and I just said 'no,' that he was going to be terminated for violation of company rules." This testimony of this conversation is uncontradicted as the unidentified ESD employee did not testify.

Still later Mrs. Willis of the Employment Security Division telephoned Carl Williams, appellant's Director of Personnel, requesting a letter stating the reasons for appellee's termination. Mr. Williams wrote in response: "The circumstances leading up to this involves Mr. Felton having possession of merchandise for which he could not produce a receipt."

First, we consider whether the publication of these communications exceeded the scope of the qualified privilege. The relevant law is summarized in the Restatement (Second) of Torts § 595 (1981):

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> > (a) there is information that affects a sufficiently important interest of the recipient or a third person and,
> >
> > (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within the generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.

Prosser explains the qualified privilege as follows:

> There remain a group of situations in which the interest which the defendant is seeking to vindicate is regarded as having an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditioned upon publication in a reasonable manner and for a proper purpose. The privilege is therefore spoken of as "qualified," "conditional," or "defeasible." It is difficult to reduce these cases to any single statement, and perhaps no better formula can be offered than that of Baron Parke, that the publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." W. Prosser, The Law of Torts, § 110, p. 805 (3rd ed. 1964).

One important condition attaches to the qualified privilege, such communications must be exercised in a reasonable manner and for a proper purpose. The immunity does not protect a defendant from publication to persons other than those whose hearing is reasonably believed to be necessary or useful for the furtherance of that interest. Prosser, *supra,* at p. 819.

We believe the statements made at the June 19 closed-door meeting come within the qualified privilege afforded an employer. *Merkel* v. *Carter Carburetor Corp.,* 175 F.2d 323 (8th Cir. 1949), 53 C.J.S. *Libel and Slander,* § 109 (1948). The only persons present other than the appellee were the warehouse manager and a supervisor, both of whom had a legitimate interest on behalf of appellant to investigate appellee's possession of merchandise without the required receipt.

Nor does the communication from Mr. Martin to appellee's wife strike us as excessive. The communication was factual and was in response to her inquiry. (See Restatement, *supra.*) She had an interest in learning the reason for her husband's termination, making this communication neither unnecessary nor excessive. *Thomas* v. *Kaufman's,* 436 F. Supp. 293 (W.D. Penn. 1977), 53 C.J.S. *Libel and Slander* § 120 (1948).

We next examine those statements made by appellant's employees to the Employment Security Division. The trial court held these not to be within the qualified privilege. We disagree. These communications fall within the general rationale for which the qualified privilege was created by protecting statements made in good faith with reasonable grounds for believing them to be true on a subject matter in which the author has a public or private duty to a person having a corresponding duty. 53 C.J.S. *Libel and Slander* § 89 (1948). Similarly, this privilege extends to reporting agencies. *Dun & Bradstreet, Inc.* v. *Robinson,* 233 Ark. 168, 345 S.W.2d 34 (1961). Under the Employment Security Act a discharged employee's entitlement to benefits depends in part on the circumstances of his termination and plainly the employer's duty to report accurately to the ESD carries a qualified privilege. We find no evidence that the content of all of the communications, oral and written, to the Employment Security Division was factually inaccurate, beyond what was necessary, or was lacking in good faith.

Finally, the statement by Emory Martin to Alonzo Waller and others that appellee was "fired because he was caught stealing" cannot be similarly disposed of, as we find no justification in fact for Martin's statement, nor any reason for the recipients (Waller and the other employees) to have an important interest affected by the investigation. Notwithstanding the fact that Waller, rather than Martin, initiated the communication and that some privilege applies to an employer's right to inform other employees that one of their number has been discharged for theft, nevertheless, when viewed in the light most favorable to the appellee we find the statement exceeds that which was necessary to the sitaution. Martin did not simply state that

appellee was under investigation for theft, or for violation of rules, but that appellee was fired because he was caught stealing. The statement was factually incorrect and obviously injurious to the appellee. He was not caught stealing and according to appellant's argument on appeal he had not even been fired, but had quit. The most that Martin could have said in truth was that appellee had been found to be in possession of goods without a receipt and was suspected of theft. Since we find no legitimate interest necessitating Martin's statement and find it to have been factually inaccurate at the expense of appellee's reputation, we think it excessive and therefore supportive of the award of compensatory damages.

Appellant argues that any defamatory impact was effectively nullified by the fact that Waller had already been told essentially the same thing by appellee on leaving the warehouse. But we disagree. There is a vast difference in saying someone is *accused* of stealing, as opposed to saying that someone has been fired because he was caught stealing. The former plainly implies the possibility of error — the latter, unquestioned guilt. Mr. Martin was under no obligation to divulge anything to other employees, at least at that point, and having chosen to speak, his communication should have been strictly accurate. When this evidence is given its fullest import it exceeds the privilege afforded under law. In *Arkansas Associated Telephone Company* v. *Blankenship,* 211 Ark. 645, 201 S.W.2d 1019 (1947), we approved the following language:

> "The protection of the privilege may be lost by the manner of its exercise, although the belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interest or his duties require. Where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is

not a defense, even though he acted in good faith." (At p. 651.)

Turning to the question of malice, the trial judge expressly found no actual malice. The appellee acknowledged that he did not believe either Burger or Martin "had it in for him." In fact, he admitted that Mr. Martin suggested appellee use his name as a reference for future employment. Appellee argues malice may be inferred from appellant's failure to further investigate the alleged theft after the June 19 meeting. The argument is unsound. Appellant's action or inaction in this respect is consistent with its contention that the appellee had quit and consequently there was no reason to continue the investigation or take further steps in the matter.

Although it is said that express malice requires no extrinsic proof and can be inferred by the jury from all of the circumstances of the case, nevertheless where the totality of the evidence is such that fair-minded men could not infer malice, an award of punitive damages cannot be upheld. We find no evidence that any ill-will was harbored by appellant's employees, or that they were motivated by malice or bad intent toward the appellee, as his own testimony sustains. It is significant that Martin's statement was not volunteered, but made in response to Waller's question, an important element in mitigation (Restatement, *supra*). We conclude the award of punitive damages cannot be upheld. *Braman and The Gus Blass Co.* v. *Walthall,* 215 Ark. 582, 225 S.W.2d 342 (1949); *Stallings* v. *Whittaker,* 55 Ark. 494, 18 S.W. 829 (1892); *Luster* v. *Retail Credit Co.,* 575 F.2d 609 (8th Cir. 1978).

Affirmed as to compensatory damages; reversed as to punitive damages.

Merril Lee CURRY *v.* STATE of Arkansas

CR 80-142 634 S.W.2d 139

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Appellant, *pro se.*

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

PER CURIAM. Petitioner Merril Lee Curry was convicted of murder in the first degree in February 1978 and sentenced to life imprisonment in the Arkansas Department of Correction. We affirmed. *Curry* v. *State,* 272 Ark. 291, 613 S.W.2d 829 (1981). This Court later denied petitioner's petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37. *Curry* v. *State* (not designated for publication, March 8, 1982). She has now filed a petition for credit for the time spent in jail prior to trial.

In the absence of any showing to the contrary, it will be presumed that a sentence is pronounced according to the statutes. *Coleman* v. *State,* 257 Ark. 538, 518 S.W.2d 487 (1975). Petitioner does not allege, and it does not appear from the face of the record, that the trial court did not afford

her the opportunity to ask for credit for jail time prior to sentencing.

Postconviction relief is not available to an accused who could have asserted the ground of her collateral attack in the trial court before sentence was pronounced but did not. *Coleman,* supra.

Furthermore, there is no way to credit jail time against a life sentence since a life sentence is for the natural life of the person. *Campbell* v. *State,* 265 Ark. 77, 576 S.W.2d 938 (1979).

Motion denied.

Lionel GREEN *v.* STATE of Arkansas

634 S.W.2d 140

Supreme Court of Arkansas
Opinion delivered June 7, 1982

Appellant, *pro se.*

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

PER CURIAM. Appellant Lionel Green, acting pro se, has filed a motion for belated appeal. His attorney Julius Kearney filed a motion for belated appeal in the case which was denied on May 10, 1982. In his motion appellant also asks this Court to declare him indigent and grant him permission to proceed pro se on appeal.

The appellant alleges that within 30 days of the date of his conviction, he informed his attorney that he wished to appeal. In his affidavit in response to appellant's motion, the attorney admits that he received a letter from the appellant expressing his desire to appeal. Instead of filing a notice of appeal, he asked the trial court to relieve him as counsel and declare the appellant indigent. The trial court has not acted on the motion. Appellant subsequently filed an untimely pro se notice of appeal.

Arkansas Rules of Criminal Procedure, Rule 36.26, provides that trial counsel, whether retained or appointed, shall continue legal representation of a criminal defendant until permitted to withdraw by the trial court or this Court. Counsel has shown no good cause for his failure to continue in his representation of the appellant. Although he avers that he attempted to explain to the appellant "how to get into court" and states that the appellant knew how to prepare legal documents from his previous incarceration, he does not demonstrate that he took any affirmative steps to see that the appellant understood the process whereby the appeal could be perfected. See *Houston* v. *State,* 263 Ark. 607, 566 S.W.2d 403 (1978).

This Court will accept an appeal in a criminal case where to do otherwise would deprive the appellant of the constitutional right to effective assistance of counsel. *Moore* v. *State,* 268 Ark. 191, 609 S.W.2d 894 (1980). Since we find that the attorney did not act to protect his client's right to appeal, and has shown no good cause for his failure to do so, we must grant the appellant's pro se motion for belated appeal. A copy of this opinion will be forwarded to the Committee on Professional Conduct. See our Per Curiam opinion relating to belated appeals dated February 5, 1979.

Appellant's request to be declared indigent is denied without prejudice as he has provided no proof of indigency. Appellant's motion to proceed pro se cannot be granted until such time as he has provided this Court with an affidavit in accordance with Supreme Court Rule 8 (d), Ark. Stat. Ann. Vol. 3A (Supp. 1981), stating that he knowingly and intelligently waives the right to the services of an attorney on appeal. He should be aware that if he insists on proceeding pro se, he will be required to fully comply with the rules of this Court, including the requirement that all abstracts and briefs be printed or typed. If appellant cannot comply with the rules of this Court, he should so state and counsel will be appointed to represent him.

Motion for belated appeal granted.

John DeCLERK et al *v.* Bob TRIBBLE

82-81 637 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered June 14, 1982
[Rehearing denied July 12, 1982.*]

Wilson, Grider & Castleman, by: *Murrey L. Grider,* for appellants.

Barrett, Wheatley, Smith & Deacon, and *J. F. Sloan, III,* for appellee.

GEORGE ROSE SMITH, Justice. The principal issue in this action for damage to a garage building is whether the trial court was right in refusing to enter a default judgment against the appellee, Bob Tribble, after his failure to file an answer within the time allowed. At a trial on the merits the jury found for Tribble. Our jurisdiction is under Rule 29 (1) (c).

The question is whether Tribble's default was due to "excusable neglect" on the part of his attorney. ARCP Rule 55 (c); *Sparks* v. *Shepherd,* 255 Ark. 969, 504 S.W.2d 716

*DUDLEY, J., not participating.

(1974). The only proof to justify the attorney's neglect is his affidavit that he prepared a timely answer, but upon its completion his secretary put it in a place where it was covered by other papers and was not brought to the attorney's attention until four days after its due date. If such carelessness is excusable, then any attorney can shift the responsibility for filing any pleading to his secretary by simply dictating the pleading and dismissing the matter from his mind. The trial judge clearly abused his discretion in condoning such negligence.

It is argued by the appellee that the notice of appeal was defective in referring only to the court's denial of a motion for a new trial instead of to the original judgment on the verdict. No greater specificity was necessary. An order refusing a new trial is final and brings up for review any preceding order involving the merits. Rules of Appellate Procedure, Rule (2) (a) (3) and (b). Moreover, the appellants designated the entire record for the appeal; so the alleged defect in the notice of appeal could not have prejudiced the appellee.

Reversed and remanded for the entry of a default judgment and for the determination of damages alleged in the complaint on file when the default occurred. See *S. R. Morgan & Co.* v. *Pace,* 145 Ark. 273, 224 S.W. 483 (1920).

DUDLEY, J., not participating.

Joe Willie REED *v.* STATE of Arkansas

CR 82-17 635 S.W.2d 472

Supreme Court of Arkansas
Opinion delivered June 14, 1982
[Rehearing denied July 19, 1982.]

Robert B. Wellenberger, for appellant.

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

FRANK HOLT, Justice. The appellant was arrested September 27, 1977, on charges of rape, burglary, and theft of property. The next day an information charging him with these offenses was filed, and he was arraigned. Shortly before his arraignment, he was appointed counsel. Following a brief consultation with his attorney, he entered a guilty plea to the three charges, pursuant to a negotiated plea, and was sentenced to 30 years for rape and 10 years on each of the other charges. The sentences were to run concurrently.

On May 15, 1980, appellant initiated proceedings for postconviction relief pursuant to A. R. Cr. P., Rule 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977). He alleged, *inter alia,* that his sentence was imposed in violation of A. R. Cr. P., Rule 24 and, therefore, his plea was not voluntarily nor intelligently made. After an evidentiary hearing, the court, in written findings of fact and conclusions of law, found to the contrary and denied relief. The court concluded any deficiencies in the September 28, 1977, plea proceeding were supplied at the postconviction relief hearing. Hence this appeal.

We need only to consider appellant's contention, through present appointed counsel, that the court erred in finding his guilty plea was entered voluntarily, knowingly, and intelligently. He argues that the judgment was imposed in violation of A. R. Cr. P., Rules 24.4, 24.5, 24.6 and 24.7, which provide:

> Rule 24.4 in pertinent part:
>
> The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:
>
> (a) the nature of the charge;
>
> (b) the mandatory minimum sentence, if any, on the charge;
>
> (c) the maximum possible sentence on the charge, including that possible from consecutive sentences;
>
> . . . .

Rule 24.5:

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

Rule 24.6:

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.

Rule 24.7:

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved.

We are hampered in our review of this matter as the court reporter was unable to supply the court with a record of the September 28, 1977, proceeding which is required by Rule 24.7. In the absence of the required record, the state has the burden of proving the plea was voluntarily and intelligently entered. *Irons* v. *State,* 267 Ark. 469, 591 S.W.2d 650 (1980); and *Deason* v. *State,* 263 Ark. 56, 562 S.W.2d 79 (1978). We will not reverse the findings of the trial court unless clearly against the preponderance of the evidence. *Mitchell* v. *State,* 271 Ark. 512, 609 S.W.2d 333 (1980).

Here, the state introduced the court's docket. However, it merely reflected the appointment of counsel to represent appellant and to advise him of his rights to a trial by jury and counsel; that the trial court read the charge to the appellant and again explained his rights to which the defendant stated that he understood them following which he pled guilty to the charges and received the sentences of 30 years for rape, 10 years for burglary and 10 years for theft, the sentences to run concurrently. The appointed attorney, who represented the

appellant when he pled guilty, testified that when he was appointed on the day of arraignment he reviewed the investigating officers' file, talked with them and conferred with and explained to appellant the possibilities of conviction upon a jury trial, including the range of sentences. The appellant had signed a confession to the crimes charged, the attorney was convinced that the confession was voluntary, and that appellant had committed the alleged offenses. He did not remember asking the appellant about prior convictions or possibilities of parole. He did not discuss the crimes of burglary or theft except as to additional punishment. Appellant appeared coherent, although he was upset, afraid and didn't know what might happen to him. He never complained about any coercion. The court "pretty well left everything" to him as appointed counsel "to advise him of his rights and so on." He did not remember the questions the trial judge asked the appellant but stated: "He [the court] didn't go into details of the event. He merely arraigned the defendant again . . . he asked him if he pled guilty or not guilty . . . . " The prosecutor then made a recommendation as to the sentence and the trial judge "didn't hesitate and rendered judgment right then, and wrote it in the docket." The trial judge did not ask the appellant anything about the voluntariness of his plea nor the factual basis.

The state's evidence clearly shows that the trial judge, upon accepting appellant's plea of guilty, failed to comply with our rules. We have said that compliance with Rule 24.6 is mandatory. *Irons* v. *State, supra.* Rule 24.5, which requires that the trial judge himself ascertain whether a plea of guilty is voluntary, is mandatory. *McGee* v. *State,* 262 Ark. 473, 557 S.W.2d 885 (1977); *Irons* v. *State, supra;* see also *Boykin* v. *Alabama,* 395 U.S. 238 (1969); and *Byler* v. *State,* 257 Ark. 15, 513 S.W.2d 801 (1974). It is the duty and responsibility of the trial court to determine beyond doubt that a plea of guilty is voluntary, and in order to do so, he should inquire of the defendant personally, substantial compliance being sufficient. *Simmons* v. *State,* 265 Ark. 48, 578 S.W.2d 12 (1979). However, reversal is not mandated where the deficiencies in the proceeding are supplied at a postconviction hearing. *Deason* v. *State, supra.* See *Byler* v. *State, supra.*

Here, on the record presented, when we view the totality of the circumstances, we cannot say with confidence that the state has met its burden of showing that the plea of guilty was voluntarily and intelligently entered.

The judgment of the trial court is reversed and remanded with directions to vacate the sentences imposed and for further proceedings against the appellant as may be appropriate.

Reversed and remanded.

Troy BROWN *v.* ARKOMA COAL CORPORATION

82-92 634 S.W.2d 390

Supreme Court of Arkansas
Opinion delivered June 14, 1982

Daily, West, Core, Coffman & Canfield, by: *Michael C. Carter* and *Wyman R. Wade, Jr.,* for appellant.

Shaw & Ledbetter, by: *J. Michael Shaw,* for appellee.

DARRELL HICKMAN, Justice. The issue in this case is whether a perfected security interest in certain equipment can be defeated by a judicial sale. The trial court held that Arkoma Coal Corporation had a perfected security interest in a John Deere road grader, a Wisconsin 4-cycle engine and a one ton flat-bed Ford truck that was not defeated by a judicial sale. But it held that the security interest was not perfected in a 1964 International Scout motor vehicle. Troy Brown, the appellant, purchased this equipment, in addition to some other, at a judicial sale and appeals the Sebastian County Circuit Court's decision awarding the three items of equipment to Arkoma Coal Corporation. We find no error as to the road grader and engine but must reverse the court's finding as to the Ford truck.

Arkoma Coal Corporation made several loans to Midwest Coal and Energy Corporation and secured the notes with security agreements, properly filed, on the equipment in question. But Arkoma did not note its lien on the certificates of title to the motor vehicles as Ark. Stats. Ann. §§ 75-160 and 75-161 direct. The City of Greenwood, Arkansas obtained a money judgment against Midwest Coal and issued a writ of execution to satisfy its judgment, attaching the equipment in question. At the sale, Troy Brown, who was the Mayor of Greenwood, purchased all of the equipment for $1,000.00. He bought the equipment individually and not as mayor. It is undisputed that no legal notice was

given to Arkoma Coal Corporation of the sale. Nor is it disputed that Arkoma Coal had filed security agreements on all of the equipment. However, on the date of the sale, the president of Arkoma Coal Corporation learned on his own that a sale was to take place and caused a petition to be filed with the court to stay the distribution of the proceeds of the sale. Arkoma either did not pursue their petition, or was unaware of the court's order confirming the sale six days later.

This suit is a replevin suit that was filed a year and a half later by Arkoma for the return of the equipment it claimed a security interest in. The trial court found that Arkoma had a superior right to the grader, engine and truck to that of Troy Brown, because there was no notice of the sale to Arkoma. He found Arkoma had neither waived its valid security interest nor was it estopped to assert its claim. In this regard the only serious consideration was whether Arkoma had either expressly or impliedly waived its claim by filing the pleading to stay the distribution. Both parties refer to Ark. Stat. Ann. § 85-9-306 (2) as authority. The statute reads:

> Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

Troy Brown argues that Arkoma, by filing the pleading, consented to the sale and falls within the category of "otherwise" authorizing the sale. The trial court correctly held that this was not a waiver of the security interest. A party holding a security interest can go against both the proceeds of the sale and the property. Ark. Stat. Ann. § 85-9-306, Comment 3. There is no evidence in this case Arkoma ever intended to waive its claim except for filing the petition and that is insufficient as a matter of law to waive a lien. *See* Nickles, *A Localized Treatise on Secured Transactions — Part II: Creating Security Inteests,* 34 Ark. L. Rev. 559 (1981).

Brown also argues that since Arkoma did not file its replevin suit until one and a half years after the judicial sale, that amounts to ratification of the sale. That fact alone cannot be controlling. Perhaps if Arkoma had elected to only seek the proceeds of the sale, rather than the collateral, that might amount to ratification. *See* Nickles, *supra,* n. 728. We do not reach that because we cannot say that Arkoma made such an election.

The only real problems to us in this case are the fact questions. The appellant did not object during the hearing to the court sitting without a jury. But the court did note in the judgment that a jury trial had been requested and went on to find no question of fact was to be decided. Actually it appears the appellant wanted any disputed facts decided by a jury. Certainly there was a disputed question regarding whether the one ton Ford truck was an on-the-road vehicle and, therefore, subject to registration. It would appear that the truck would have to be registered with the State of Arkansas. (Arkoma did not perfect its lien by noting its interest on the certificate of title as required by Ark. Stat. Ann. §§ 75-160, 75-161.) The only testimony regarding this vehicle came from the president of Arkoma who testified that the Ford truck was probably an off-the-road vehicle used in a coal mine or used to transport material between coal mines. But he could not be certain. If it was not subject to registration, Arkoma should probably prevail. However, the matter is further complicated because it may be that Brown's claim, based on the judicial sale, is still inferior to Arkoma's because evidently the order of sale did not list the truck in question as one of the vehicles to be sold. Instead, another truck was listed which was a "water" truck — not a flat-bed truck. The court simply found that the one ton Ford truck was the property of Arkoma and the decree recites there were no questions of fact to be decided. Obviously there was at least one disputed question of fact and that should have been resolved either by the trial court with the consent of the parties or before a jury.

In our judgment there remained no other disputed facts before the court. Waiver and estoppel were presented as defenses because of the pleadings filed and the passage of

time only. There appears to be no other basis for these arguments. If the appellant had desired these issues preserved for a jury he should have explicitly said so. These issues were submitted to the court without explicit objections. It is the duty of the appellant to make his record and we must resolve all doubts on behalf of the appellee on appeal. *Orsby* v. *McGee,* 271 Ark. 268, 608 S.W.2d 22 (1980). The trial court's finding regarding the Ford truck is reversed and remanded and the remainder of the judgment is affirmed.

Affirmed in part, reversed and remanded in part.

ARKANSAS LIVESTOCK AND POULTRY COMMISSION *v.* Dennis HOUSE

82-29 634 S.W.2d 388

Supreme Court of Arkansas
Opinion delivered June 14, 1982

Steve Clark, Atty. Gen., by: *Roger W. Giles,* Asst. Atty. Gen., for appellant.

Van T. Younes of *Adams, Covington & Younes, P.A.,* for appellee.

STEELE HAYS, Justice. By this appeal we are asked to decide whether the discharge of an employee by the Arkansas Livestock and Poultry Commission is subject to review

under the Administrative Procedure Act. The circuit court held it to be an adjudication and, hence, covered by the act. On appeal we reverse, holding the discharge of an employee to be an administrative decision and the circuit court is without jurisdiction to review those decisions.

Appellee House had been employed for several years as a livestock inspector for the Arkansas Livestock and Poultry Commission. In October 1978 he was discharged on the ground that alcohol was interfering with his job performance, which was otherwise quite acceptable. He was later reinstated to a probationary status pursuant to a grievance proceeding but subject to immediate discharge for drinking on the job, while in uniform or in a State-owned vehicle, or for failure to regularly attend meetings of Alcoholics Anonymous.

During the probationary period appellee was notified that his employment was again terminated for drinking and for failure to regularly attend meetings of Alcoholics Anonymous. A fact-finding panel again heard testimony from several witnesses including appellee and recommended against rehiring until such time as appellee had demonstrated voluntary rehabilitation. This recommendation was adopted and appellant then filed suit in circuit court, invoking the Arkansas Administrative Procedure Act, Ark. Stat. Ann. § 5-701 through 714 (Repl. 1976), tracking his allegations of error, for the most part, in accordance with the grounds for judicial review set out in Section 13 (h) of the act.

Appellant commission moved to dismiss the complaint on the ground that the termination of an employee is not an "adjudication" within the meaning of the act, which the court declined to grant, holding instead there was no substantial evidence to support appellee's termination.

For reversal, appellant contends employee terminations are not subject to review under the Administrative Procedure Act and the trial court erred in not dismissing appellee's complaint for lack of jurisdiction and second, appellee's dismissal was supported by substantial evidence. We need

not reach the second point, as the first point must be sustained.

It seems too obvious for serious argument that the Administrative Procedure Act, enacted in 1967, was never designed nor intended to create supervisory responsibility by the judicial branch of state government over the day-to-day actions of the executive branch, including the hiring and firing of personnel, but, rather, to establish procedures for hearings and notice (which meet due process requirements) in those functions of the executive branch which are basically adjudicatory or quasi judicial, particularly with respect to rule making, the renewal or revocation of licenses, and where, under law, an agency of the State must make orders based on the adjudication process. But it is only in the judicial functions that the Administrative Procedure Act purports to subject agency decisions to appellate review and then only as narrowly prescribed in the act. See *J. L. Williams & Son* v. *Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943). It hardly need be said that firing employees is clearly an administrative act and not a matter that involves the quasi judicial function of an agency. If firing is subject to judicial review then we can think of no logical reason why hiring should not be also. And if hiring is, it follows that promotion would also come under our purview, and so on and on.

In *Sikes* v. *General Publishing Co., Inc.*, 264 Ark. 1, 568 S.W.2d 33 (1978), we reviewed the fundamental distinction between administrative rulings and judicial functions in the separate branches of government, observing that appellate review under the act is confined to adjudications, which Webster defines as "a *judicial* determination" (New International Dictionary, 2d ed., 1939). Obviously, when and under what circumstances an agency employee should be terminated is not a judicial function, but a basic and perfunctory part of the administrative routine of an agency in its discharge of public business and nothing would be more inimical to the separation of powers than for the judicial branch to claim the power to monitor such decisions.

Appellee argues that where the agency appoints a fact-finding panel, gives written notice to the employee, conducts a hearing, makes findings of fact and conclusions of law and generally underakes to proceed as if a judicial function were involved, it is estopped to deny that the proceeding is an adjudication as defined in the act. Appellee has given us no authority in support of the position and we find an essential requirement of estoppel (assuming a branch of state government was subject to that doctrine of the law) is lacking. Estoppel does not dictate that one who has taken a particular course of direction must continue irreversibly on that course; it is only where one has taken a certain course or position knowing that another is relying on that course and which, if altered, would leave him exposed, or in a vulnerable or defenseless position to his detriment, that estoppel comes into play. *American Casualty Co.* v. *Hambleton,* 233 Ark. 942, 349 S.W.2d 664 (1961); *Hudson* v. *Hudson,* 219 Ark. 211, 242 S.W.2d 154 (1951). Here, appellee was not jeopardized by the grievance procedures, on the contrary, he was simply afforded an opportunity to plead his case, which he managed to do successfully the first time. And while the outcome of the second hearing was not favorable to appellee, he was not prejudiced by it. By giving the appellee the right to be heard on the issue of whether he had violated the conditions of his probation, the agency did not thereby subject itself to judicial review of what was so clearly an administrative act.

We find the circuit court was without subject matter jurisdiction, and we reverse with directions to dismiss the complaint.

Levonia T. GREY *v.* STATE of Arkansas

CR 82-112 334 S.W.2d 392

Supreme Court of Arkansas
Opinion delivered June 14, 1982

Omar Greene, for petitioner.

Wilbur C. "Dub" Bentley, Prosecuting Atty., Sixth Judicial District, for respondent.

PER CURIAM. Levonia T. Grey filed a petition for a writ of certiorari alleging two reasons the writ should be granted. First, it stated that the bail of $75,000.00 was excessive, and, second, that the prosecuting attorney later filed an additional charge, for which an additional $25,000.00 bail was imposed. It is alleged this is part of a pattern to systematically deprive him of his constitutional right to bail.

The only record before us is a transcript of the bond hearing. The charges that have been filed against the petitioner are not listed but were alluded to by the attorneys at the oral argument in this matter. They include arson, conspiracy to commit arson and first degree battery, which are all serious charges.

After the hearing the trial judge reduced the bond which had been $150,000.00 to $75,000.00.

In order for us to say that the trial court was wrong in determining that $75,000.00 was a proper amount of bail to be set, we would have to find his judgment clearly erroneous. We have no basis at all to substitute our judgment for the trial court's as to what amount would be proper.

It is suggested in the dissent that the trial judge did not follow the procedures set forth in the Rules of Criminal Procedure regarding bail. *See* A. R. Cr. P. Rule 9. But that issue was not raised below nor has it been raised on appeal and we do not determine on our own such issues. *Cain* v. *Ark. Podiatry Board,* 275 Ark. 86, 628 S.W.2d 295 (1982); *Wilson* v. *Lester Hurst Nursery,* 269 Ark. 19, 598 S.W.2d 407 (1980).

An allegation was made that the prosecuting attorney intended to continue filing charges to prevent the release of the petitioner and that he has filed a separate charge and an additional $25,000.00 bail has been imposed, but we have nothing before us to prove the prosecutor is acting in bad faith. We cannot presume facts nor make judgments on the basis of bare allegations.

Writ denied.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. Although the record is not as complete as it should be, petitioner, Levonia T. Grey, is apparently charged in Pulaski County Circuit Court, Fourth Division, with arson, two first-degree batteries, and various conspiracies relating to the main charges, for which bond was set at $100,000. One of these charges was filed subsequent to the filing of the petition in this Court.

In setting bail the trial court completely ignored the United States and Arkansas Constitutions; the Arkansas Rules of Criminal Procedure which were enacted by our legislature and adopted by this Court; and a recent decision of this Court, *Thomas* v. *State,* 260 Ark. 512, 542 S.W.2d 284 (1976).

The purpose of bail is to ensure the accused's presence at trial. Therefore, bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment of the United States Constitution and under Article 2, § 8 and § 9 of the Arkansas Constitution. *Stack* v. *Boyle,* 342 U.S. 1 (1951). In considering the purpose for which bail is set, we emphasized in *Thomas, supra,* that "Money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance."

Mr. Dub Bentley, Prosecuting Attorney for the Sixth Judicial District, argued this case orally before the Arkansas Supreme Court and stated:

> The purpose in setting the bail at this amount is not to deny him bail but rather to assure his presence not only for his trial but 14 other trials in which he will be a witness.

Rule 8.5 (c) (ii) requires the prosecuting attorney to recommend bail. Such a recommendation could partially account for the circuit court's apparent confusion as to the purpose of bail. Here, it is unknown how much of the $100,000 is to assure the petitioner's appearance in court for his own trial and how much is for the illegal purpose of assuring his presence in court as a witness at someone else's trial.

Furthermore, in fixing bail in this case, the trial court failed to comply with the provisions of A. R. Cr. P. Rule 9. For example, Rule 9.2 (a) provides that "The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court." This Court addressed this requirement in *Thomas, supra,* and specifically held at page 522 of that opinion that a "determination that no other condition would ensure petitioner's appearance in court" be made before setting money bail. Here, the trial court made no such determination.

Another example of the trial court's failure to comply with the rules is the fact that the trial judge made no findings

as to the "facts relevant to the risk of wilful nonappearance" as required by Rule 9.2 (c). This rule provides:

> (c) In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of wilful nonappearance including:
>
> (i) the length and character of the defendant's residence in the community;
>
> (ii) his employment status, history and financial condition;
>
> (iii) his family ties and relationship;
>
> (iv) his reputation, character and mental condition;
>
> (v) his past history of response to legal process;
>
> (vi) his prior criminal record;
>
> (vii) the identity of responsible members of the community who vouch for the defendant's reliability;
>
> (viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance; and
>
> (ix) any other factors indicating the defendant's roots in the community.

There are no findings by the trial court indicating that any of the above factors were considered in setting the bail.

The trial court also ignored Rule 9.2 (e) which states that an appearance bond and any security deposit already required shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct. Here, at least two of the charges against petitioner arose out of the same conduct as the other

charges, but whether the trial court took this into consideration in setting the bond is unknown.

Lastly, it should be noted that in *Thomas, supra,* we held that Rule 9.2 contemplates the use of the least restrictive of the three types of money bail set out in Rule 9.2. This holding was apparently ignored by the trial judge, who obviously used the most restrictive type of money bail arrangement in order to keep the petitioner in jail until his trial and possibly in jail until the 14 other cases in which he is to be a witness come to trial. This could be an indefinite length of time.

On a better day this Court in *Thomas, supra,* recognized that the fixing of bail requires the payment of a considerable sum to a professional bail bondsman and that this constitutes a substantial penalty before trial. This Court went on to conclude in that case, a conclusion equally applicable to this case, that "The spirit of the fixing of bail by the trial court contravened the drafting committee's view that 'money bail in any form ought to be a last resort and should be used only to assure the defendant's appearance.'"

For the reasons stated I would reverse this case and remand to the trial court and require that reasonable bail be set under the procedures set out by this Court and the legislature as reflected by the Arkansas Rules of Criminal Procedure.

JOHN I. PURTLE, Justice, dissenting. In addition to the reasons given by the Chief Justice in his dissent, with which I wholly agree, I wish to add additional reasons for my separate opinion.

To start with, Amendment 8 to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Art. 2 § 9 of the Constitution of the State of Arkansas states:

> Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punish-

ment be inflicted; nor witnesses be unreasonably detained.

The petitioner filed his petition at a time when he was charged with five felony counts. Two are for conspiracy to commit two of the other acts charged. He was initially placed under a $150,000 bond and the judge lowered the bond to $75,000. After he filed his petition for habeas corpus he was charged with an additional felony and bond was set at $25,000 which raised his total present bond to $100,000. By comparison these are fairly minor felonies.

It was admitted by the prosecuting attorney that the petitioner was being held as much as a witness as he was an accused. In response to a question at the hearing, the prosecuting attorney made the statement that he and his staff could be prepared for trial in regard to the charges against the petitioner within one week. Hopefully, the question before this court will be moot by the time this opinion is published.

The petitioner is 26 years of age and has been a lifelong resident of Arkansas. He did spend two years outside Arkansas while attending college in Milwaukee. Additionally, he spent some time serving in the armed forces of the United States. He is a veteran with a 40% disability rating. He was regularly employed before his arrest and has been promised employment if he is released. In fact, he has worked for Bob Troutt since he was 15 years of age except for the time he was away in college and in the armed forces. He has never been convicted of a felony.

It appears to me that the petitioner is being held under unreasonable bond for the simple reason that he is employed by Robert Troutt. I do not care what kind of vendetta the Sheriff of Pulaski County has against Troutt, but whatever it is, he should not be permitted to utilize the courts as willing accomplices to the disruption of the processes of orderly justice. This petitioner deserves and is guaranteed the right to have reasonable bail set for him based on the guidelines contained in the Chief Justice's opinion. In

accordance with our constitution, he is innocent until proven guilty. Therefore, I would set a reasonable bond in an amount which would be sufficient to expect him to appear for trial.

James E. DAVIS *v.* John W. GOODSON, Circuit Judge

81-229 635 S.W.2d 226

Supreme Court of Arkansas
Opinion delivered June 21, 1982
[Rehearing denied July 19, 1982.*]

C. Wayne Dowd of *Dowd, Harrelson & Moore* and *N. Lynn Cooksey,* for petitioner.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for respondent.

RICHARD B. ADKISSON, Chief Justice. The Miller County Circuit Court held petitioner, an attorney, in contempt of court for advising his client in open court that it was not necessary for him to follow a lawful order of the court.

*PURTLE, J., would grant rehearing.

Petitioner was sentenced to 24 hours in jail and fined $250. On appeal, we affirm.

The conduct which gave rise to the trial court's finding of contempt occurred after the client's case had been called. As petitioner and his client approached the bench the judge stated that he believed that the client was drunk. The following exchange then took place:

BY THE COURT:

Let's take a breathalizer and see. Go with the sheriff.

BY MR. DAVIS:

Just a minute. I don't see why he should be made to take one. It's self-incriminatory, and he should be advised that he —

BY THE COURT

Because he is staggering and coming around here in open court, and I asked him if he's had anything to drink, and he says he hadn't.

BY THE DEFENDANT:

That was because of my boots that —

BY MR. DAVIS:

You don't have to take the test.

BY THE COURT:

Yes, he will take the test, Mr. Davis. Mr. Sheriff, take him down. Now, if you want to get an order to stop me, you go ahead and get one, sir. But when I order one here in front, don't you tell somebody they don't have to do it.

BY MR. DAVIS:

He's my client, Your Honor. I can advise him as I see fit. If I'm wrong —

BY THE COURT:

If I'm wrong, you can take me to the Supreme Court, but don't get here in front of this court and tell somebody not to obey an order that I have just given. You hear me, sir?

BY MR. DAVIS:

I hear you.

Although an attorney has a duty to represent his client zealously, he should not engage in conduct which offends the dignity of the court. An attorney may make a proper objection to a ruling of the court but then should abide by the ruling so long as it remains in effect. *Stewart* v. *State,* 221 Ark. 496, 254 S.W.2d 55 (1953). Here, petitioner was clearly in contempt of court when he specifically advised his client in open court that he could disregard a lawful court order which had just been made.

Petitioner does not question the court's authority to order a breathalizer but alleges that the following statement did not constitute an order: "Let's take a breathalizer and see. Go with the sheriff." It is obvious from petitioner's immediate response that even he believed it to be an order:

BY MR. DAVIS:

Just a minute. I don't see why he should be made to take one. It's self-incriminatory, and he should be advised that he —

The statement was clearly taken as an order by the court and all present, and it was, in fact, an order. *See Hall* v. *State,* 237 Ark. 293, 372 S.W.2d 603 (1963).

Petitioner also argues that he merely advised his client that he did not have to take the test, which is different from advising his client to disobey the order. We fail to see or appreciate this fine distinction under the facts of this case.

Affirmed.

DUDLEY, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority in this case in that I do not believe the applicable statutes were followed and I cannot find contemptuous behavior on the part of the petitioner.

Ark. Stat. Ann. § 34-904 (Repl. 1962) states:

> Whenever any person shall be committed for a contempt under the provisions of this act (§§ 34-901 — 34-906), the substance of his offense shall be set forth in the order, or warrant of commitment.

This procedure was not followed by the court in this case. The court order which was entered on the docket sheet stated:

> Def appeared drinking — intoxilyzer test ordered — Atty Davis in open ct. told def not to take the test. . . . Davis found in contempt — fine 250 and 24 hr in jail —

This brief annotation by the judge cannot be held to set out the substance of the offense of contempt by any stretch of the imagination.

I feel that the wording of the order "Davis in open ct. told def not to take the test" is not the true situation as reflected by the record. I listened to the tape of the proceedings involving the petitioner and the court, and I could nowhere hear any disrespect in petitioner's tone or wording to the court. It seems as though the petitioner never even got a change to finish out his objections before the court would

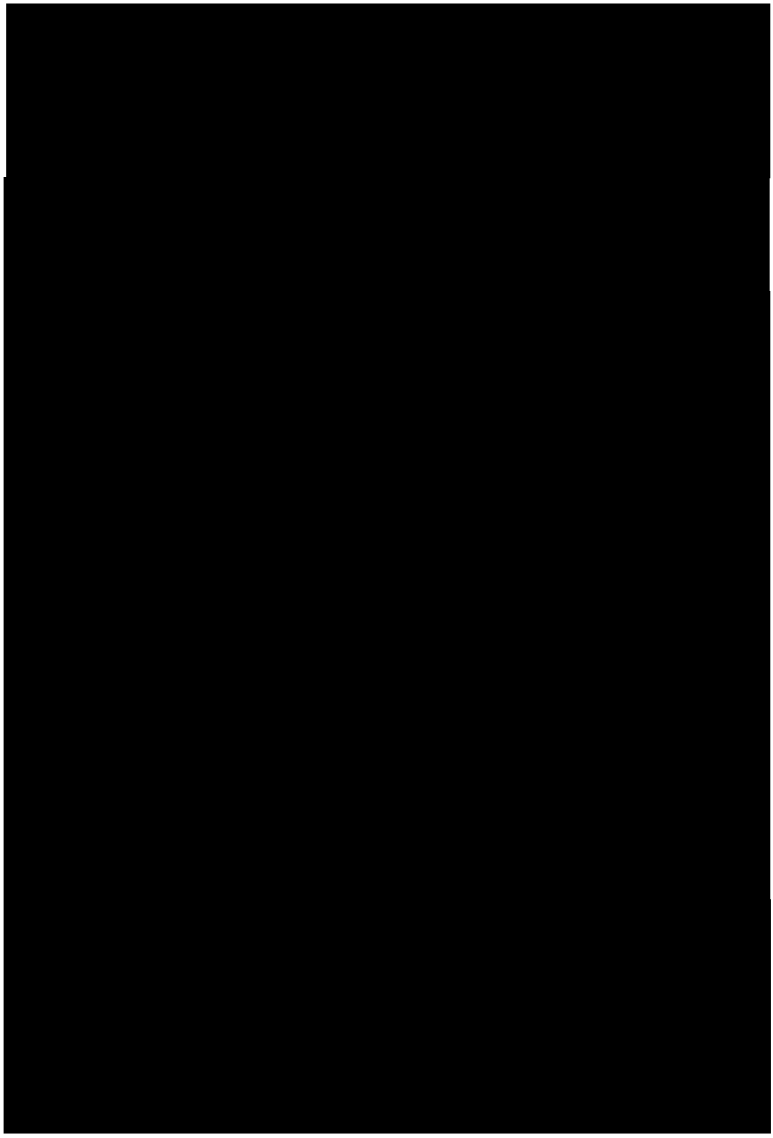
interrupt him. Under the Code of Professional Responsibility an attorney has the right and duty to advise his client as to the law. If an attorney advises a client in good faith even though that advice may be incorrect, he should not be held in criminal contempt of the court for doing what he feels is proper under the circumstances. The petitioner stated, "You don't have to take the test." This can be interpreted more than one way. Having listened to the tape and the voices and tones thereon, I do not feel that the petitioner ordered his client not to take the test but was merely advising him that he had the right not to take the test. Whether his client actually did have the right to refuse to take the test is not in issue. The issue is whether an attorney can advise a client in good faith as to what he believes the law to be without fear of being thrown in jail. To uphold a contempt citation in this case would, in my opinion, discourage attorneys from attempting to put forth their best effort in the defense of their clients. In any event, an attorney should be warned by the court prior to a finding of contempt and should definitely be afforded an opportunity to defend himself as to the charges.

I respectfully dissent.

Danny SANDERS *v.* STATE of Arkansas

CR 82-2 635 S.W.2d 222

Supreme Court of Arkansas
Opinion delivered June 21, 1982



[redacted]

Allen & Heuer, by: *Tom Allen,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. Following a trial by jury appellant, Danny Sanders, was sentenced as a habitual offender to 20 years on each of two counts of aggravated robbery and to 60 years for rape. On appeal, we affirm.

On July 5, 1981, a husband and wife were camped at the Oil Trough Ferry near Batesville. About 2:00 a.m. they were awakened by a man in their tent who told them that he had a .38 pistol and that he wanted their money. The husband immediately turned on a spotlight, at which time they realized there were four men in the tent, two armed with guns and two with knives. Later a fifth accomplice came into the tent. The robbers took the $11.00 that the couple had; the husband was then forced to accompany three of the men to the tent-trailer of people camped nearby. Meanwhile, appellant and another man stayed in the tent and raped the wife.

Several weeks later a deputy sheriff showed the victims photographs of four suspects. The wife picked out appellant as being one of her assailants. The husband picked appellant as a look alike but was unable to make a positive identification. At trial appellant was positively identified by each victim.

Appellant first argues that the victims' in-court identification of appellant should have been excluded because it was unreliable. Appellant alleges that the following factors point to unreliability: The wife, in a handwritten statement to the police, stated that her assailants referred to each other as Ricky and Bobby; appellant's name is Danny. The wife at one time testified that appellant's face was clean shaven; yet there was some evidence that appellant had a mustache and

goatee at the time of the rape. The wife stated she did not remember any distinguishing characteristics about appellant; yet he had numerous tattoos on his arms and was small (5′1″ and 115 pounds). The husband positively identified appellant at trial; yet before trial was unable to make a positive identification from a photograph.

It is not argued that the procedures leading to the identification were constitutionally infirm; therefore, the reliability of eyewitness identification is a question for the jury. *Synoground* v. *State,* 260 Ark. 756, 543 S.W.2d 935 (1976). Although the wife could recall very few of appellant's physical characteristics in describing him to the police, her identification of appellant both in court and by picture was always positive and unwavering. There was testimony that the spotlight in the tent was on during the rape, and the wife testified that she looked directly at appellant. The credibility of the witnesses and the weight to be given to their testimony was a question for the jury.

Appellant argues that the trial court erred in allowing the State to introduce a photograph depicting appellant as clean shaven on the date of his arrest. The appellant called several witnesses, most of them family members, who testified that the appellant had facial hair on the date of the offenses, but had shaved it after he was arrested. The photograph was relevant to the testimony of those witnesses who stated that the appellant shaved his face only after he was incarcerated because the photograph shows him clean shaven on the date of his arrest. A juror could draw an inference of either dishonesty or faulty perception based on this evidence.

Appellant argues that the trial court erred in refusing to order that appellant be allowed to take the depositions of two out-of-state persons who were called as witnesses at the trial by the prosecution. Appellant alleged that the witnesses refused to speak with defense counsel; therefore, he could not adequately prepare for trial. However, appellant has failed to show how he was prejudiced by his not being allowed to take their depositions before trial. *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 284 (1982). Both witnesses testified at

trial and defense counsel had an opportunity to cross-examine them. There is nothing to indicate that appellant was not furnished with the witnesses' statements after direct examination as required by Ark. Stat. Ann. § 43-2011.3 (Repl. 1977). Appellant cites A. R. Cr. P. Rule 17.4 (Repl. 1977) and Ark. Stat. Ann. § 43-2011 and § 43-2011.1 (Supp. 1981), to support his argument but neither the statutes nor the rule provides for the taking of a deposition under the circumstances present in this case. In light of the above considerations, we cannot say that the trial court abused its discretion in refusing to order the depositions.

Appellant argues that the trial court erred in limiting his attorney's fee to the statutory amount of $350.00 as set out in Ark. Stat. Ann. § 43-2419 (Repl. 1977). We disagree. The attorney submitted a bill of $4,625.00 to the county for services rendered pursuant to his appointment in this case. The trial court ruled that the charges were reasonable but correctly refused to order payment in full, citing precedent of this court and the statutory limit of $350. *State* v. *Ruiz & Van Denton,* 269 Ark. 331, 602 S.W.2d 625 (1980).

Appellant now argues on appeal that Ark. Stat. Ann. § 43-2419 (Repl. 1977) violates various other provisions of the state and federal constitutions. However, these objections to the statute were not raised in the trial court and this court will not consider arguments raised for the first time on appeal. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I concur with the result but would add that the appellant's attorney has not demonstrated that he has been singled out to represent this indigent defendant, or others, to his obvious legal detriment.

It is part of the duty and responsibility of any practicing attorney to do his part to represent individuals in the locality in both civil and criminal matters who cannot afford

counsel. All lawyers must bear some burden in administering the justice system. *See* ABA CANON 2, Ethical Consideration 2-25. [Code of Professional Responsibility and Canons of Judicial Ethics.]

It may be possible in a given criminal case that an indigent's attorney might make a showing that he has been deprived of property without due process of law. That is a theoretical possibility. *See State* v. *Ruiz,* 269 Ark. 331, 602 S.W.2d 625 (1980). But a bare showing that numerous hours have been invested cannot in my mind even raise that issue, and that is essentially all the appellant's attorney has done.

Billy L. WOOD *v.* STATE of Arkansas

CR 82-75 635 S.W.2d 224

Supreme Court of Arkansas
Opinion delivered June 21, 1982

Benny E. Swindell, for appellant.

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

RICHARD B. ADKISSON, Chief Justice. Following a trial by jury, appellant, Billy Wood, was convicted of rape and sentenced to 20 years in the Arkansas Department of Correction. On appeal, we affirm.

The victim was hitchhiking from Clarksville to her home near Salus when she was picked up by appellant and his nephew. Instead of taking her home, appellant turned off the highway on to a dirt road and stopped. Appellant told his nephew to get out and go behind the car. He threatened the victim with a knife, made her get out of the car, and raped her. He then instructed his nephew to return to the car and both men drove away, leaving the victim partially dressed on the road. She walked about four miles before neighbors gave her a ride home, and one of them testified that she appeared nervous and upset.

Upon arriving home she told her husband that she had been raped. They agreed not to report the incident to the police because they were new to the community and were afraid the police would not believe them. Over two years later the husband threatened to kill appellant after learning

that he was the rapist. During the investigation of the husband's threat on appellant's life, the victim reported the rape. The police then questioned appellant who, at first, denied any knowledge of the rape; later, at trial, his defense was that of consent.

Appellant argues that the trial court erred in refusing to give the following instruction:

> You are instructed that if you find from the evidence that Deborah Kersen failed to make complaint immediately after the alleged commission of the offense, you may consider this in determining whether she gave her consent or not.

Appellant relies on *Jackson* v. *State,* 92 Ark. 71, 122 S.W. 101 (1909), where we held that it was error to refuse to give this evidentiary instruction. However, as explained in AMCI 200, Comment, most evidentiary instructions of this nature are no longer appropriate because under our Uniform Rules of Evidence the weight to be given the evidence is a matter for counsel to argue and for the jury to decide, once the trial court has determined that such evidence is admissible. *See also Hall* v. *State,* 276 Ark. 245, 634 S.W.2d 115 (1982). Here, the jury was properly instructed on the applicable law of rape by the giving of AMCI 1803.

Appellant argues that the trial court erred in repeating, at the jury's request, the definition of "forcible compulsion" without repeating all the other instructions. The jury had returned to the courtroom, unable to reach a verdict, when the following exchange took place:

> A JUROR:
>
> And, we'd like the definition of what the law says what rape is.
>
> THE COURT:
>
> The definition of rape?

THE JUROR:

Forcible rape.

. . . .

THE COURT:

All right. The definition that I gave you with reference to rape — and you want the forcible compulsion part of it, I take it. Is this right? You want the definition of what forcible compulsion is?

THE FOREMAN:

Yes.

The judge then read them the AMCI definition of "forcible compulsion" but did not reread any of the other instructions or give the jury a cautionary instruction.

It is within the province of the presiding judge to recall the jury and given them further instructions when, in the exercise of a proper discretion, it is necessary to do so in the furtherance of justice. *Harrison* v. *State,* 200 Ark. 257, 138 S.W.2d 785 (1940). It is not always necessary in such cases that he should repeat the whole charge. *Harrison* v. *State, supra.*

We have held that instructions must be taken as an entirety and one instruction should not be emphasized more than any other. *St. Louis, Iron Mountain and Southern Railway Company* v. *Reed,* 88 Ark. 458, 115 S.W. 150 (1908). It is only when the jury fails to understand a certain one, and does understand the others, that one should be read over to them without reading the others. *St. Louis, Iron Mountain and Southern Railway Company* v. *Reed, supra.* Here, the rereading of the definition of "forcible compulsion" did not unduly emphasize one instruction at the expense of the others, and it is clear from the record that the jury wanted that particular instruction repeated.

Appellant also argues that the trial court should have cautioned the jury that the instruction on "forcible compulsion" was only part of the case; however, appellant did not request such a cautionary instruction at that time. Under these circumstances, it was not error for the trial court to reread the portion of the instructions specifically requested by the jury without giving a cautionary instruction.

Appellant argues that the trial court erred in refusing to order the prosecutor to provide appellant with the victim's statement prior to trial. Appellant made a motion for disclosure of the statement but the record does not reflect whether appellant's motion was ever brought to the attention of the trial court, nor is there any indication that the court ever ruled on it. It is incumbent upon the moving party to obtain a ruling on an issue or motion in order to preserve it for appeal. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Affirmed.

John HALL *v.* Charles RAGLAND, Commissioner of Revenues et al

81-260 635 S.W.2d 228

Supreme Court of Arkansas
Opinion delivered June 21, 1982

Harmon & Honeycutt, for appellant.

James Eads, Jr. and *Wayne Zakrzewski,* Revenue Division, Department of Finance and Administration, for appellee Charles Ragland.

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *Larry C. Wallace* and *Joseph H. Purvis,* for appellees City of North Little Rock and City of Mountain Home.

GEORGE ROSE SMITH, Justice. In this taxpayer's suit for a declaratory judgment the appellant challenges the constitutionality of Acts 133 and 861 of 1981, under which North Little Rock and a few other municipalities have voted to levy a 1% local sales tax. Ark. Stat. Ann. §§ 19-4513 *et seq.* (Repl. 1980 and Supp. 1981). The appellant contends that the 1981 acts are void because they extend the provisions of a prior act by reference to its title only, in violation of Article 5, § 23, of the Constitution, and because they are local acts, in violation of amendment 14. The chancellor upheld the validity of the 1981 legislation.

The basic statute authorizing the levy of a municipal sales tax was Act 990 of 1975. Section 1 (a) of that act

restricted its operation to cities having a population of more than 30,000 and being located in a border county, which limited the application of the law to Fort Smith and Fayetteville. In other respects Act 990 was a comprehensive statute providing for a local election to approve the levy, for the collection of the tax by the Commissioner of Revenues, for its distribution to the cities through the state treasury, and for other administrative details. Act 990 was amended in 1977 and 1979 to extend its provisions to a few other cities.

In 1981 the legislature adopted Act 133, amending Act 990 to include all cities of the first class, and then adopted Act 861, further amending Act 990 to include all cities and incorporated towns. We need quote only Act 861, which is entitled: "An Act to Amend Sections 1 and 2 of Act 990 of 1975, as Amended (Ark. Stats. 19-4513 and 19-4514); and for Other Purposes." The rest of Act 861 provides:

> SECTION 1. Section 1 of Act 990 of 1975, as amended, the same being Arkansas Statute 19-4513, is hereby amended to read as follows:
>
> "Section 1. The following words shall have the following meanings unless a different meaning clearly appears from the context:
>
> (a) The term 'City' shall mean any city of the first class, city of the second class, or incorporated town.
>
> (b) The term 'Commissioner' means and refers to the Commissioner of Revenues of the State of Arkansas, or any of his duly authorized agents."
>
> SECTION 2. Section 2 of Act 990 of 1975, as amended, the same being Arkansas Statute 19-4514, is hereby amended by adding subsection (j) as follows:
>
> "(j) Any city may provide in its ordinance authorized by this Act for a rebate from the city for taxes in excess of twenty-five dollars ($25.00) paid to the city on a single transaction."
>
> SECTION 3. It is hereby found and declared by the General Assembly that there is a great need for immediate improvement of municipal services and a stable source of revenue to finance such vital local government services. Therefore, an emergency is hereby declared to exist and this Act being immediately

necessary for the protection of the public peace, health and safety shall take effect and be in full force immediately on its passage and approval.

We first turn to the argument that Act 861 is contrary to Article 5, § 23, which reads: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revised, amended, extended or conferred shall be reenacted and published at length." Here the question is whether Act 861 improperly amended Act 990 or improperly extended its provisions, the references to "revive" and "confer" not being pertinent.

The language of the 1874 constitution was derived from a similar Article 5, § 23, of the 1868 constitution. In an early case we said that the object of the constitutional provision was "to prevent that system of amendments, which, instead of inserting the amendment or alteration, together with so much of the old law as was retained, provided . . . that a given law should be amended as follows, to wit: in a given section or line, strike out given words and insert others, leaving the court, by this direction, to make the amendment itself and make a new law out of the two." *Palmore* v. *State,* 29 Ark. 248 (1874), followed in *Perkins* v. *DuVal,* 31 Ark. 236 (1876). After the adoption of the 1874 constitution we adhered to the view expressed in *Perkins. Scales* v. *State,* 47 Ark. 476, 1 S.W. 769, 58 Am. Rep. 768 (1886).

In actuality we have seldom encountered statutes attempting to amend earlier acts by merely substituting one word or phrase for another, the procedure condemned in *Palmore.* Such an instance did arise in *Rider* v. *State,* 132 Ark. 27, 200 S.W. 275 (1918), where the amending statute merely provided that wherever Act 310 of 1909 read "Charleston District of Franklin County" it was amended to read "Charleston District of Franklin County and Barham and Wittich Townships of Franklin County." We held the amending statute to be in violation of the Constitution.

In other contexts, however, we have in about twenty-five cases passed on the validity of statutes that were said not

to have complied with the requirement in the Constitution that "so much [of the earlier statute] as is revived, amended, extended or conferred shall be reenacted and published at length." We find it impossible to completely harmonize all the language in our earlier cases. Some of our holdings simply conflict with others. We cannot conscientiously decide the present case without recognizing those conflicts and following what we think to be the better rule.

We are sure that the intent of the Constitution was misconstrued, twelve years after its adoption, in *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S.W. 384 (1886). There one section of an act provided that "the law now in force governing in cases where counties are authorized to call in their floating indebtedness, shall apply and govern in proceedings had by counties, cities or incorporated towns." Although the act in question did not *expressly* purport to amend *any* earlier statute, we held it to be invalid because it did not re-enact the act authorizing counties to call in the evidence of their indebtedness. This language in the opinion is no longer law:

> But can the operation of the provision [applicable to counties] be *extended* or the power given by it *conferred* upon cities, by a general reference to the former law? We apprehend that it was just this sort of blind legislation the Constitution intends to prohibit when it says the provisions of a law shall not be "extended or conferred" without "re-enacting" the part "extended" or "conferred." It may be that no legislator was misled by this act or failed to perceive all that it was desired it should accomplish. Of that we have no means of judging. It is sufficient that the Constitution renders such an effort at legislation unavailing.

The error in the *Watkins* case was effectively corrected in 1915, but we neglected to overrule or even cite *Watkins. State* v. *McKinley,* 120 Ark. 165, 179 S.W. 181 (1915). In *McKinley* we recognized the validity of "reference statutes," such as the one invalidated in *Watkins,* by approving this language in an Alabama opinion:

> There is a class of statutes, known as "reference statutes," which impinge upon no constitutional limitation. They are statutes in form original, and in themselves intelligible and complete — "statutes which refer to, and by reference adopt, wholly or partially, pre-existing statutes. In the construction of such statutes, the statute referred to is treated and considered as if it were incorporated into and formed a part of that which makes the reference. The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one does not operate upon or affect the other." *Phoenix Assurance Co.* v. *Fire Department,* 117 Ala. 631, 23 So. 843, 42 L.R.A. 468. Such statutes are not strictly amendatory or revisory in character, and are not obnoxious to the constitutional provision which forbids a law to be revised, amended, or the provisions thereof to be extended or conferred by reference to its title only. That prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which without the presence of the original act are usually unintelligible.

The *Watkins* opinion contained another misleading statement, that the constitutional provision now before us was meant "to lay a restraint upon legislation where the bill was presented in such form that the legislator could not determine what its provisions were from an inspection of it." That overbroad statement was quoted, albeit harmlessly, as recently as 1968 in *City of Manila* v. *Downing,* 244 Ark. 442, 425 S.W.2d 528.

The constitutional provision in question relates to the situation in which the legislature is passing a bill for the purpose of modifying in some way a certain previous law. In that situation it is hardly possible for the amending act to be drawn in such a way as to explain its full effect without any legislator having to look at the act being modified. That point was made clear in *Scales* v. *State, supra,* when we said:

> It is well settled that this provision does not make it necessary, when a new statute is passed, that all prior laws modified, affected or repealed by implication should be re-enacted. If we should so hold a large part of the laws of this state would have to be re-enacted and republished at every session of the legislature, and some of them many times over. . . . To make the provision mean that would be an absurd construction.

To illustrate the point, Act 57 of 1981, now compiled as Ark. Stat. Ann. § 19-2203, was entitled: "An Act to Amend Section 3 of Act 491 of 1921; and for Other Purposes." It might have been better if the title had indicated the nature of the proposed amendment, but there is no such constitutional requirement. The act itself contains only one section, which amends a section in the earlier act "to read as follows." The section is long, more than a printed page. No legislator or anyone else could determine the changes made by the new act without comparing it word for word with the 1921 act being amended. But Act 57 complied strictly with the Constitution by re-enacting and publishing at length that part of the earlier act being changed. The constitutionality of Act 57, as far as Article 5, § 23, is concerned, cannot be doubted. There are scores of similar amendatory statutes now in force, all of which would be imperiled if we adopted the literal meaning of the language in the *Watkins* opinion.

It is plain enough that there is no requirement that an amendatory statute be so self-sufficient that no examination of the act being amended is needed for a complete understanding of the changes being made. On the other hand, we recognize the possibility that a legislative bill might contain a "re-enactment" of so few words in a prior statute as to fall within the prohibition in *Palmore* v. *State,* where we condemned the mere substitution of one word for another.

That impermissible brevity, however, is not to be found in the statute under attack, Act 861, which we have quoted in full. It re-enacts in full the definition of the term "city," which is being changed. It adds a new subsection (j) to Section 2 of Act 990, permitting a city to authorize a rebate of

taxes in excess of $25 paid in a single transaction. Furthermore, the act contains an emergency clause referring to the immediate need for a stable source of revenue to finance an improvement in needed municipal services. An emergency clause has been considered in determining the validity of a statute in a case of this kind. *Hollis & Co.* v. *McCarroll,* 200 Ark. 523, 140 S.W.2d 420 (1940). It cannot be said that Act 861 contained such a marked lack of information as to amount to a violation of the Constitution.

In reaching this conclusion we have carefully studied the case of *Texarkana-Forest Park etc. Dist. No. 1* v. *State Use Miller County,* 189 Ark. 617, 74 S.W.2d 784 (1934), cited by the appellant. That case had its remote origin in Act 126 of 1923, a complete and comprehensive act authorizing the creation of suburban improvement districts for various purposes, including the construction of streets, roads, waterworks systems, gas pipe lines, sewer systems, and other improvements. Section 24 of the act limited its application to counties having more than 75,000 inhabitants. By Act 183 of 1927 the legislature amended Act 126 to make it applicable to all counties. Act 183 repealed Section 24 of the earlier act and added several other sections designed to increase the scope of the original law, such as a section permitting a suburban improvement district to include land in two or more counties and a section reducing from 10,000 to 6,000 the minimum population of those cities near which a suburban improvement district could be formed.

In the *Texarkana* case the court, in a 4-3 decision, held that Act 183 of 1927, the amending act, violated Article 5, § 23, of the Constitution. The court first relied on the *Watkins* case, *supra,* which, as we have seen, had in effect been overruled by *State* v. *McKinley, supra.* The opinion then copied eight additional citations from *Farris* v. *Wright,* 158 Ark. 519, 250 S.W. 889 (1923), but for the most part those cases were actually contrary to the *Texarkana* holding and had been cited in *Farris* for a quite different reason. The court rested its final conclusion squarely on *Rider* v. *State, supra,* saying that in *Rider* "we had before us, in effect, the exact question here presented." In *Rider,* however, the amending statute had merely substituted for the words

"Charleston District of Franklin County," wherever they appeared in the statute being amended, the words "Charleston District of Franklin County and Barham and Wittich Townships of Franklin County." Thus the *Rider* case merely applied the basic principle announced in *Palmore* v. *State, supra,* and was certainly not a basis for the holding in the *Texarkana* case. In fact, the *Texarkana* decision stands alone during the past sixty years or more in its holding that an amending statute which adds sections to a previous act must also re-enact the earlier statute in its entirety. Such a rule would invalidate hundreds and perhaps even thousands of amendatory statutes that have actually complied strictly with the constitutional requirement that the amended provisions be re-enacted. We have no hesitancy in overruling the *Texarkana* case.

The appellant's second point, that Act 861 is a local act, does not require extended discussion. The chancellor held that Act 990 was not local even though it applied only to Fort Smith and Fayetteville. We do not reach that issue, because the effect of Act 861 was to convert Act 990 into a general law, applicable alike to all cities and towns throughout the state. Ordinarily, the legislature cannot amend a local act, *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S.W.2d 233 (1932), but that is because the amending act is itself a local act. Here, however, the amending act made Act 990 a general law. The legislature could have reached precisely the same result by re-enacting Act 990 in its entirety, with the broader definition of a city — a consideration that is not applicable to most amendments of local acts. Consequently there was no violation of the principle that generally prevents the passage or the amendment of a local act. This point of distinction was completely overlooked in the opinion on rehearing in the *Texarkana* case, where the court merely stated the general rule that a local act cannot be amended.

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. Rather than determine whether our cases are inconsistent, I have tried to

determine whether they are consistent. Rather than see if the constitution and our cases can condone this legislation, I have sought to determine if this legislation complies with the constitution and the principles of law set forth in our cases. In doing so, I would reach an opposite result because there is a common theme that runs throughout our cases; that is, whether the amendatory legislation can stand alone on its face and notify any legislator of its purpose.

The intent of Article 5, § 23 of the constitution is to insure that members of the General Assembly are given fair notice of the effect of an amended act. Of course, that principle may not have always been consistently applied since no two pieces of legislation are the same and, therefore, our cases are not all alike. But our approach has been consistent. And that is to make certain Article 5, § 23 has some force and effect.

In *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S.W. 384 (1886), we held a proposed amendment invalid because it was "blind legislation." Regarding Article 5, § 23 we said:

> They [The framers of the Constitution] meant only to lay a restraint upon legislation where the bill was presented in such form that the legislator could not determine what its provisions were from an inspection of it. . . . The language of the provision is so broad that a liberal construction would hamper legislation, almost to the extent of prohibiting it.

The majority interprets *State* v. *McKinley,* 120 Ark. 165, 179 S.W. 181 (1915) as overruling *Watkins, supra.* In *McKinley* we did quote with approval language from an Alabama decision. But that language is consistent with our posture — the amendment must be intelligible and be able to exist separately; it cannot be unintelligible. We said in *McKinley*:

> The purpose of the clause of the Constitution was to protect the members of the Legislature and the public against fraud and deception.
>
> Where the new act is not complete but refers to a

> prior statute which is changed so that the legislative intent on the subject can only be ascertained by reading both statutes, uncertainty and confusion will exist and this constitutes the vice sought to be prohibited by this clause of the Constitution.

Regarding the Act in question we said:

> In the case before us, the act is very broad and comprehensive. It is complete in itself and in no manner attempts to amend or change the existing election laws.

In *McKinley* we also quoted from a Michigan case, *People* v. *Mahaney,* 13 Mich. 481, which said:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws.

In *City of Manila* v. *Downing,* 244 Ark. 442, 425 S.W.2d 528 (1968), we said that Article 5, § 23 " . . . was intended to prohibit legislation drafted in such form that the legislators could not determine what its provisions were from an inspection of it. . . . " We upheld the act in question, Act 124 of 1961, for the reason that it did "not contain any meaning that was not apparent on the face of the Act." In *Texarkana-Forest Park Dist. No. 1* v. *State Use Miller County,* 189 Ark. 617, 74 S.W.2d 784 (1934), we did not construe Article 5, § 23 as strictly as we had in other cases, but it was and is the law and has not since been questioned. It emphatically holds that a local act cannot be amended, even though the local act is made general in its application by the amendment. Evidently that principle is also overruled.

Our position heretofore was fairly summarized in Anderson, *Drafting a Legislative Act in Arkansas,* 2 ARK. L. REV. 382 (1948):

> The Arkansas Supreme Court, however, has adopted a rather restricted construction which does not impose unreasonably severe limitations upon the amendment process. The purpose of the provision is said to be the *prevention of amendatory acts that are not complete in themselves and which, for that reason, cannot be intelligently considered by the legislature without reference to the text of the earlier act.* [Emphasis added.]

I find no inconsistency in principle in these cases.

Does Act 861 meet our test? Is it complete in itself? Or does the original text have to be referred to? The trial court made a finding that the original act had to be referred to to understand the proposed amendment, and it was undisputably right in that regard. There is no way any legislator, citizen, lawyer or judge could say this legislation on its face authorized cities and towns to enact a one cent sales tax. That information is simply not there; therefore, the legislation fails our test.

The majority raises the specter of thousands of other acts being also illegal. Whether other such unconstitutional legislation exists is, of course, irrelevant. It is not within our province to tell the legislature how to conduct their business; our purpose is to interpret and enforce the constitution. Thousands of local acts have been passed in violation of amendment 14. As everyone knows, including the legislators themselves, the local acts are nonetheless illegal. Actually, Article 5, § 23 is primarily for the benefit of the General Assembly; members should only be accountable for their vote on that which is legally and intelligibly before them.

How could Act 861 have been made constitutional? In several ways. Simply by providing its purpose on its face, exactly as another act that passed the same session did. That legislation, Act 991 of 1981, authorized counties to enact a sales tax. Its title provides: "AN ACT to Authorize Counties to Levy a One Percent (1%) Sales Tax; Requiring an Election on the Issue; and for Other Purposes." Is it too much to ask

that just such information appear somewhere in the amended Act? No doubt, because of the title of Act 991, all legislators were on notice as to what the legislation was; just as surely the legislators could not know that Act 861 was authorizing cities to levy a one cent sales tax. Another way Act 861 could have been made constitutional is by providing in any section, including the emergency clause, that a one cent sales tax was being authorized. The amended legislation could also have been recited in full, leaving no doubt as to the meaning of the amendment. In my judgment any of these methods could have made Act 861 constitutional.

The precedent set by the majority will uphold the constitutionality of amendatory legislation regardless of its content and the notice it gives to legislators, if the amended act is referred to and the amendment is set forth in full.

Rather than adopting a better rule, we are diluting the constitutional provision in question and abandoning an important principle of law consistent in our cases. Rather than overrule any cases and emasculate an article of the constitution, I would declare the act void.

Since I would void the legislation because it violated Article 5, § 23, I would not reach the question of local legislation. If I did, I would not treat it so gently.

PURTLE, J., joins in this dissent.

JOHN I. PURTLE, Justice, dissenting. I fully agree with Justice Hickman's dissent; however, for my own peace of mind, I would like to add a few words. Article 5, § 23, Constitution of Arkansas, reads as follows:

> No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be reenacted and published at length.

Act 861 of 1981 reads as follows:

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Section 1 of Act 990 of 1975, as amended, the same being Arkansas Statute 19-4513, is hereby amended to read as follows:

"Section 1. The following words shall have the following meanings unless a different meaning clearly appears from the context:

(a) The term "City" shall mean any city of the first class, city of the second class, or incorporated town.

(b) The term "Commissioner" means and refers to the Commissioner of Revenues of the State of Arkansas, or any of his duly authorized agents."

SECTION 2. Section 2 of Act 990 of 1975, as amended, the same being Arkansas Statute 19-4514, is hereby amended by adding subsection (j) as follows:

"(j) Any city may provide in its ordinance authorized by this Act for a rebate from the city for taxes in excess of twenty-five dollars ($25.00) paid to the city on a single transaction."

SECTION 3. . . . (Emergency Clause.)

In my opinion, the General Assembly runs a serious risk of having legislation declared unconstitutional unless they abide by the provisions of Article 5, § 23 as set out above. Until the foregoing constitutional provision is repealed or amended by the people of the state of Arkansas, I shall continue to insist that its provisions be strictly complied with.

James E. BERRY and Joyce BERRY *v.* SPRINGDALE WATER & SEWER COMMISSION et al

81-266 635 S.W.2d 236

Supreme Court of Arkansas
Opinion delivered June 21, 1982
[Rehearing denied July 19, 1982.]

Jones & Segers, for appellants.

Davis & Bracey, P.A., for appellees.

GEORGE ROSE SMITH, Justice. This case must be affirmed because of flagrant deficiencies in the appellants' abstract of the record. Rule 9 (d) requires that the abstract consist of an impartial condensation of such parts of the record as are necessary to an understanding of all questions presented for decision. In scores of cases we have discussed the essentials of a proper abstract of the record. In the case at bar the following statement from *Collins* v. *Duncan,* 257 Ark. 722, 520 S.W.2d 192 (1975), is especially pertinent: "A good rule of thumb would be for an attorney to forget that he knows anything at all about the case, and examine his abstract of the record for a determination of whether it clearly sets out all he would need to know if he were required to decide the issues involved on appeal." In the light of that statement we quote the appellants' entire abstract:

The Complaint of Appellant alleges jurisdiction; a contract between appellant and appellee; a breach of the contract and resulting damages (TR-1). The answer of appellee alleges it is a quasi-municipal corporation; comparative negligence as a bar to recovery; and governmental immunity as a bar to recovery (TR-3). Motion for Jury Trial by appellant (TR-5). Order Transferring cause from Second Division to First Division (TR 6-10). Request for Admissions of Fact by Appellee (TR-13). Answer of Appellant to Request admitting the act which occurred was an act of an employee or agent of appellee, the act was an act of negligence and was not caused by an automobile (TR-15). Motion for Summary Judgment with brief by Appellee alleging immunity, no evidence of a contractual relationship and no issue of material fact existing (TR 17-20). Response of appellant stating the contract is a fact question and there is an issue to be determined (TR-22-23). Order granting Judgment to Appellee Summarily (TR-24). Notice of Appeal and Designation of the Record (TR-25).

For reversal it is argued, first, that we should abolish municipal immunity from tort liability, and second, that whether a contract existed between the parties was a question of fact precluding the entry of summary judgment. The appellants' abstract tells us next to nothing about the plaintiffs' asserted cause of action, about the supposed contract, about the alleged act of negligence, about the possible fact question, or about the summary judgment. We have insufficient information from the abstract even to discuss, much less decide, the issues that are argued.

Affirmed.

AMERICAN SHEET METAL WORKS, INC. *v.* CON-ARK BUILDERS, INC. et al

81-225 635 S.W.2d 241

Supreme Court of Arkansas
Opinion delivered June 21, 1982
[Rehearing denied July 19, 1982.*]

Bridges, Young, Matthews, Holmes & Drake and *Holmes, Holmes & Trafford,* for appellant.

Friday, Eldredge & Clark, by: *Bill S. Clark,* for appellees.

DARRELL HICKMAN, Justice. This is an appeal from the trial court's directed verdict in favor of the appellee, Con-

*HAYS, J., would grant rehearing; HOLT, J., not participating.

Ark Builders, and others, finding that the appellant, American Sheet Metal Works, Inc., did not have a binding contract to be a subcontractor to Con-Ark, which had the general contract to construct the medium security building at the Cummins unit of the Department of Correction. American Sheet Metal Works had sued the appellees for damages for breach of contract.

We agree with the trial court that the issue was a question of law and find the court properly decided that issue.

Con-Ark Builders was the general contractor bidding on the medium security building at the Cummins unit of the Department of Correction. American Sheet Metal Works made a telephone bid to several general contractors, bidding on various mechanical portions of the job. American's bid was $643,969.00 and it was the low bid for its portion of the job. Con-Ark used American Sheet Metal's bid as part of its overall bid and was awarded the construction project as the low bidder. Later, Con-Ark had some reservations about the ability of American Sheet Metal Works to perform the job. Of the total subcontract of $643,969.00, approximately $400,000.00 of it was plumbing. It was learned that American Sheet Metal Works, which was primarily a sheet metal, electrical, air conditioning and mechanical contractor, intended to use Southern Mechanical, a Memphis, Tennessee firm, to perform the plumbing part of the subcontract and that Southern had no license to perform construction work in Arkansas. Con-Ark also questioned whether American Sheet Metal Works could obtain a bond in the amount of the subcontract, and, Con-Ark learned that American Sheet Metal Works' Arkansas license did not authorize American Sheet Metal for the specialty of plumbing. Con-Ark notified American Sheet Metal that it would not enter into a written contract with American Sheet Metal on this job; instead Con-Ark obtained permission from the State to substitute one of its subsidiaries, Nabco Mechanical, Inc., to perform this subcontract at the amount bid by American Sheet Metal Works.

Essentially American Sheet Metal argues that the trial court was wrong in finding as a matter of law that it did not have an enforceable contract with Con-Ark Builders. What American Sheet Metal Works could not avoid at trial, nor with us, is that its Arkansas license, at the time of the negotiations, did not authorize American Sheet Metal Works to do plumbing. Later, American Sheet Metal Works did have its license amended to reflect that it was authorized to perform plumbing work. American insisted below and insists on appeal that the missing authorization was due to a mistake. But the question has to be, could Con-Ark be forced to accept the proposal in view of the deficiency on the license and the other considerations that we have mentioned?

American Sheet Metal Works, Inc. argues that Ark. Stat. Ann. § 14-613 (Repl. 1979) was circumvented by Con-Ark. Ark. Stat. Ann. § 14-613 is referred to in the construction industry as the "name your subcontractor law." Generally it requries that a general contractor offer the first opportunity for subcontracts to Arkansas contractors qualified as mechanical, electrical, roofing and sheet metal contractors engaged in plumbing, heating, ventilating, air conditioning, electrical wiring and illuminating fixtures and other such specialties.

However, the statute reads that the general contractors must "first offer an opportunity to Arkansas *licensed and qualified* . . . subcontractors." [Emphasis added.] Con-Ark insisted that American Sheet Metal Works, Inc. was not licensed and qualified at the critical time and we must agree.

Essentially, American Sheet Metal Works' argument is one of equity and implies that Con-Ark Builders used bad faith. It is suggested that American Sheet Metal Works was simply used to obtain the bid and then Con-Ark deliberately awarded the subcontract to one of its subsidiaries. American Sheet Metal Works argues that it found a qualified Arkansas subcontractor to perform the plumbing work; that it proved that it could be bonded for the full amount and that later it had its license amended to include plumbing. But all these factors arose after the fact and could merely be used as arguments to persuade Con-Ark to sign a contract with

them. These arguments avoid the question of law involved and that is, whether Con-Ark Builders was required to accept American Sheet Metal Works' proposal after the State of Arkansas awarded the contract to Con-Ark. The Arkansas statute did not require Con-Ark to accept the bid and, consequently, we cannot.

Affirmed.

HOLT, J., not participating.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I thoroughly disagree with the decision to affirm. I believe the question of whether American Sheet Metal Works was "licensed and qualified" is one of fact and the trial court erred in taking the case from the jury at the close of the evidence.

The majority agree with the trial court that the issue was a question of law, correctly decided. By taking that view, the opinion shuns the necessity of dealing with the evidence, and avoids both a formidable task and an unconvincing result. But having declared the issue to be one of law, the opinion fails to state with any clarity the rule of law it relies on. No cases are given and Ark. Stat. Ann. § 14-613 is cited merely as requiring that general contractors must "first offer an opportunity to Arkansas *licensed and qualified* . . . subcontractors." And Con-Ark insists that American Sheet Metal Works was not licensed and qualified. By avoiding any specific citation of the law, the majority leaves the dissent with the burden of proving that American Sheet Metal was not, under the law, unlicensed and unqualified.

As to the license, it is undisputed that American Sheet Metal was licensed and if the license was insufficient by not including a "mechanical specialty designation" then where is the law that makes that requirement? It is certainly not to be found in § 14-613, the only statute cited. Appellees' brief recognizes the void and offers § 71-710 of the Contractor's Licensing Law of Arkansas as giving the Licensing Board power to limit the license of a contractor "to the character of

work for which the applicant is qualified." But the problem here is there was absolutely no evidence presented that the Board had limited the license of American Sheet Metal; to the contrary, there was evidence from which the jury could have readily determined that the Licensing Board considered American Sheet Metal fully qualified to perform the work on which it had bid. Moreover, we have held licensing statutes must be construed strictly *in favor* of an individual against whom such enactments are sought to be applied. *Davidson* v. *Smith,* 258 Ark. 969, 530 S.W.2d 356 (1975). Con-Ark's argument would have us do the reverse. If a litigant under our system is to be deprived of the opportunity to present his cause to a jury on the basis of an adverse rule of law, it ought to be possible (and essential) to clearly state what that rule is and where in our code or our cases it is to be found. Anything less is as unfair to the successful party as it is to the losing party.

Perhaps American Sheet Metal Works was thought to be unqualified, which § 14-613 *does* require. But that surely is a question of fact and the burden of proving that allegation was on Con-Ark. The proof was to the contrary, evidenced by the fact that Con-Ark's motion for a directed verdict made no claim that American Sheet Metal was not qualified.

For the sake of argument, let us assume that by inference § 14-613 does require that the license of American Sheet Metal Works bear a mechanical specialty designation in order for it to take advantage of the statute and enforce its bid. The evidence presented in this case is such that the jury could reasonably infer that American Sheet Metal did in fact have a mechanical specialty designation which was simply omitted from its license through oversight. This was precisely the import of the testimony of Mr. Robert Carter and others that American Sheet Metal was a mechanical contractor licensed since 1969; had done mechanical work previously for Con-Ark; that the company had requested a mechanical designation from the Licensing Board and was unaware that its license failed to include the designation; that when Con-Ark asked about the mechanical designation he appeared before the Licensing Board to point out the

mechanical designation was missing and the license was reissued for the years 1977-1978 to show the mechanical specialty effective July 1, 1977. When this evidence is considered in light of the following letter to American Sheet Metal from the Licensing Board, there is ample evidence to submit the issue to the jury:

> Dear Mr. Carter:
>
> This is to advise that it is the Board's opinion that you are presently qualified to do the mechanical work *you now have under contract* as well as any future contracts undertaken. (My italics.)
>
> Your Certificate of License has been amended to read as follows and mailed to you under separate cover:
>
> "SPECIALTY: Mechanical — Sheet Metal — Air Conditioning"
>
> Yours very truly,
>
> CONTRACTORS LICENSING BOARD
> /s/ Howard Jones, Administrator

The result reached by the majority goes against what we have said in a host of cases: On appeal a directed verdict is reviewed by taking that view of the evidence most favorable to the party against whom the verdict is directed, together with all reasonable inferences which can be drawn therefrom, and we must reverse if there is *any* substantial evidence tending to establish an issue in his favor. *Farm Bureau Mutual Insurance Company* v. *Parks,* 266 Ark. 454, 585 S.W.2d 936 (1979), and *Housing Authority of the City of Texarkana* v. *E. W. Johnson Construction Co., Inc.,* 264 Ark. 523, 573 S.W.2d 316 (1978). Even more, we have said, correctly, that where the evidence is not in dispute if it is such that fair-minded men might draw different conclusions from it, a jury question is presented. *Moore Ford Company* v. *Smith,* 270 Ark. 340, 604 S.W.2d 943 (1980); *Williams* v. *Curtis,* 256 Ark. 237, 506 S.W.2d 563 (1974).

The majority opinion states that American Sheet Metal's arguments that it was qualified, capable of being bonded, and had its license amended all "arose after the fact" and Con-Ark was not required under § 14-613 to accept American Sheet Metal's bid after the State of Arkansas awarded the contract to Con-Ark. The reasoning ignores two things: First, that § 14-613 makes it *mandatory* for Con-Ark to award the subcontract to the subcontractor whose *name and bid* Con-Ark listed on its bid to the State, and it is undisputed that Con-Ark listed American Sheet Metal and American Sheet Metal's bid of $642,969.00 on its bid to the State. Second, it ignores the fact that although Con-Ark wrote to American Sheet Metal on February 22, 1978, to ask its interpretation of § 14-613 as to its having the necessary license to bid any plumbing, heating or ventilating work, adding, "Sure hope we can work something out to our mutual benefit," there was evidence that two weeks earlier on February 8 Con-Ark was engaged in efforts to acquire the entire contract for itself by substituting Nabco, simply a division of Con-Ark, for American Sheet Metal, which is precisely what § 14-613 seeks to avoid. The fact is that Con-Ark managed to accomplish this objective to the loss of American Sheet Metal, and whether by so doing Con-Ark violated § 14-613 and rendered itself liable to American Sheet Metal should be resolved by a jury and not by a directed verdict.

Deborah MARVEL *v.* COAL HILL PUBLIC SCHOOL DISTRICT

82-6 635 S.W.2d 245

Supreme Court of Arkansas
Opinion delivered June 21, 1982

Cearley, Gitchel, Mitchell & Roachell, by: *Richard W. Roachell,* for appellant.

Josef V. Hobson, for appellee.

DARRELL HICKMAN, Justice. The question in this case is whether a full-time school teacher can be denied the minimum salary due to teachers because of a written contract for a lesser amount. The trial court found such a contract enforceable. We disagree and reverse.

Deborah Marvel had been a part-time librarian and teacher for the Coal Hill Public School District when her contract was negotiated for the 1979-1980 school year. She said that Mr. Nolan Williams, the superintendent of schools, told her she would serve as part-time librarian and part-time

teacher but would receive the same salary that full-time teachers did. (She had been paid in the past as an aide, but was now to be paid as a teacher.) Williams refuted that. But the contract only provided for a salary of $9,800.00 and the minimum a full-time teacher with her experience would receive is $11,450.00. She accepted the position and signed the contract but chose to sue for the difference, which was $1,650.00, plus interest.

The parties disagreed as to whether Miss Marvel signed the contract under protest but that is irrelevant. It is not disputed that she was a "teacher" within the meaning of Ark. Stat. Ann. § 80-1326 (Repl. 1980), and performed all the duties of a full-time teacher. She performed the ancillary duties of all teachers such as hall monitor, attending ball games and faculty meetings. She kept grade, class planning and attendance records. In order to qualify as full-time, she was required to work six periods a day. She acted as a teacher five periods a day and as a librarian two periods. It is also undisputed that the school district filed with the State Department of Education a salary schedule, as required by Ark. Stat. Ann. §§ 80-1324 and 80-850.7 (Repl. 1980), and that her salary as a full-time teacher would have been $11,450.00.

The superintendent said the reason Miss Marvel was not paid the minimum salary is because the part of her salary for teaching remedial reading was Title I money (federal money) and the grant did not allow her to be paid more.

The trial court held that the contract did not violate Arkansas law which requires that school districts promulgate minimum salary schedules, citing Ark. Stat. Ann. §§ 80-1325, *et seq.* (The Teachers' Minimum Salary Law), and 80-850.1, *et seq.* (The School Finance Act of 1979), and *Fennell* v. *School Dist. No. 13,* 208 Ark. 620, 187 S.W.2d 187 (1945). The court found that since she was paid fairly for librarian duties from general funds that the district complied with the law, and found further that Miss Marvel knowingly and freely entered into a binding agreement.

The trial court was wrong in its interpretation of the

law. Miss Marvel was a full-time teacher and the district could not receive her services and refuse to pay her the minimum salary it paid other full-time teachers. Title I provisions cannot be used to avoid Ark. Stat. Ann. §§ 80-1327 and 80-850.7, which require each school district to set a schedule of minimum salaries and abide by it.

If the district's position were to prevail, then no teacher could be sure of equal treatment when he or she was hired or retained — at least to the extent that a minimum salary would apply to all hired for full-time duties. The school district received the benefit of the services of a full-time teacher and it should not be allowed to manipulate the law to avoid its legal responsibility.

The judgment is reversed and the cause remanded for the court to enter judgment for the appellant.

Reversed and remanded.

Herschel Glen MURRY *v.* STATE of Arkansas

CR 81-117 635 S.W.2d 237

Supreme Court of Arkansas
Opinion delivered June 21, 1982

Damon Young and *James E. Davis,* for appellant.

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

DARRELL HICKMAN, Justice. Herschel Glen Murry was convicted of killing his mother and sentenced to life imprisonment. He denied the act and the case against Murry was circumstantial. On appeal it is argued the conviction should be reversed because there was no substantial evidence to support the verdict and because the trial court erred in permitting law enforcement officers to testify regarding

statements Murry made to them at the initial stage of the investigation.

Actually, Murry convicted himself when he admitted writing a letter that was mailed to the Chief of Police of Ashdown, Arkansas, two weeks after the murder, and when it became obvious that Murry's first statements to the law enforcement officers could not be reconciled with an autopsy report. Those statements placed him at home with his mother at the time of the murder — not elsewhere as he testified at his trial.

Murry, seventeen, and his mother lived alone in a house trailer in Little River County near the Oklahoma state line. His mother, Nedra Sharp, who had been married twice before and was single at the time, worked as a licensed practical nurse in a nursing home in Ashdown, Arkansas. Murry had finished the eleventh grade in high school, had dropped out of school, and was working as a welder for a local man. He said he got off work about 3:00 or 3:30 p.m. on Friday afternoon, January 11, 1980, and went home. Shortly thereafter his mother arrived home. He left to check on some animal traps he had set nearby, went on into Foreman, washed his pickup truck and returned home. He told two officers his mother was eating supper when he left and he specifically recalled she was eating fish sticks. He said he did not eat. He said his mother mentioned that she was going to meet an old friend that evening from Shreveport and he did not recall the man's full name but thought he was called Lane. He said after he returned from washing his truck, he took a shower, changed his clothes, and left in his mother's Pontiac Trans Am for Betty's Place which is located in nearby Oklahoma; Betty's is a local establishment that sold beer and is frequented by young people. He and a friend played pool, later went to his friend's home and in the early morning hours of the next day he returned to the trailer. He said the lights were on, the television was on, there was blood all over the trailer, and his mother was missing. He awakened a relative of his who lived about a mile away and brought him to the trailer. The relative called the local deputy sheriff. The deputy got to the trailer at 4:09 a.m. He made a preliminary investigation. He left and then returned

with several other officers about 8:00 a.m. The officers questioned Murry about his whereabouts that night, his mother's activities and friends and what he knew about the possibility of her death. A crime scene investigation was made of the trailer and as one officer testified, it was obvious there had been a fierce struggle. Blood was on the carpet, walls, and door steps; large chunks of hair were found in the trailer and two small pieces of what appeared to be a human skull. The officers were told about the man named Lane and found that name in Mrs. Sharp's telephone book. Indeed such a man lived in Shreveport who had dated Mrs. Sharp. He was Lane Barmore. He was not her regular boyfriend; he was married, but had dated Mrs. Sharp. Several Arkansas officers went to Shreveport and with Louisiana authorities conducted an investigation. The officers were satisfied that Mr. Barmore had an honest alibi. His vehicle had been searched and inspected. Evidence of blood was found in the trunk and examined but it proved to be animal blood. He was no longer a suspect. It was not until January 24th, two weeks after the incident, that the officers said they suspected Herschel Glen Murry. That day a letter was received at the police department in Ashdown which was printed in large letters. It read:

> NEDRA WAS A GOOD PIRSON BUT SHE HAD TO DIE FOR SHE DID NOT WONT TO MARY ME. I LOVED HER BUT I HAD TO DO IT I HAIF TO KILL THE BOY TO HE WILL DIE TO I NO WHERE HE IS
>
> > I PUT NEDRA UNDER SOME TREE TOPS ABOUT 1000 YARDS EAST OF THE OLD HOUSE PLACE AT PINNEY
>
> THE BOY IS DID TO

The sheriff's office called Murry to the office. He was warned of his rights and asked to give them ten samples of his handwriting. The officers directed that he write out the contents of the letter they had received. Murry was not shown the letter; an officer read it to him. Shortly thereafter an expert concluded that Murry had written the letter. Murry

was asked about the letter, and after about two hours he admitted he had written it. He said when he was in Louisiana with relatives during the past week, a man stopped him on the road, got in his pickup truck, held a pistol on him and threatened to shoot Murry if he did not do exactly as the man said. He said the man told him he had his mother and unless he did what he was told he would kill her. He could only give a general description of the man but he said the man was very upset and crying. He said he wrote down exactly what he was told and later mailed the letter. He did not tell anyone of this incident. He still denied killing his mother or knowing anything about her disappearance. On the basis of the letter, a search was conducted in the area and eventually the body of Nedra Sharp was found on the 31st of January in a shallow grave near the old Piney Cemetery. It was near an old home place approximately one-half mile from the home of Murry and his mother. The grave was covered with dead pine tree tops and located at the edge of a sage grass field.

Other critical circumstantial evidence in this case was that Murry in conversations with at least two of the officers told them that he left the trailer at 4:30 or 5:00 p.m. to wash the truck and his mother had prepared some fish sticks before he left. He said that his mother ate her supper but that he did not. The medical examiner conducting the autopsy said that because of the weather conditions in January, the body of the deceased was well preserved and he was able to determine that Mrs. Sharp died within thirty minutes or an hour after she ate supper. He said he was able to determine this because he found undigested fish in her stomach and therefore he could estimate accurately her time of death. If Murry's first version given to the police was true, he was at the trailer when she was killed which would have been well before 8:00 p.m., which was about the time that he left the trailer that evening. He was seen in town washing his truck by his friend, Don Cleghorn. His friend testified that he saw Murry at the car wash between 6:30 and 7:00 p.m., January 11th. He said he saw what appeared to be some tufts of hair that looked like animal hair in the back of the pickup truck which Murry was washing. Murry told him he had killed a deer. Murry testified that he did tell this acquaintance that

he had killed a deer, and that he was washing out his pickup truck because he did not want to get caught by the Game and Fish people. Actually, at the trial he said he had not killed a deer that day but had killed one several days before. Murry testified that he was at the car wash between 5:30 and 6:00 p.m.

A distant relative of Murry's who lived in the vicinity said that he saw Murry as he drove by the trailer that evening shortly between 6:00 and 6:20 p.m.; it was dark. He saw Murry pull out from the trailer in his pickup truck. He said that Murry was going very slowly behind him 75 to 100 yards, and this aroused his attention because Murry usually drove fast. He said that he continued on down the road and after he topped a hill, Murry's vehicle did not follow him. Between Murry's place and the hill was the turnoff to the Piney Cemetery. This witness, Mr. John Oglesby, testified that the next day when he learned of the incident and the investigation of the possible murder, he went down the road towards the cemetery. He drove into a sage grass field near the cemetery and saw that tracks had been left by a vehicle which had large mud grip tires and it appeared that a "short gauge" vehicle had made a circle in this field. Murry owned a four-wheel drive Chevrolet Luv pickup truck which had extra large mud grip tires. The evidence showed that his mother's body was found not many feet from the tracks this vehicle had made as it turned in the field.

The medical examiner who performed the autopsy testified that Mrs. Sharp had been killed by strangulation, numerous knife wounds, and blows to her head. The pieces of skull found at the trailer came from her skull. Her voice box had been crushed in one blow when she was strangled by someone right-handed. Murry was right-handed. She had at one point been impaled on the trailer floor by a large knife. A knife which matched the wounds and cut in the floor was found about twelve feet from the body. It was identified by Murry as an old "antique" knife his former stepfather had found while working on a pipeline. The body was found wrapped in bed clothes and tied with the belt to Mrs. Sharp's robe. There was a shovel, located outside the trailer where they lived, in a hole which was being dug to house a

foundation for a C.B. radio antenna. After the body was found, one of the officers had the shovel examined and in a splintered part of the handle, was found a thread which was proven to be consistent with the fabric of the belt to Mrs. Sharp's robe. Blood specks found in the cab of Murry's truck were determined to be human blood.

On the 12th of January when Murry was asked what was missing from the place, he said that the day before he had given his mother two fifty dollar bills which she placed in her purse. The purse was evidently rifled and the money was not there. He said she had a twenty-five caliber automatic pistol which was missing. It was discovered in the pocket of a jacket found in his pickup truck the day after the murder. He said he must have carried it with him to run his traps. He said his cowboy boots with metal toe tips that he wore home from work that day, and the clothes he wore that evening were missing, as well as some bed clothes.

When Murry testified, he denied that he told the officers that his mother had eaten early that evening when he came home. He said she did not eat until he left that evening about 7:45 or 8:00 p.m. This was critical testimony, of course, because the medical examiner testified that she died shortly after she ate. Obviously the jury refused to believe Murry in his sworn testimony and chose to believe that he told the officers the truth on the morning after the murder about when she ate supper. It is also obvious that the jury rejected Murry's explanation of the letter that described where his mother was buried.

Another bizarre event occurred on June 1, 1980. Murry, while staying alone at the trailer, reported that an unidentified intruder had tried to kill him. He said he was shot at several times and had a bullet hole in the webbing of his left hand and a wound in his shoulder. An officer investigating the incident testified that he was of the opinion it was self inflicted.

It is argued that the State was unable to show Murry's motive for the killing. There was no evidence that there were serious problems between him and his mother or that Murry

had ever been in trouble. While there was no eyewitness to the murder and he never admitted the killing, certainly the evidence in this case would support a finding that Murry killed his mother. The law is incapable of looking into the minds of everyone accused of a crime and determining their exact thoughts, and that is particularly true in a family situation. But the jury could easily conclude that Murry became enraged that evening and murdered his mother. He testified that when he questioned her about the man named Lane she refused to tell him his name and that she had refused at previous times to tell him about things he wanted to know about her work. He admitted that she had struck him before, but that he had never struck her; he said she had cursed him before, but he had never cursed her. He said that, in effect, he had become the head of the household in recent years, taking on the responsibility of doing things that his mother could not do. It was and is, of course, a tragic case, but Murry was afforded a fair trial and there is evidence sufficient to support his conviction.

Where circumstantial evidence, alone, is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. *Darville* v. *State,* 271 Ark. 580, 609 S.W.2d 50 (1980). Whether circumstantial evidence excludes every other reasonable hypothesis is usually a question for the jury. The test on appeal is whether there was substantial evidence to support the jury's verdict. Substantial evidence was defined in *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980), as evidence of sufficient force and character to compel a verdict with reasonable certainty. It must compel the verdict without resort to speculation or conjecture. In this case it was for the jury to decide whether Murry was telling the truth about the evening of his mother's death. There was substantial evidence to support its decision.

Murry argues that the statements that he made to the officers during the two days after his mother was killed were not admissible because he was a suspect at the time and was not warned of his rights before he made these statements. The officers testified that the investigation never focused on Murry until they received the letter and this is borne out by the evidence. When the police found Lane's name and

address in Mrs. Sharp's telephone book and contacted the Louisiana authorities, an investigation was immediately conducted regarding the possibility of this man's involvement in the murder or disappearance of Mrs. Sharp. Lane Barmore was brought into the Shreveport police station on the 13th of January and his vehicle was searched. The Louisiana and Arkansas authorities concluded that he had an alibi and could not have killed Mrs. Sharp.

These statements made by Murry were all made on the 12th and 13th of January while an investigation was being conducted to see if, in fact, there was a murder and they were routine questions. He was never placed under arrest or held in custody until the letter was received and at that time he was warned of his rights. The *Miranda* rights do not attach until an investigation is focused on a suspect. *Lascano* v. *State,* 275 Ark. 313, 631 S.W.2d 258 (1982); *Miranda* v. *Arizona,* 384 U.S. 436 (1966). We cannot say the trial judge was clearly wrong in finding that the investigation had not focused on Murry at the time he made these statements to the officers. Therefore, they were admissible.

We have reviewed the record and no error is shown by the abstract of other objections.

Affirmed.

Max EDWARDS, MAXCO, d/b/a CENTURY 21 EDWARDS & COMPANY *v.* Kathleen PENNINO

82-50 635 S.W.2d 246

Supreme Court of Arkansas
Opinion delivered June 21, 1982
[Rehearing denied July 19, 1982.]

Tom Donovan of *Witt & Donovan* and *Stephen E. Whitwell* of *Hurley & Whitwell,* for appellants.

House, Holmes & Jewell, P.A., by: *Robert L. Robinson, Jr.* and *Scotty M. Shively,* for appellee.

Cearley, Gitchel, Mitchell & Roachell, for *amicus curiae* Arkansas Realtors Association.

JOHN I. PURTLE, Justice. The Pulaski County Chancery Court held appellant liable for damages to appellee resulting from the sale of appellee's real estate by appellant. The court held that the appellant failed to exercise reasonable care and diligence in not selling the property for a better price than he did. This appeal is from the decree awarding damages to appellee. We disagree with the trial court and reverse and remand the case for purposes stated later in this opinion.

The appellee and her husband purchased 20 acres of land from the trust department of Worthen Bank. The land

had been a part of the Gannaway estate prior to the sale by Worthen to the appellee and her husband. Two deeds were executed by Worthen, at the request of the appellee. A house was situated upon a 5-acre tract which was deeded separately from the 15-acre tract of vacant land. The total purchase price was $60,000 but the appellee requested that the sale be broken down to indicate payments of $18,000 for the 15 acres and $42,000 for the 5 acres and the house. Appellee borrowed the full purchase price of the entire tract, $33,600 on the 5-acre tract and $26,400 on the 15-acre tract.

Very shortly after the purchase the appellee contacted the appellant, a licensed real estate broker, about selling the property for her. She had previously worked for appellant as a real estate salesman; however, she had not been active within the past five years. The property was listed for a total sale price of $75,000. The listing also had the two parcels as separate properties and if sold separately the price of the 15-acre tract was to be $35,000 and the 5-acre tract, including the house, was to be $45,000. The listing was dated September 4, 1979, following appellee's purchase of the property on August 21, 1979. Therefore, she listed the property at a price of $15,000 or $20,000 above what she had purchased it for two weeks earlier. The record reveals that the appellee called the appellant and asked him to look at the property and handle the sale. The appellant went out and looked at the property and informed the appellee and her husband that in his opinion it was worth between $800 and $1,200 per acre. Neither the appellant nor appellee consulted an appraiser or any other person relative to the value of the property at the time of the listing.

On September 28, 1979, appellant procured a prospective buyer who offered $27,500 for the 15 acres. The appellee rejected the offer and countered with an offer of $30,000 for the property. The proposed buyer rejected the counter offer. On October 3, 1979, the same buyer renewed his interest and made an offer of $28,500 for the 15 acres which was accepted by appellee and her husband. However, the appellee decided not to close the deal stating that her husband coerced her into agreeing to the sale and later alleging that the appellant failed to represent her properly in the matter. The pur-

chasers sued for specific performance on November 7, 1979. Several other parties became involved in the litigation but we will restrict ourselves to the pertinent pleadings. The appellee filed a cross-complaint against the appellant alleging he caused her to list and sell the property at a price well below the market value. The appellant counterclaimed for a commission on the sale and alleged the appellee cancelled the listing thereby depriving him of commission on the sale of both parcels of land. The trial was a protracted one and involved more than one chancellor but the final result was that the trial court ruled the purchasers were entitled to specific performance on the contract relating to the 15 acres. At a later date the hearing on the present proceedings was conducted. On March 16, 1981, the special chancellor entered a decree awarding appellee judgment in the amount of $16,500 representing the difference between the sale price of $28,500 and the actual market value which the court placed at $45,000. In addition, the chancellor awarded the appellant judgment of $1,995 as a commission on the sale of the property for which he had decreed specific performance. He also awarded appellee a judgment of $16,500 because of appellant's breach of duty to exercise reasonable care and diligence on behalf of the appellee.

There was testimony from a number of appraisers and other people relating to the market value of this property on the date of the sale. We do not deem it relevant to set forth this information in view of the decision we have made.

We agree with the parties that this is a case of first impression in this court. Therefore, we must determine the standard to be utilized in situations similar to this. There are three standards of care which we could adopt in this case: first, is the standard for intentional misrepresentation or other acts of fraud committed by the listing agent or his representative; second, that liability would rest on the negligent acts of the broker or his agents; and, third, the theory of strict liability. An annotation in 94 A.L.R. 2d 468 (1964) contains a statement relating to the standard of care with which real estate brokers are charged. It is as follows:

It is the well-established rule that a real-estate broker,

> who is not a mere middleman, but is employed by a principal to act as agent in a real-estate transaction, is under a duty to exercise reasonable care and skill, or that degree of care and skill ordinarily employed by persons of common capacity engaged in the same business, and that a broker is liable to his principal for all consequences directly flowing from his failure to exercise such degreee or ordinary care and skill in the handling of the matter entrusted to him.

The above standard of care was adopted by the Arkansas Court of Appeals in *Townsend* v. *Doss*, 2 Ark. App. 195, 618 S.W.2d 173 (1981). We think this is the proper standard to be adopted by this court. Therefore, we must examine the record to determine whether the appellant breached his duty of ordinary care and skill in the handling of this sale on behalf of the appellee. The record reveals that the appellee, a former salesman for appellant, initiated the listing in this case. At her request the appellant came to the property and looked at it and informed her he thought it was worth between $800 and $1,200 per acre. There had been no appraisal of the property and none was done at this time. There is no indication that the appellant indicated to the appellee that he knew the real value of the property or that he was working for the interest of any other person. Certainly, if the appellant had assured the appellee that he would get the full market value for the property, he would be held responsible for his representations. That is not the issue. She knowingly and voluntarily listed the property at the prices previously mentioned. She subsequently turned down an offer of $27,500 and made a counter-offer of $30,000. The buyer rejected the counter-offer and nothing further happened until October 3 when the same buyer submitted a second offer for $28,500. The appellant recommended that she accept this price. She did accept the offer but subsequently refused to close with the purchasers. The trial court ordered her to specifically perform the contract and there does not appear to have been an appeal from that decree.

To adopt the standard of care urged by the appellee would in effect put all real estate transactions in limbo for a

period of five years. Also, it would render the former seller of this property liable to the owner for the sale in which appellee purchased the property. We think neither the law nor public policy demands such a strict standard.

The question before us is not establishing the fair market value of the property at the time of the sale but whether the appellant breached his duty to the appellee. Under the circumstances and facts of the present case we find neither substantial evidence nor a preponderance of the evidence to support the decree of the trial court. The trial court apparently adhered to the rule which we have quoted above but found from the facts that the appellant had breached his duty of ordinary care and skill in handling the matter entrusted to him. We do not imply by this decision that a broker or salesman would never be liable for failure to determine the fair market value of real estate listed by him for sale. Certainly, the parties may agree or contract to do or not do any number of things. We are stating that the standard of performance under an arm's length real estate transaction is the standard set out previously. This case is reversed and remanded to the trial court with directions to enter a judgment on behalf of the appellant for $1,995 which represents the sales commission on the 15-acre tract of land.

Reversed and remanded.

Charles McVAY and Patricia A. McVAY, Husband and Wife *v.* J. B. COWGER

82-93 635 S.W.2d 249

Supreme Court of Arkansas
Opinion delivered June 21, 1982
[Rehearing denied July 19, 1982.]

J. L. Hendren, for appellants.

Laws & Swain, P.A., by: *William S. Swain,* for appellee.

ROBERT H. DUDLEY, Justice. Appellee was burning stumps on his land when the fire got out of control and destroyed appellants' house and most of their possessions. The appellants brought suit asking $75,000 in damages but the jury gave them a verdict for only $7,500. Their motion for a new trial alleging insufficiency of damages was denied. This appeal is from that denial and comes to this court as a tort action pursuant to Rule 29 (1) (o). Appellants's sole point of appeal is stated as follows:

> The trial court erred, as a matter of law, in denying appellants' motion to set aside the jury's verdict on damages and in denying appellants a *new trial on the issue of damages.* [Emphasis supplied.]

Appellants' opening sentence in their statement of the case is:

> This is an appeal from the lower Court's denial of appellants' motion to set aside that portion of a jury verdict relating to damages and for a new trial on the issues of *damages alone.* [Emphasis supplied.]

The final paragraph of their conclusion is:

> Appellants urge this Court to reverse the decision of the lower Court in which the motion for new trial was denied, and to enter its order setting aside that portion of the jury verdict awarding damages of $7,500.00 and order a new trial *on that issue alone.* [Emphasis supplied.]

Thus, appellants do not ask for a new trial but seek to limit the scope of appellate review in order that they can avoid the hazards of a complete new trial and, if remanded upon the condition asked, have the jury only assess damages with the law of the case being that $7,500 is an inadequate verdict. We do not allow such a course. Because we cannot grant the relief asked, the lower court must be affirmed.

" . . . In law cases the verdict is an entity which we cannot divide by affirming the finding of liability and yet remanding the cause upon the issue of damages." *Manzo* v. *Boulet,* 220 Ark. 106, 246 S.W.2d 126 (1952), citing *Martin* v. *Street Improvement District No. 349,* 180 Ark. 298, 21 S.W.2d 430 (1929). This has long been our law. *Krummen Motor Bus & Taxi Co.* v. *Mechanics' Lumber Co.,* 175 Ark. 750, 300 S.W. 389 (1927); *Martin* v. *Kraemer,* 172 Ark. 397, 288 S.W. 903 (1926); *Bothe* v. *Morris,* 103 Ark. 370, 146 S.W. 1184 (1912); *Carroll* v. *Texarkana Gas & Electric Co.,* 102 Ark. 137, 142 S.W. 586 (1912); and *Dunbar* v. *Cowger,* 68 Ark. 444, 59 S.W. 951 (1900).

As a matter of law we cannot grant the only relief asked on appeal and, therefore, the lower court is affirmed.

DR. J. F. COOLEY *v.* FIRST NATIONAL BANK OF LITTLE ROCK, ARKANSAS

82-68 635 S.W.2d 250

Supreme Court of Arkansas
Opinion delivered June 21, 1982

James E. Smedley, for appellant.

Joe D. Bell of *Friday, Eldredge & Clark,* for appellee.

STEELE HAYS, Justice. This suit was brought on behalf of the Committee for Peaceful Co-Existence, Inc. by appellant, Dr. J. F. Cooley, alleging negligence and breach of contract by First National Bank in the handling of a joint checking account. After hearing the evidence, the Chancery Court held the claim was barred by the three-year statute of

limitations (Ark. Stat. Ann. § 37-206 [Repl. 1962]), and the only issue on appeal is whether the chancellor's ruling is clearly erroneous. We find no basis for a reversal of his ruling.

On August 29 of 1969, Dr. J. F. Cooley, Rev. Cato Brooks, as co-chairmen, and Rev. V. Castle Stewart, as a board member, opened a checking account in the name of the Committee for Peaceful Co-Existence. The signature card authorized the bank to honor checks drawn by any two of the three authorized signatures. All bank statements were to be sent to post office box no. 1787, the Little Rock address of the Committee for Peaceful Co-Existence. Dr. Cooley insists he never received a bank statement until after this suit was filed in December, 1976, but he concedes that three other persons, including Rev. Brooks, had access to the post office box. On February 16, 1970, the account name on the signature card was changed, apparently by Rev. Brooks and Rev. Roy L. Laird, to the Mobile Section of the Committee for Peaceful Co-Existence. Withdrawals required both signatures. In March 1970, some 22 checks totaling over $4,000 were drawn on the account by Rev. Brooks and either Rev. Stewart or Rev. Laird.

As early as November 1969, Dr. Cooley suspected that unauthorized withdrawals were being made from the account. He notified the bank verbally in November 1969 and by letter on March 26, 1970. He asked that copies of past statements and cancelled checks be sent to him, to no avail.

Dr. Cooley testified that around April 1, 1971, he went to the bank and demanded the records; he was told to come the next day to pick them up, but when he returned a bank officer told him someone from the committee had already claimed the records earlier that morning. The bank then refused to give him the records because of the conflict within the committee and the bank's uncertainty as to who was actually authorized to receive the records. Dr. Cooley said he made numerous inquiries and hired three attorneys between 1969 and 1976, and after this suit was filed the chancellor entered an order directing the bank to provide the committee

with all records and documents relative to the disputed account.

Appellant argues the statute of limitations was tolled by his letter of March 26, 1980, requesting records and directing the bank to stop honoring drafts on this account. He relies on Ark. Stat. Ann. § 85-4-406 (Add. 1961), which requires a bank to make statements reasonably available to customers. Dr. Cooley maintains he never received a bank statement nor was one ever made available to him.

Dr. Cooley's only argument on appeal is the statute of limitations never started to run because the bank failed to make bank statements available. But whether the bank statements were sent was, of course, a question of fact. The chancellor resolved the issue in the bank's favor and his finding will not be set aside unless clearly erroneous. ARCP Rule 52. The bank offered credible evidence at trial that the statements were mailed to post office box no. 1787, as designated on the signature card. Even after the signature card was changed, the mailing address for the bank statements continued to be post office box 1787. Joy Greer, a senior vice president in charge of the bank's communications division, testified the only monthly statement addressed to the post office box which was returned to the bank was not until after the post office box had been closed out. Where bank statements are mailed to the address provided by the depositors as reflected on the signature card, we believe they are "available" within the meaning of Ark. Stat. Ann. § 85-4-406. Further, the usage and custom of a bank in delivering statements and cancelled checks to its depositors is competent evidence to prove delivery was effectuated. *England Nat'l Bank* v. *United States,* 282 F. 121 (8th Cir. 1922).

The bank's payment of a check or withdrawal on less than the required number of signatures renders the signature "unauthorized" within the meaning of Ark. Stat. Ann. § 85-4-406 and requires the customer to discover and report it within one year from the time the statement and items are made available. *Pine Bluff Nat'l Bank* v. *Kesterson,* 257 Ark. 813, 520 S.W.2d 253 (1975); *First National Bank of*

Springdale v. *Hobbs,* 248 Ark. 76, 450 S.W.2d 298 (1980); Ark. Stat. Ann. § 85-4-406 (4).

Dr. Cooley's testimony reveals he believed there were unauthorized withdrawals of money as early as November of 1969, yet he did not bring suit until December, 1976. In conclusion, we believe the evidence in the record is more than sufficient to support the chancellor's conclusion that Dr. Cooley had knowledge of unauthorized withdrawals and yet failed to act within the time allowed under the statute of limitations.

Affirmed.

ADKISSON, C.J., not participating.

HOLIDAY INNS, INC. *v.* Mary DREW

82-57 635 S.W.2d 252

Supreme Court of Arkansas
Opinion delivered June 21, 1982

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

Holloway & Bridewell, for appellee.

THOMAS M. BRAMHALL, Special Justice. On the morning of November 14, 1975, Appellee, Mary Drew, drove from her home in Lake Village, Arkansas, to Appellant, Holiday Inn, in West Memphis, Arkansas, to join some friends who were registered there and attending a teacher's conference in one of Appellant's meeting rooms. She and one of her friends planned to leave the Holiday Inn as soon as the conference was over and travel to Memphis to do some

personal shopping. Mrs. Drew arrived in West Memphis on the morning of the day in question and she and her friends had lunch at an unspecified location. Her friend had another meeting to attend that afternoon and they planned to leave for Memphis immediately thereafter. Mrs. Drew decided to attend the meeting with her friend rather than sit in the lobby and wait for her. In order to effect a quick departure, she was going to reserve some seats at the back of the meeting room while her friend checked out of the motel.

The room in which the meeting was held was immediately adjacent to the lobby. In route to the meeting room she noticed an employee of the motel vacuuming the lobby, and she also saw some acquaintances sitting on a couch. This couch was in the lobby and the furniture was arranged in such a way that one of the couches was away from the wall and it made sort of an entry to the meeting room. Near the wall was a table, and Mrs. Drew was heading between the couch and the table. As she turned to speak to her friends, her leg became entangled in the vacuum cleaner cord causing her to trip and fall. She hit her chest on a table and her knees on the floor. The jury returned a verdict of $75,000.00 against Holiday Inn which promptly appealed.

Approximately six weeks after the trial, the parties were notified that the court reporter's recording equipment had malfunctioned, and it was uncertain how much, if any, of the transcript would be reproducible. In November of 1981, more than six months after the trial, the incomplete transcript was given to the parties. The bench conferences, arguments concerning jury instructions, all motions made outside the hearing of the jury, some objections by counsel, and parts of the testimony of the witnesses were not recorded and thus not available to the attorneys or this court.

The parties and the trial judge attempted to reconstruct what occurred during the periods of time not recorded pursuant to Rule 6 of the Arkansas Rules of Appellate Procedure. Suffice it to say, substantial disagreement as to the events that transpired and statements made has evolved. The most notable disagreement centers around the events which surround the proffering of proposed jury instructions

by the parties and the subsequent reading of the instructions to the jury.

On March 5, 1982, eleven months after the trial, the trial judge entered an order pursuant to Rule 6 of the Arkansas Rules of Appellate Procedure, which order provides in part as follows:

> After all evidence has been presented, the Court and counsel retired to chambers to consider instructions. Counsel for Appellant attempted to offer certain instructions presumably AMI 206, 602 and 1106. The Court told counsel that the standard preliminary instructions should be selected and agreed upon and told counsel for Appellant that the Court would consider his proffered instructions after the standard instructions had been approved by the Court. At this point, counsel for Appellant stated these exact words or words to this effect, 'I don't care if you give these instructions or not.' The Court proceeded to assemble the instructions which were given and counsel for Appellee submitted his but counsel for Appellant failed to resubmit his instructions to the Court for the Court's acceptance or rejection.
>
> Before counsel and the Court returned to the courtroom, it was agreed by the parties and the Court that the parties would be able to make any and all objections to the giving or rejection of instructions after the case was submitted to the jury.
>
> Instructions were read to the jury and the case was argued. After the Court had instructed the jury, counsel for Appellant approached the bench and complained that the Court had not given Appellant's instructions. The Court at this time informed counsel for Appellant that the instructions in question had not been resubmitted in accordance with the Court's directions after having been withdrawn. (S 1-2)

Appellant argues, *inter alia,* that the record is defective and does not afford proper review by this court and the inadequate record is a ground for reversal. We agree.

The trial court, in its effort to settle the record, said that Appellant had not resubmitted its instructions in accordance with the court's direction after the instructions had been withdrawn. The finding that Appellant's instructions had been withdrawn is a conclusion reached by the trial court as distinguished from a recitation of the events which occurred and the facts surrounding the proffering of proposed jury instructions by the attorneys. The trial court did say that counsel for Appellant "attempted to offer" certain instructions, at which time the court told counsel for Appellant that the court would consider his proffered instructions after the standard instructions had been approved by the court. At that point the Appellant is quoted by the trial court to have said, "I don't care if you give these instructions or not." Based upon this statement, the trial court reached the conclusion that Appellant's counsel had withdrawn his proffered instructions and this court is of the opinion that this conclusion is erroneous.

Ark. Stats. Ann. 22-351 and 22-352 place an affirmative duty on the trial court to provide an adequate record for review by the appellate courts of this state. Therefore, in a case such as this where there is virtually no record of the proceedings conducted out of the presence of the jury due to a malfuncton of a recording device and the record is inadequate for appellate review, this court can do nothing other than remand the case for a new trial. By this ruling we do not wish to imply that Rule 6 of the Arkansas Rules of Appellate Procedure is not an effective tool with which to correct or reconstruct a record. We are saying that when a record cannot be settled pursuant to that rule, reversible error exists.

There is other error which forms a basis for reversal of this case which this court feels should be discussed since the case is remanded and these issues probably will again arise in the trial court.

Appellant contends the failure of the court to give AMI 206, which instructs the jury on the issue of negligence on the part of Appellee, is error. As stated above, this court is of the opinion that counsel for the Appellant did in fact offer

certain instructions, including AMI 206, and the statement attributed to Appellant's counsel to the effect that he did not care if the court gives these instructions or not does not constitute a withdrawal or a waiver of the giving of this instruction. It should be noted that the instructions proffered by Appellant were described by the court reporter as having been offered and the only issue was whether the instructions had been refused by the trial court or had been withdrawn by Appellant. The negligence of Appellee was specifically pled as a defense in Appellant's answer and the Appellant in its examination of the witnesses at the trial generated some testimony that would allow a jury to find that Appellee was guilty of negligence in failing to see the vacuum cleaner cord so as to avoid tripping on it. However, the jury only received AMI 203, which placed the negligence of the Appellant in issue without the corresponding issue of the Appellee's own negligence as a proximate cause of her injuries. The bracketed paragraph at the end of AMI 203 was not given. This paragraph is only given when affirmative defenses such as negligence of a claimant or assumption of the risks are not in issue. It is at this point that AMI 206 pertaining to affirmative defenses such as negligence on the part of a party claiming damages should be given. However, based upon the record in this case the instruction was refused by the trial court.

In its argument that the court's refusal to give AMI 206 was error, Appellant relies on *Beevers, Adm'x.* v. *Miller,* 242 Ark. 541, 414 S.W.2d 603 (1967), which was a wrongful death action brought on behalf of a decedent who was a passenger in a truck driven by Goodwin. The Administratrix alleged that Appellee drove his truck negligently, forcing Goodwin to swerve his vehicle off the road to avoid a collision with him, thereby causing the death of the decedent. Appellee defended on the grounds that Goodwin was negligent, and there was some evidence to support that defense. Appellant contended the trial court erred in failing to give AMI 502, which is the instruction on concurring proximate causes and Appellee contends there was no error because the content of AMI 502 was covered by the Court's instructions AMI 501 and AMI 503. This court said:

> As earlier pointed out, the pleadings show clearly that appellee's defense was largely based on a contention that appellant's damage was caused solely by the negligence of Goodwin. He did not plead negligence by her decedent, nor did he assert that negligence of Goodwin should be imputed to him. Consequently, the jury should understand clearly that appellant was entitled to a verdict if it found appellee guilty of negligence which contributed as a cause, however slightly, to appellant's damage, even though they might have thought that the negligence of Goodwin was a far greater contributing cause. With the issues so presented, Goodwin not having been made a third party defendant, it was imperative that the jury be told that Goodwin's negligence constituted no defense unless they found it to be the sole proximate cause. We do not think that the instructions given by the court made this clear. It was essential to do so in order to give the jury a clear understanding of the governing legal principles, particularly in a case submitted for a general verdict. Speculation as to the failure to make Goodwin a party would have been eliminated as a possible factor in the verdict.
>
> *Even if the court's general instructions could be said technically to have covered the matter in a general way, it is error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted. (Emphasis added.)*

Beever, supra, at 546-47 (citing past Arkansas cases).

In the case at bar the issue of negligence on the part of Mary Drew was raised in the pleadings and developed by the testimony. However, as previously stated, the jury simply received AMI 203, which required that the jury find: First, that Appellee sustained damages, second, that Appellant was negligent, and third, that such negligence was a proximate cause of Appellee's damages. Thereafter, the jury was instructed by the giving of AMI 2102, which is the comparative negligence instruction. The Appellee argues

that the giving of AMI 2102 to the jury covered the issue of the Appellee's negligence and therefore the Appellant was not prejudiced by the jury not receiving AMI 206. We cannot agree. Although AMI 2102 does explain what the jury should do after it has determined if one or both of the parties are negligent, this court feels the failure to give AMI 206 constitutes reversible error for the reason that nowhere throughout the other instructions can be found an explanation by the court that one of the issues involved in the case is the affirmative defense of negligence on the part of Appellee.

This Court in *Beevers, supra,* stated that a lawyer, of course, understands that the charge of the judge was intended to convey a particular idea; but the jurors are not usually learned in the law, and that in the absence of the specific instruction covering the particular point, the jury may become confused. The court stated that it was not saying the jury did take the confused view of the law, but simply that they might have so concluded.

Another argument that presents itself is that during the argument of this case to the jury, Appellant's counsel would have well covered this point. We feel certain counsel for Appellant would have argued this point since without the court having given the proper instruction this would be Appellant's only recourse. We said in *Beevers, supra,* at 548-49, quoting *St. Louis & S.F.R Co.* v. *Crabtree,* 69 Ark. 134, 62 S.W. 64 (1901),

> [J]urors are not required to take the law from counsel, and it was putting an undue burden upon the defendant company to compel it to rely upon convincing the jury as to the proper view of the law by an argument of its attorney. If the sympathies of the jury happen to be with the other side, that might be difficult to do, and might be too heavy of a task even for the most gifted attorney. It is a burden that the law does not impose, for it is the duty of the judge to instruct; and each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for misapprehension or mistake.

Beevers, supra, at 549, then cites numerous past decisions of this court for our declaration that:

> A reversal must follow the refusal of a proper instruction, unless it affirmatively appears that no injury resulted. ... Although the court is not required to give correct instruction offered when the instructions given explicitly, clearly, fully and fairly cover the matter requested, we cannot say that prejudice to Appellant did not result in this situation.

For the reasons set out above, the trial court's refusal to give AMI 206 was erroneous.

Appellant contends the trial court erred by finding as a matter of law that Mary Drew was a business invitee. Testimony at the trial established the fact that Appellee was not a registered guest at the Holiday Inn and not a registered participant at the meeting conducted on the Holiday Inn premises. There is testimony in the record of this case that Appellee had lunch with her friends, but there is no testimony in the record to tell us whether Appellee and her friends ate lunch on the premises of the Holiday Inn. Suffice it to say, there are facts that would support a finding by the jury that Appellee was a licensee on Appellant's premises. Conversely, there are also facts that would seem to indicate Appellee was an invitee. We are aware of the decision in *Little Rock Land Company* v. *Raper,* 245 Ark. 641, 433 S.W.2d 836 (1968), in which case we held a wife who was accompanying her husband to a doctor's office in a building was an invitee. Mrs. Raper was unquestionably in the building for a purpose benefiting the owner. In the present case, there is some evidence that Mary Drew was on the premises for her own personal convenience, and we find this evidence is sufficient to warrant submission of this issue to the jury. We are simply not willing to say that one lawfully on the premises of an innkeeper is an invitee as a matter of law under every conceivable circumstance.

Finally, appellant contends it was error for the court to submit the issue of whether the injury of appellee was temporary or permanent to the jury. This court has re-

peatedly held that evidence must tend to establish permanency with reasonable certainty. It must not leave the jury to speculation or conjecture. *Welter* v. *Curry,* 260 Ark. 287, 539 S.W.2d 264 (1976); *Midwest Bus Lines* v. *Williams,* 243 Ark. 854, 422 S.W.2d 869 (1968); *Missouri Pacific Transp. Co.* v. *Kinney,* 199 Ark. 512, 135 S.W.2d 56 (1939). None of the physicians who testified in this case indicated appellee's injuries were permanent in nature. We have held on occasions that a particular injury in and of itself may be sufficient to submit the issue of permanency to a jury even in the absence of medical testimony to that effect. *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S.W.2d 840 (1930). The injuries of appellee do not meet that criterion.

Reversed and remanded for a new trial.

HOLT, J., not participating.

Robert James WILLIAMS *v.* STATE of Arkansas

CR 81-137 635 S.W.2d 265

Supreme Court of Arkansas
Opinion delivered June 28, 1982

William R. Simpson, Jr., Public Defender and *Jeff Rosenzweig* and *Sandra Berry,* 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.

GEORGE ROSE SMITH, Justice. The appellant Williams was found guilty of murder in the first degree, having shot and killed Pravin Patel in the perpetration of robbery at the Ritz Motel in Little Rock on November 28, 1980. The jury, finding that Williams was an habitual criminal with four or more previous felony convictions, sentenced him to life imprisonment. The two principal arguments for reversal stem from the trial court's having permitted the State, in its refutation of Williams's alibi defense, to prove on rebuttal that Williams had held up another person in the same vicinity a short time before the robbery at the Ritz Motel.

Patel was shot at the motel at about 10:30 or 11:00 p.m. A witness for the State saw Williams running from the motel

with a gun in one hand and the cash drawer in the other. The witness noted the license number and other identifying features of Williams's get-away car. That information led the police to Williams. The witness recognized the car when the police took him to it and also identified Williams in a line-up and at the trial. The sufficiency of the evidence is not in question.

In support of an alibi defense both Williams and his wife testified that he came home at about eight o'clock on the evening of the murder and remained there during the night except for a quick trip to buy beer at about nine o'clock. At an omnibus hearing the prosecution had announced its intention to call John Martin as a witness, but the judge did not then rule on the admissibility of Martin's testimony.

The State, after the defense had rested, was allowed to introduce Martin's testimony in rebuttal. Martin testified that at about ten o'clock on the evening of the murder, as he was closing up his place of employment seven or eight blocks from the Ritz Motel, Williams held him up at gunpoint and demanded that Martin hand over the money in the safe. Martin convinced Williams that he did not have a key to the safe nor any money on his person. Williams then said he was a policeman, just checking Martin out, and left. Thus the Martin incident and the murder took place in the same vicinity and during the time when Williams and his wife testified he was at home.

The admissibility of Martin's testimony is not open to serious question. It was clearly relevant to disprove the alibi. In *Nash* v. *State,* 120 Ark. 157, 179 S.W. 159 (1915), we upheld the admissibility of evidence, introduced as part of the State's case in chief to refute an alibi, that the defendant had committed another robbery at about the same time and in the same vicinity as the robbery on trial. There the trial judge gave a limiting instruction, explaining the purpose for which the testimony was presented. There was no request for such an instruction in this case; so the court was not required to give one. *Chisum* v. *State,* 273 Ark. 1, 616 S.W.2d 728 (1981). The admissibility of testimony about another crime, to rebut a defense of alibi, is uniformly recognized.

Wharton's Criminal Evidence, § 258 (13th ed., 1972); *People* v. *Appleton,* 1 Ill. App. 3d 9, 272 N.E.2d 397 (1971); *Reed* v. *State,* 481 S.W.2d 814 (Tex. Cr. App., 1972). Uniform Evidence Rule 404 (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979), is to the same effect, because Martin's testimony was relevant to disprove the alibi and was not offered merely to show Williams's bad character.

It is argued that Martin should have been permitted to testify only that he saw Williams at the specified time and place, without saying that Williams confronted him with a gun. This argument is totally unrealistic. Had the testimony been so watered down, the jury would have received a false impression about the incident and might well have doubted whether Martin could identify a stranger whom he saw casually as he was closing up for the night. It was the very fact that Williams used a weapon in an attempt at robbery that would fix the incident in Martin's memory and strongly support his identification of Williams. The probative value of that important fact heavily outweighed any prejudice to Williams from the proof that he had drawn a gun on Martin.

Second, in a related point it is argued that the prosecution should not have been allowed to ask Williams on cross-examination if he had not pulled a gun on Martin at about ten o'clock that evening. In view of the admissibility of Martin's testimony, the question was within the broad latitude allowed on cross-examination to elicit facts contradicting Williams's testimony on direct examination and therefore to attack his credibility. *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S.W.2d 795 (1964). Indeed, had the question not been asked, the jury might have thought that the prosecution had indicated some weakness in its position by failing to give Williams an opportunity to deny or explain the incident to be described by Martin on rebuttal.

Third, before the trial expert testimony was heard for a day and a half on the question whether a death-qualified jury is more likely to convict than one not so qualified. We agree with the trial judge's conclusion that the expert testimony was not conclusive, and we adhere to our earlier

position on this issue. *Neal* v. *State,* 270 Ark. 442, 447, 605 S.W.2d 421 (1980).

We find no reversible error in the points argued nor in the other rulings brought to our attention.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. It is undisputed that the appellant used a gun in the crime with which he was charged. He was also found to have committed the crime of murder in the perpetration of a robbery. Any evidence of him pulling a gun for the purpose of robbing another individual would be seen by a jury as similar conduct to that for which he was being tried. Under our Uniform Rules of Evidence, Rule 404 (b), evidence of other crimes is not admissible to either show the character of a person or to show that someone acted in conformity with certain criminal actions. I think it was prejudicial error to admit John Martin's testimony that appellant pulled a gun on him at a time very close to the robbery and murder in question. The appellant's alibi was that he was not in the neighborhood at the time of the commission of the murder. Mr. Martin could easily have been asked, without prejudicial effect, whether he observed the appellant near his place of business and at what time. He also could have been asked whether he had a conversation with the appellant at that time. This would be all that would be needed to disprove appellant's alibi theory. No mention would have to be made of any prior criminal acts of the appellant. The single effect of the testimony that the appellant pulled a gun on Martin was to prejudice the jury. It had absolutely no probative value beyond the fact that it placed the appellant near the robbery scene. In the case of *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954), we stated:

> We do not permit the State to bolster its appeal to the jury by proof of prior *convictions,* with their conclusive presumption of verity, and still less is there reason to allow the jury to be prejudiced by mere

> accusations of earlier misconduct on the part of the defendant.

This clearly shows that our standards in the past and up until now have been to disallow evidence of prior misconduct on the part of a defendant being charged with a crime. In *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979), we stated:

> There are circumstances where it is possible for the State to introduce into a criminal trial evidence that the defendant has committed crimes unrelated to those with which he is charged. One circumstance is in its case in chief, where, in very limited circumstances, the State may offer evidence of other offenses. Ordinarily, such evidence is not permitted. It is prejudicial by nature and should only be used against a defendant in a criminal action in rare cases.

I cannot see where this is a rare case coming under the exception stated in *Gustafson* because evidence of the physical presence of the appellant could have been introduced without evidence of the appellant's prior bad acts.

In response to the majority opinion that no limiting instruction was requested by the appellant, he filed a motion in limine to prevent the exact testimony which was twice presented in this case, once on cross-examination and a second time on rebuttal. Objections were also made at the time the testimony was presented and a motion for mistrial was made. Every effort was made to prevent this prejudicial material from being used against the appellant. A limiting instruction at this point would have been useless even if it had been given.

I believe the appellant has furnished proof that a "death qualified" jury is more apt to convict than a jury not so qualified. The record on this point is quite persuasive and voluminous. I will not repeat any of it here because my opinion comprises such a distinct minority on this issue. It appears to me the only way to solve this continuous and troublesome problem is to have a "non-death qualified"

jury determine the guilt or innocence of an accused and then allow a "death qualified" jury to determine the sentence.

MADISON BANK AND TRUST et al *v.*
FIRST NATIONAL BANK OF HUNTSVILLE,
Arkansas et al

81-267 635 S.W.2d 268

Supreme Court of Arkansas
Opinion delivered June 28, 1982

Rose Law Firm, by: *Vincent Foster, Jr.,* for appellant.

Friday, Eldredge & Clark, by: *Robert K. Walsh,* for appellees.

FRANK HOLT, Justice. In October, 1980, following approximately one year of negotiations, the appellants purchased substantially all of the outstanding shares of the Bank of Kingston, a state bank, now named Madison Bank and Trust. The buyer under the agreement was James E. McDougal, Agent. The sellers, the Hargis family trust and members of the Bunch family, were also the majority shareholders in the only other bank in Madison County, the appellee First National Bank of Huntsville. The purchase agreement provided for a cash purchase price which exceeded $500,000, plus a restrictive covenant. The contract provides in pertinent part:

> WHEREAS, as an inducement to each of the SHAREHOLDERS to enter into this Agreement for the Sale

> and Purchase of Bank Stock, the BANK has agreed that during the ensuing ten (10) year period it will not move its main office or establish a branch bank or a teller's window in the Cities of Huntsville and Hindsville, the Town or Community of Marble, Madison County, Arkansas, and otherwise within a ten (10) highway mile radius of Huntsville, Madison County, Arkansas . . . .

Thereafter, paragraph 7 (b) provides:

> As a part of the consideration to each of the SHAREHOLDERS and the essence of this Agreement for the Sale and Purchase of Bank Stock is the agreement of the BANK and the BUYER that the BANK shall not within a period of ten (10) years after this date establish its main office, or a branch office or a teller's window in the Cities of Huntsville and Hindsville, and the Town or Community of Marble, Madison County, Arkansas, and within a ten (10) highway mile radius of Huntsville, Arkansas . . . .

About three months after the purchase or in the early part of 1981, the Board of Directors of the Bank of Kingston changed the name to Madison Bank and Trust and shortly thereafter initiated applications to the State Bank Department and the Federal Deposit Insurance Corporation (FDIC) for authority to amend its charter to permit moving its main office from Kingston to Huntsville and establish a full service branch at Kingston. After an investigation by the Bank Department staff and before the application was heard, the appellee bank and two of the sellers filed this action seeking specific performance of paragraph 7 (b) of the agreement and an injunction against the appellants to prohibit them from proceeding with their application or acting contrary to the provisions of paragraph 7 (b) in the purchase agreement. In response the appellants contended that the restrictive covenant was void and unenforceable under state law and violated antitrust laws. Following a hearing the trial court ordered specific performance of the agreement and granted the injunction.

The court found that the agreement was freely and voluntarily entered into by the parties on equal footing; that McDougal was expressly acting as agent for certain named appellants with the remaining appellants committed to be buyers at the time of closing; that the individual appellants knew of Paragraph 7 (b) by the time of the closing; that the individual appellants as shareholders and directors of the Bank of Kingston ratified the purchase agreement; that the application to move the bank from Kingston to Huntsville would be in direct violation of Paragraph 7 (b) of the agreement; that it was the intent of the parties that the Bank of Kingston be bound thereby and the National Bank of Huntsville be a third party beneficiary to the contract; that paragraph 7 (b) serves a legitimate purpose by protecting the residents of Kingston by limiting the ability of the bank to move its assets from that community and its people; that paragraph 7 (b) was an essential part of the consideration for the sale or transfer of stock and sale and transfer of the bank would not have occurred without paragraph 7 (b); that paragraph 7 (b) is not in violation of the Sherman Act since appellants are not prohibited from commencing a new bank or engaging in the business of banking in Huntsville or from otherwise competing for customers with any other financial institution; that paragraph 7 (b) is a limited restraint, reasonable in scope, duration, and geographical extent; that the agreement is enforceable and binding on the individual appellants and the Bank of Kingston now Madison Bank and Trust. Hence this appeal.

Appellants first contend that the trial court erred in finding paragraph 7 (b) of the agreement has a legitimate, protectable purpose and is reasonable in scope and geographic exent. The general rule is that a contract in restraint of trade ancillary to a sale or a business transaction, which is reasonably limited as to time and place, is not against public policy and is not invalid. See *Bloom* v. *Home Insurance Agency,* 91 Ark. 367, 121 S.W. 293 (1909); *Webster* v. *Williams,* 62 Ark. 101, 34 S.W. 537 (1896); *United States* v. *Empire Gas Corp.,* 537 F.2d 296 (8th Cir. 1976), cert. den. 429 U.S. 1122 (1976); 17 C.J.S. Contracts § 238, p. 1107; 54 Am. Jur. 2d, Monopolies, Etc., § 103.

There are two types of these contracts — one, the employer/employee and two, the sale or transaction involving an established business. The courts view a restraint of trade agreement ancillary to the transfer of a business with greater liberality, being "more prone to uphold restrictive clauses" than employer/employee covenants. *McLeod* v. *Meyer,* 237 Ark. 173, 372 S.W.2d 220 (1963); see also 42 Am. Jur. 2d, Injunctions, § 115; and 54 Am. Jur. 2d, Monopolies, Etc., § 543. In *Little Rock Towel and Linen Supply Co.* v. *Independent Linen Service Co. of Ark.,* 237 Ark. 877, 377 S.W.2d 34 (1964), we said: "Owing to the possibility that a person may be deprived of his livelihood the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale." Whether a restraint provision is reasonable or unreasonable is a question to be determined under the facts of each case. *McLeod* v. *Meyer, supra.* The burden is on the party challenging the validity of the covenant to show it is unreasonable and against public policy. See *United States* v. *Empire Gas Corp., supra.* The trial court's findings will not be reversed unless clearly erroneous. *Ford Motor Credit* v. *Yarbrough,* 266 Ark. 457, 587 S.W.2d 68 (1979); A.R.C.P. Rule 52 (a), Ark. Stat. Ann. Vol. 3A (Repl. 1979).

McDougal began negotiations to purchase the Bank of Kingston from the appellees in the summer of 1979. An offer to purchase was tendered to an officer and shareholder of the bank. The offer was not acted upon by appellees and in early 1980, because of a "no progress" report, McDougal told the officer and part owner that he had decided to forget the deal. In April, 1980, this bank official contacted McDougal and said that he and the other owners of the bank wanted to sell. Negotiations were resumed. One shareholder was a nonresident. By letter addressed to him dated April 21, 1980, McDougal offered $1,500 cash per share for his stock and to sign an agreement not to move the bank to Huntsville during the next ten years. Considerable discussion ensued with appellees. However, McDougal withdrew his offer by letter dated July 25, 1980. In August, appellees' attorney contacted McDougal and informed him he could close a deal on the bank. On August 21, 1980, McDougal signed an agreement to purchase the bank stock as "James B.

McDougal, Agent." McDougal stated he signed as agent to make the sellers aware they could be expected to deliver the shares to persons other than himself. He knew about the restrictive covenant before he signed the agreement. There was conflicting testimony as to whether he or the sellers initiated the idea for the restriction. It appears that the other parties who purchased the stock knew of the existence of paragraph 7 (b) before the October closing. It was stipulated that each stock certificate issued to appellants was endorsed, stating it was subject to the provisions of paragraph 7 (b) of the agreement. In April, 1981, the Board of Directors of the appellant bank voted to amend its charter and make application to the State Bank Department to move its main office to Huntsville. In June, 1981, the Board of Directors rescinded the agreement or consent not to move its office to Huntsville on the basis that paragraph 7 (b) was invalid and unenforceble.

The contract clearly provides and the testimony indicates, as the court found, that paragraph 7 (b) was an essential part of the consideration for the sale, and the transaction would not have occurred but for appellants' covenant in paragraph 7 (b). Appellees' expert witness testified that the purpose of such a restriction was to make transfers such as this possible. In *United States* v. *Addyston Pipe and Steel Co.*, 85 F. 271 (8th Cir. 1898), aff'd 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96, the court said with respect to a buyer-seller covenant:

> Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property.

See also 14 Williston on Contracts, 3d, § 1637 (1972) and 54 Am. Jur. 2d, § 528. Here, we cannot say that the chancellor's finding that paragraph 7 (b) had a legitimate and protect-

able purpose is clearly erroneous, nor that its sole object, as argued by appellants, is to prevent competition and is too broad with respect to the public interest.

We also feel the chancellor's finding that the restriction was reasonable in scope, geographic extent and duration was supported by the evidence. The general rule is that, in order to be reasonable, the territory included in the covenant must be necessary for the protection of the promisee's interest. 46 A.L.R. § 5 [e], p. 149 (Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by territorial extent of restriction). The annotation, § 181, p. 363, shows the overwhelming majority of jurisdictions uphold a ten mile restriction ancillary to a sale or transaction involving a business as being reasonable in territorial extent. Similarly, a duration of ten years is also upheld as being reasonable. See 45 A.L.R.2d § 158, p. 238. See also *Robins* v. *Plant,* 174 Ark. 639, 297 S.W. 1027 (1927). Further, good will is not a necessary element in this transaction. *Colby* v. *McLaughlin,* 210 P.2d 527 (Wash. 1957).

Appellants next argue that enforcement of paragraph 7 (b) is injurious to the citizens of Madison County. The investigation by the State Bank Department staff revealed that another bank in Huntsville would stimulate growth and create new jobs. It would benefit the local economy and not have an adverse impact on competing banks. The First National Bank of Huntsville presently does not provide many of the banking services which the appellants propose to bring to Huntsville. Appellants assert that the restraint, if enforced, would deprive the public of its services until the ten year period terminates. We cannot agree. Appellants are not prohibited from servicing customers or engaging in the banking business within the ten mile radius. It appears they are doing so, although it would be more convenient for all concerned if they had their main office in Huntsville. Furthermore, there is nothing to prevent the appellants from applying to the State Bank Department for a new charter in order to establish a new bank in Huntsville if the Department deems its findings so justify. In doing so, it can consider and assure the fulfillment of the need for a banking

facility in Kingston. Ark. Stat. Ann. § 67-205 (Repl. 1980). Further, the action here is based upon an alleged breach of contract.

Appellants next contend paragraph 7 (b) constitutes a horizontal division of markets and of customers in violation of the Sherman Act. We cannot agree. In *Syntex Laboratories, Inc.* v. *Norwich Pharmacal Co.,* 315 F. Supp. 45 (S.D.N.Y. 1970), aff'd 437 F.2d 566 (2nd Cir. 1971), the court stated at p. 56:

> It is hornbook law that a covenant not to compete ancillary to the sale of a business (or a part of a business), when reasonably limited as to time and territory, does not fall within the prohibition of the Sherman Act.

See also *Goldberg* v. *Tri-States Theatre Corporation,* 126 F.2d 28 (8th Cir. 1942). Further, it is apparent that presently the appellants are vigorously competing with the appellees for customers. Also, the appellants, as previously stated, are not prohibited from applying for a charter to establish a new bank in Huntsville.

Appellants insist that paragraph 7 (b) is unenforceable against Madison Bank and Trust, as the officer, the president who signed the agreement on behalf of the Kingston Bank was acting outside the scope of his authority and there was no consideration. The chancellor correctly found, as the contract provided, that it was the intent of the parties that the Bank of Kingston (now Madison Bank and Trust) and each of the individual appellants as shareholders and members of the Board of Directors be bound by the agreement and by the provisions of paragraph 7 (b); further, the individual appellants as shareholders and directors ratified the agreement and paragraph 7 (b) of the agreement was an essential part of the consideration of the sale or transfer of the stock. The Bank of Kingston, as a legal entity, can only act through its agents, and the acts of its corporate officers are regarded as its acts. *Kull* v. *Dierks Lumber & Coal Co.,* 173 Ark. 445, 292 S.W. 695 (1927).

Appellants finally assert that the court erred in enjoining the individual appellants from exercising their discretion as bank directors. We find no merit in this contention. The agreement is binding upon the appellants as individuals and directors, as the court held, and they cannot be allowed to act contrary to paragraph 7 (b). See *Bloom* v. *Home Insurance Agency, supra.*

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. I find the duration of ten years is unreasonable. The cotton gin case of *Robins* v. *Plant,* 174 Ark. 639, 297 S.W. 1027 (1927), used by the majority, is, in my judgment, somewhat out of date in today's commercial market. Ten years is simply too long to restrict any kind of trade.

There is no doubt that the community of Madison County will suffer unless the appellees receive fair competition and that is essentially what the appellees propose to prevent. I expect the majority may be deeply influenced in its judgment by the fact that the appellants were knowledgeable, well informed businessmen who should have known what they were signing when they made and entered into the written agreement, and should not readily be able to break it. But to me that is a moral and not a legal consideration. The appellants cannot be bound by such an agreement in a court of law because the contract is an unreasonable restraint on trade. We cannot make it reasonable in time because to do so would be to draw a new contract for the parties, which we do not have the power to do. *Rector-Phillips-Morse, Inc.* v. *Vroman,* 253 Ark. 750, 489 S.W.2d 1 (1973). Therefore, I would declare it void.

JOHN I. PURTLE, Justice, dissenting. In my opinion, the Arkansas General Assembly has, through Ark. Stat. Ann. § 67-205 (Repl. 1980), delegated to the State Bank Commissioner and the State Banking Board the authority to approve or disapprove the creation and transfer of banks and their branches. The statute reads in part:

> All applications for charters for the new banks and for approval of amendments of the charters of existing banks shall, immediately upon their filing with the State Bank Commissioner, be submitted to the board for investigation and for approval or disapproval by it. The board shall, immediately upon the submission to it of each application for a charter or each certificate of amendment of a charter make such investigation as shall enable it to determine the fitness of the applicants, the need, from the public standpoint, for the proposed institution or the change to be effected by the proposed charter amendment and all other questions, whether or not of like kind with those herein referred to, bearing directly or indirectly upon the need or desirability from the public standpoint of the proposed institution or charter amendment, and shall then without delay approve or disapprove the application . . . No bank or trust company shall change or remove the location of its banking house, office or place of business from one [1] town or city to another save by charter amendment first approved by the Bank Commissioner and the State Banking Board in the manner herein required in respect of charter amendments generally.

Only the State Banking Board has the authority to determine whether the public needs are met by the establishment of a bank or branch bank in a particular community. In the present case the investigation by the State Banking Board and the commissioner's staff found that it would be beneficial to the local economy to have appellants establish a bank in Huntsville. It was also found that it would not have an adverse impact on the competing bank. The investigation established clearly that the existing bank does not provide many of the banking services which appellants proposed to bring to Huntsville. Therefore, if the existing bank refuses to bring full and adequate services to the people it serves, it is only logical that a competing bank should be allowed to provide these services. The majority opinion agreed that the State Banking Board might well approve the establishment of a new bank charter in Huntsville. According to the above-quoted statute, the board and commissioner

also have the exclusive right to approve or disapprove of a transfer of an existing bank's office to another town.

In my opinion, paragraph 7 (b) of the purchase agreement is unenforceable because it is an attempt to evade provisions of the law as established by the people of the state of Arkansas through the General Assembly in establishing the State Banking Board and the office of Bank Commissioner. It should be noted that the Madison Bank did not include any of its "good will" with the sale of its stock in the Kingston Bank. It seems that the provisions of paragraph 7 (b) were included specifically to stifle competition and promote an existing monopoly. In the case of *Shapard* v. *Lesser,* 127 Ark. 590, 193 S.W. 262 (1917), we held that an agreement to prevent attempts to buy a competitive gin and to stay out of the gin and cotton seed business in competition with an existing corporation was an unenforceable contract. It seems to me that in the great majority of cases where a restraint of personal services or trade has been enforced the grantor has conveyed at least a portion of its good will and services to the purchaser. No such items were purchased by the appellants and none were granted by the appellee bank.

There is no doubt in my mind that the State Banking Board is in a much better position as an administrative agency to determine and resolve the issues of this case than is a chancery court or the supreme court. In the case of *Gordon* v. *Cummings,* 262 Ark. 737, 561 S.W.2d 285 (1978), this court recognized that administrative agencies are in a better position to resolve such issues than are the courts. Such agencies are by nature specialists and they have greater experience and insight and are more able to determine and analyze the legal principles and facts involved than we are. The courts should not substitute their opinion for that of state agencies unless there has been an obvious failure to comply with the legal requirements in making such decisions.

For the foregoing reasons, I respectfully dissent.

Doris Bowden FOWLER et al *v.*
John HOGUE, Trustee et al

82-55 635 S.W.2d 274

Supreme Court of Arkansas
Opinion delivered June 28, 1982

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

Sam Boyce, for appellees.

DARRELL HICKMAN, Justice. The question before us involves the interpretation of the language in a testamentary trust. We affirm the trial court's determination which essentially was that the plain and ordinary meaning of the language controls.

Delphia Wilson, whose estate consisted primarily of farm land in Poinsett County, created a trust in her will for certain beneficiaries who were to receive during their respective lives the following income from the trust:

1. Juanita Bowden, 30% of the net annual income;
2. Dale Thomas Bowden, 30% of the net annual income;

3. George Milburn Bowden, 20% of the net annual income;
4. Doris Bowden, 20% of the net annual income;
5. George Carlyle Bowden, 10% of the net annual income.

Besides that provision the only other relevant language in the will reads:

VI.

Upon the death of George Milburn Bowden, his interest shall pass to his two sons, Mike Bowden and Timmy Bowden, who shall receive one-half (1/2) each of the said George Milburn Bowden's share. Provided, that if at any time the said Juanita Bowden shall remarry, then her interest in the trust shall terminate. Upon death of any of the beneficiaries above named, with exception of George Milburn Bowden, the deceased beneficiaries' share shall be divided equally between the remaining beneficiaries of the trust. This trust shall terminate upon the death of the last beneficiary herein named and all assets of the trust and any accumulated income shall be divided equally between my then existing heirs at law.

The will was admitted to probate in 1969. In March, 1976, Juanita Bowden died and a petition was filed to construe the trust. It was found that her 30% share of the income would be equally divided between the remaining living beneficiaries. So each received an additional 7.5% of the income of the trust. No appeal was taken from that decision.

In May, 1981, George Milburn Bowden died and another petition was filed to construe the trust. The question this time was whether George Milburn Bowden's two sons, Mike and Timmy, should receive only the original 20% granted to their father by the provisions in the trust or whether they were entitled to the 27.5% share their father was receiving at his death.

The trial court held that the two sons would receive 27.5% for the duration of the trust.

George Milburn Bowden's sons were favored by the trust; only his sons were granted a share in the income from the trust. It is possible that George Milburn Bowden could have died first and, if so, his sons would have only received 20% of the income from the trust. As it turned out, he died later and his sons' share is greater because, according to the plain language of the trust, they were to receive his share at his death. That is the interpretation the trial court gave the language and that is the only reasonable interpretation we can give the language in view of the law. The words and sentences used in a will are to be construed in their ordinary sense in order to arrive at the true intention of the testator. *Morgan* v. *Green,* 263 Ark. 125, 562 S.W.2d 612 (1978).

Affirmed.

Sue Stewart RAGLAND *v.* THE COMMERCIAL NATIONAL BANK OF ARKANSAS

82-117 635 S.W.2d 258

Supreme Court of Arkansas
Opinion delivered June 28, 1982

Tommy H. Russell, for appellant.

Everett O. Martindale, for appellee.

ROBERT H. DUDLEY, Justice. The testatrix, Halley S. Desvernine, executed a will bequeathing her diamond solitaire ring and her diamond wedding ring to her step-daughter, Donna Desvernine Kiyotoki. Later she executed a codicil in which she removed the diamond wedding ring from the list of bequests to her step-daughter and bequeathed the diamond wedding ring, instead, to her niece, appellant Sue Stewart Ragland. After Mrs. Desvernine's death, the appellee bank, as co-executor of the will, inventoried the decedent's safety deposit box and found the diamond solitaire ring and the diamond wedding ring taped together. The diamond wedding ring is described as a ring with diamond chips on it. The executors delivered both rings to the appellant. Shortly thereafter the step-daughter's attorney notified the executors that she questioned the disposition of the rings. A petition was filed in probate court asking the return of the rings to the bank during probate proceedings. The appellant, Sue Stewart Ragland, contended that the rings had previously been given to her by the decedent. The probate judge held there was insufficient

evidence to sustain the finding of a gift of the solitaire diamond ring to the appellant and held that the diamond wedding ring referred to in the codicil, and bequeathed to appellant, was the wedding band with diamond chips on it and not the diamond solitaire ring. Jurisdiction is in the Supreme Court pursuant to Rule 29 (1) (p). We affirm.

Appellant's first point for reversal is that the probate judge erred in holding that there had not been a prior gift of the diamond solitaire ring. Appellant testified that the decedent, who was appellant's aunt, came to live with appellant, her husband and brother in Fayetteville in early 1977. Her husband was discovered to have a fatal illness and she testified that her aunt gave her the diamond solitaire ring, consisting of a 1 to 2 carat diamond, to sell if she needed to pay medical bills or else to keep. She kept the ring for one and one-half years and during that time had it sized to fit her finger but testified that after her husband's death she gave the ring back to her aunt for safekeeping. Appellant's brother, also an interested witness, testified that the decedent had made a gift of the ring. The testimony of a good friend of the brother tended to corroborate their testimony. On the other side, a bank trust officer testified that the decedent repeatedly stated that the ring had been loaned, not given away, and that the person who had used it was not the same person to whom she wanted to bequeath it. The ring was in the possession of the testatrix at the time of her death.

The requirements for an effective inter vivos gift have been stated by this court as: an actual delivery of the subject matter of the gift to the donee with a clear intent to make an immediate, unconditional and final gift beyond recall, accompanied by an unconditional release by the donor of all future dominion and control over the property so delivered. *Boling* v. *Gibson,* 266 Ark. 310, 584 S.W.2d 14 (1979). And these elements must be shown by clear and convincing evidence. *Porterfield* v. *Porterfield,* 253 Ark. 1073, 491 S.W.2d 48 (1973). Appellant's evidence that a gift had been made consisted almost entirely of testimony by interested witnesses. The credibility of the witnesses is for the trial court to determine and we will not reverse the findings of a probate judge unless they are clearly erroneous. ARCP Rule

52. We cannot state that the findings of the trial judge on this issue are clearly erroneous.

Appellant's second point for reversal is that the probate judge found that the codicil referred only to the wedding band and not the diamond solitaire ring. In the will the decedent bequeathed both her diamond solitaire ring and her diamond wedding ring to her step-daughter. Then, in the codicil, the decedent removed the diamond wedding ring from the list of bequests to her step-daughter and added it to the items intended for appellant. Appellant argues that the wedding band only had chips in it and the probate judge erred in classifying it as a diamond wedding ring. It is true that when there is any inconsistency between any portion of a will and a codicil then the codicil will control. *McLaren* v. *Cross,* 236 Ark. 648, 370 S.W.2d 59 (1963). But here there does not appear to be any inconsistency. There were two rings found in the bank box and the terminology concerning two rings remained consistent in the will and codicil. The probate judge determined that the decedent only intended to change the bequest of the diamond wedding ring and to leave the bequest of the diamond solitaire ring unchanged. A will and a codicil must be construed together in order to ascertain the intent of the testator. *Garnett* v. *Clayton,* 222 Ark. 324, 260 S.W.2d 441 (1953). That is what the probate judge did and his finding will not be disturbed.

The appellee has requested that this court order appellant to pay appellee's costs incurred in ordering a transcript. Appellant only ordered a transcript of the proceedings of the temporary hearing and did not set out with clarity the points of appeal. Appellee maintains appellant should have paid for the cost of the complete transcript of the final hearing. Rule 6 (b) of the Rules of Appellate Procedure provides:

> . . . If the appellant has designated less than the entire record or proceeding, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the filing of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be

> included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

The appellee did not notify the appellant that it deemed a transcript of other parts of the proceedings to be necessary. Instead, it ordered a transcript of all other proceedings and asks reimbursement for those costs. We make only the proper adjustment to costs. Those parts of the transcript supplied by appellee which contain the deposition of the bank trust officer and the findings of fact by the trial court, found at transcript pages 95 and 96, were necessary for the decision of this appeal. Costs are ordered awarded for these parts of the transcript. Costs are denied for the remainder of the transcript because it concerns the mental capacity of the testatrix, which is not on appeal, and could not have been thought by appellee to be on appeal after reading the designated points of appeal.

Affirmed.

Wanda Lee CALAMESE *v.* STATE of Arkansas

CR 82-15 635 S.W.2d 261

Supreme Court of Arkansas
Opinion delivered June 28, 1982

Vashti O. Varnado, for appellant.

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

STEELE HAYS, Justice. Appellant was charged with 22 counts of theft of property and 22 counts of first degree forgery by information filed on October 3, 1980. She was convicted in a jury trial on September 28, 1981, and sentenced to 26 years in the Department of Correction.

Appellant argues two points for reversal, neither of which has merit and, therefore, we affirm the judgment. Appellant first contends that the trial court erred in permitting her to represent herself at trial. The only support for her argument is a notation dictated by the trial judge several days after the trial, stating appellant had appeared without counsel on the morning of trial and asked to proceed pro se. But the record itself demonstrates the appellant did not represent herself and was not without the benefit of counsel. The proceedings with respect to appointment of defense counsel were erratic from the outset. Initially, Mr. Robert Lamb was appointed and he secured appellant's immediate release from custody on her own recognizance, conditioned on weekly deposits by the appellant to be applied to retained counsel. In November, appellant filed her first motion for a continuance and requested that other counsel be appointed. Her motion was granted and Mr. David Hodges was named to represent her. In February, Mr. Hodges was relieved and Mr. Lamb was substituted and on appellant's motion trial was continued to the next term of court. In May, appellant again moved for a continuance of the trial then scheduled for June 1, this time on the basis of her daughter's tonsilectomy

which conflicted with the trial date. This motion was either denied or not acted upon and on May 29 appellant renewed her motion, stating that she did not wish to proceed with Mr. Lamb as counsel but intended to obtain other counsel, unnamed, who would be out of the state until after the June 1 trial date. On the morning of trial a hearing was conducted in chambers and the court granted yet a third continuance in order for appellant to hire other counsel, which she stated she had the resources to do. Appellant assured the court she was not seeking to delay the progress of the case and understood the case would be set for trial during the September term.

On September 28, 1981, the case was called for a jury trial and appellant appeared without having retained counsel. At that point the trial judge appointed Messrs. Steven G. Howard and Stanley Montgomery to assist appellant. While they were ostensibly appointed merely to assist in trial, it is clear that Mr. Howard, who seems to have been appellant's lawyer in a similar case, immediately assumed a fully active role as trial attorney, conducting the entire interrogation, cross-examination, making objections to evidence and exhibits, presenting a defense with numerous exhibits and four defense witnesses, including lengthy testimony from the defendant and making a forceful closing argument, all of which was done with evident familiarity.

Appellant's defense was that she was an employee of the City of Diaz paid with CETA funds; that at times her CETA checks would not arrive and with the approval of the city clerk, Mrs. Jean Sullins, appellant would sign Mrs. Sullins' name to checks from the city for the amount of her salary, refunding the amount to the city when her CETA checks arrived; that she was at times instructed to sign Jean Sullins' name to checks, cash them and give the money to Mrs. Sullins, which she did. This explanation was directly disputed by Mrs. Sullins and our concern here is not with credibility but with the adequacy of appellant's defense. The record satisfies us that she had sufficient opportunity to present her case, and we note an absence of any argument that she was deprived of an adequate defense. In sum, she argues that though she asked to be allowed to represent

herself, the court erred in permitting her to do so, as the record fails to reflect a voluntary and intelligent waiver. It is true there is nothing in the record showing the trial court made any inquiry into appellant's attempted waiver of counsel, and if she had been permitted to act as her own counsel we would be hard-pressed to deny the argument, as the State has the burden of showing a voluntary and intelligent waiver of counsel. *Jackson* v. *State,* 249 Ark. 653, 460 S.W.2d 319 (1970), and *United States* v. *Dujanovic,* 486 F.2d 182 (1973). But we are unwilling to sustain the argument where the appellant was not left to represent herself, but was capably represented throughout the trial. Nowhere in the record does it appear that she was called on to represent herself or left unrepresented at any stage of the proceedings, trial or pretrial. Thus, the only conceivable impediment to the appellant is the fact that trial counsel were appointed for her on the morning of trial. However, no argument is offered on that score and in view of the repeated opportunities given her to employ her own counsel, which she had the means and disposition to do, we find no prejudicial error mandating another trial. The circumstances of each case must be examined in their entirety in determining whether a defendant has been adequately represented and on that basis we can reject appellant's argument. *Barnes* v. *State,* 258 Ark. 565, 528 S.W.2d 370 (1975); *Jackson* v. *State, supra; Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

Appellant's second point is that she was unfairly prejudiced by the verdict forms used in her trial. We find no prejudice. Appellant was charged with 22 counts of theft of property, carrying a minimum sentence on each count of two years where the property exceeds $100.00 in value, and 22 counts of first degree forgery, which carries a minimum sentence of three years on each count. During trial, the State and the defense stipulated that instead of submitting the verdict forms to the jury on each of the 44 counts, only three verdict forms would be given the jury — one for felony theft of property, one for misdemeanor theft of property and one for first degree forgery, on the understanding that if the jury found appellant guilty of felony theft of property and first degree forgery she would enter a plea of guilty to one year on each remaining forgery charge, to be added to the sentence

recommended by the jury. Further, if the jury found her guilty on the misdemeanor charge only, then she would be sentenced to one year on each of four misdemeanor thefts.

The jury found appellant guilty on all three verdict forms submitted to it and fixed her punishment at two years on felony theft, three years on first degree forgery, and one year on misdemeanor theft, a total of six years. Thus, on the stipulation she was sentenced to one year on each of the remaining 21 forgery counts, for a total of 26 years, leaving one forgery charge unaccounted for.

We find no merit to appellant's argument that she was prejudiced by this stipulation, to which she and counsel agreed. The obvious fact is she benefited by it. By the stipulation the State agreed to a sentence of *only one year* on each remaining 21 forgery charges, which carried a minimum sentence of three years on each charge, thus benefiting appellant from that standpoint. Too, the stipulation must have included a dismissal of the 20 remaining charges of theft of property, giving her an additional advantage. Furthermore, if the jury convicted her only on misdemeanor theft it appears that under the stipulation she would have been sentenced only on the four misdemeanor charges, with all remaining forgery and felony theft charges dismissed. Clearly, the stipulation offered a more attractive option to appellant than that of submitting all 44 counts to the jury with instructions as to the minimum sentences of two and three years each and, hence, we find no prejudice in the stipulation.

Affirmed.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. On the first point argued I dissent because the record does not reflect that appellant knowingly waived her right to counsel as is required to be shown by the State. *See Carnley* v. *Cochran,* 369 U.S. 506 (1962); *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

On the second point argued I dissent because the record

does not reflect that appellant knowingly and intelligently entered a plea of guilty to 21 forgery counts for which she was sentenced to one year each to be served consecutively. *See Boykin* v. *Alabama,* 395 U.S. 238 (1966); *North Carolina* v. *Alford,* 400 U.S. 25 (1970); *Deason* v. *State,* 263 Ark. 56, 562 S.W.2d 79 (1978); *Byler* v. *State,* 257 Ark. 15, 513 S.W.2d 801 (1974); A.R.Cr.P., Article VII, Pleas of Guilty and Nolo Contendere (Repl. 1977). The arrangement made for a plea of guilty to certain offenses conditioned on being found guilty of other certain offenses amounts to no more than a wager on the outcome of the jury verdict.

I am hereby authorized to state that PURTLE, J., joins in this dissent.

In Re: Counsel's Failure to File
Timely Briefs in Criminal Appeals

635 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered June 28, 1982

Ron Heller, for appellant.

Steve Clark, Atty. Gen., for appellee.

PER CURIAM. In *Rector* v. *State,* No. CR 82-36, the appellant's brief was not filed when due. His attorney, Ron Heller, obtained two extensions of time and in each instance failed to file the brief. A third request for an extension was denied, for want of any showing of good cause.

Mr. Heller has now filed another motion, stating that he has not been properly diligent, admitting that the complete fault is his, and asking that the court allow the brief to be filed out of time. To deny this motion would as a practical matter establish ineffective assistance of counsel. In accordance with our practice in the corresponding situation when the record is not filed on time owing to the fault of counsel, see Per Curiam order of February 5, 1979, 265 Ark. 964, we shall in this case and similar later cases permit the brief to be filed, publish a per curiam order giving the name of the lawyer, and send a copy to the Committee on Professional Conduct, to be kept in its files for the Committee's information if a complaint of any kind should later be filed against that lawyer.

Tonnie BROWN *v.* STATE of Arkansas

635 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered June 28, 1982

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

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

PER CURIAM. Appellant, Tonnie Brown, by his attorney, has filed for a rule on the clerk.

His attorney, Deborah R. Sallings, admits that the record was tendered late due to a mistake on her 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.

Richard POWELL *v.* STATE of Arkansas

635 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered June 28, 1982

Paul D. McNeill, for appellant.

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

PER CURIAM. Appellant, Richard Powell, by his attorney, has filed for a rule on the clerk.

His attorney, Paul D. McNeil, 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.

Leardis SMITH *v.* William F. EVERETT, Director of Labor, and ODUS PACK CARPET SALES

82-69 637 S.W.2d 537

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Katherine D. Ehrenberg of *Central Arkansas Legal Services,* and *James R. Cromwell* of *UALR Law School Legal Clinic,* for petitioner.

Thelma Lorenzo and *Bruce H. Bokony,* for respondents.

RICHARD B. ADKISSON, Chief Justice. The Employment Security Division denied unemployment benefits to petitioner, Leardis Smith, after finding that he was discharged for dishonesty. After a hearing on the issue the Appeals Tribunal reversed, based on an affidavit of a customer submitted by the employer and the testimony of petitioner and two character witnesses. The Board of Review then reversed the Appeals Tribunal and denied unemployment benefits, basing its decision on a review of the record and an additional affidavit submitted by the employer. The Court of Appeals affirmed. *Smith* v. *Everett, Director of Labor, et al.,* 4 Ark. App. 197, 629 S.W.2d 309 (1982). We granted certiorari to review the legal basis of the Court of Appeals' decision in affirming the Board of Review.

Petitioner first argues that the Board of Review's denial of benefits was not supported by substantial evidence because the only direct evidence proving that petitioner was dishonest was by affidavit. Petitioner relies on *Woods* v. *Daniels,* 269 Ark. 613, 599 S.W.2d 435 (Ark. App. 1980) which held that hearsay alone was not substantial evidence. However, the *Woods* decision is contrary to the decision of this Court in *Bockman* v. *Arkansas State Medical Board,* 229 Ark. 143, 313 S.W.2d 826 (1958), where we held that although the evidence consists of affidavits and certified copies of other decisions it was nevertheless competent and constituted substantial evidence to support the Board's findings. To the same effect see *Richardson* v. *Perales,* 402 U.S. 389 (1971).

Petitioner next argues for reversal that he was denied due process of law because he did not have the opportunity to subpoena or to cross-examine adverse witnesses. Ark. Stat. Ann. § 81-1107 (d) (4) (Repl. 1976) sets out the manner in

which proceedings before the Appeals Tribunal and Board of Review shall be conducted:

> (4) Procedure. The Board of Review, appeal tribunals and special examiners shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before such tribunals shall be conducted in such manner as to ascertain the substantial rights of the parties. . . .

The United States Supreme Court, in interpreting the rights of an individual in adjudicatory administrative proceedings, has held that before state granted benefits (welfare) can be taken away the claimant must be given an opportunity to confront and cross-examine adverse witnesses at an evidentiary hearing. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). *See also Hannah* v. *Larche,* 363 U.S. 420 (1960) and *Richardson* v. *Perales, supra.*

Here, petitioner had no opportunity to subpoena and cross-examine adverse witnesses either at the hearing before the Appeals Tribunal or at the proceeding before the Board of Review. Although the notice informing him of the hearing date before the Appeals Tribunal stated that upon his request witnesses could be subpoenaed, at that time he did not know who the adverse witnesses would be. Petitioner did know who the adverse witnesses were by the time his case was reviewed by the Board of Review; however, he was informed by the Board that a second hearing would not be held and that only affidavits could be submitted.

It is clear that petitioner has not had an opportunity to subpoena and cross-examine witnesses as required by the above cited cases setting forth the minimum requirements for due process of law. Therefore, we reverse the Court of Appeals and remand to the Board of Review for a hearing consistent with this opinion pursuant to Ark. Stat. Ann. § 81-1107 (d) (7) (Repl. 1976).

Reversed and remanded.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree with the result reached in this case because of the peculiar facts involved. Leardis Smith was accused of dishonesty by his employer and the officer who actually heard the testimony found that the proof was insufficient to prove that dishonesty. Smith's employer only submitted an affidavit. He did not appear. The Board of Review asked for more evidence and at this hearing another affidavit was submitted by the man who allegedly made the dishonest transaction with Smith. So we have a situation where a man is accused of being dishonest and never has the opportunity of confronting his accuser. Certainly I believe that any administrative agency should be able to consider hearsay, but in this case that rule breaks down and denies Smith a meaningful hearing granted by the due process clause of the United States Constitution. I would point out that one of the problems in review of administrative cases such as this is that the Board of Review is a fact finding agency but they rarely hear witnesses. They simply review the record. In this case it was their role to decide the credibility of the witnesses and they never heard any witnesses. On the basis of affidavits alone they decided Smith lied and was dishonest.

James Dean WALKER *v.* STATE of Arkansas

CR 82-22 637 S.W.2d 528

Supreme Court of Arkansas
Opinion delivered July 6, 1982

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

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

RICHARD B. ADKISSON, Chief Justice. After a trial by jury appellant, James Dean Walker, was convicted of felony escape and sentenced to two years in the Arkansas Department of Correction, with the sentence to run consecutively to

any sentence then being served. On appeal from this conviction the only issue is whether the trial court erred in instructing the jury pursuant to AMCI 6004, the instruction for deadlocked juries. We affirm.

The jury was given the case on the afternoon of October 19, 1981, but had still not reached a verdict after approximately four hours of deliberation. At that time the court asked the foreman how the jury stood in its voting. The foreman responded that it was nine to three. The court then gave the jury an instruction commonly known as the "Allen charge" which is essentially set out in AMCI 6004. In giving the instruction the court added the sentence emphasized below to the AMCI version:

> It is to the interest of the State of Arkansas and of the defendant(s) for you to reach an agreement in this case, if at all possible. A hung jury means a continuation of the case and a delay in the administration of justice. *And it also means additional expense on the taxpayers.*
>
> You should consider that this case will have to be decided by some jury and, in all probability, upon the same testimony and evidence. It is unlikely that the case will ever be submitted to 12 people more intelligent, more impartial, or more competent to decide it. . . .

The instruction then goes on to tell the jury that they should weigh and discuss the evidence and make every reasonable effort to harmonize individual views on the merits of the case. It also states that no juror should surrender his sincere convictions to reach a verdict and that the verdict should be the result of each juror's free and voluntary opinion, but that every sincere effort should be made to reach a proper verdict. After hearing this instruction the jury continued their deliberation but were unable to reach a verdict until the next morning.

Appellant objects to the sentence added by the court for two reasons: (1) the sentence is extraneous to issues of guilt or innocence or punishment; and (2) modification of the

instruction should not have been made without the trial judge setting out in writing the reason for not giving the AMCI version.

In regard to instructing the jury on extraneous matter we held in *Evans* v. *State,* 252 Ark. 335, 478 S.W.2d 874 (1972) that:

> An admonition to the jury as to its duty to return a verdict, without any expression of the court's opinion as to the weight of the evidence, or any change in instructions previously given, or suggestion that any juror yield his individual convictions to reach a verdict is not improper.

In *Graham* v. *State,* 202 Ark. 981, 154 S.W.2d 584 (1941) this Court committed to the general rule that the trial court may detail to the jury the ills attendant upon a disagreement, including the expense. *See also McGaha* v. *State,* 216 Ark. 165, 224 S.W.2d 534 (1949).

In answering appellant's second objection, we quote the "Note on Use" which follows AMCI 6004:

> This instruction should not be given until the jury, after prolonged deliberation, has not reached a verdict. The trial judge may wish to give this type of instruction in his own words. The above is submitted as a guide to avoid errors sometimes made.

Because of the language in the note which invites the trial judge to use other language, it was not error to detail to the jury that necessary expense is involved in a subsequent trial, particularly where our cases have approved such language.

Appellant also argues that the portion of the instruction which informs the jury that the case will have to be decided by some jury should not have been given because such a statement is legally inaccurate. Appellant points out that a jury may never decide the case because if there is a mistrial, the State has the authority to request dismissal of the action.

Although technically appellant is correct, it was not error for this language to be included in the instruction. There is always a possibility that a particular case will never be decided by a jury for any number of reasons, i.e., death of the defendant. But, as a practical matter, in most instances some jury will have to decide the case. Also, the statement itself does not encourage the jury to find the accused guilty; therefore, appellant cannot show any resulting prejudice from the language in the instruction.

Affirmed.

Don PARKER *v.* Ronnie BRUSH and Eddie POLK

82-71 637 S.W.2d 539

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Cliff Jackson, P.A., for appellant.

Gary Eubanks & Associates, by: *Darrell E. Baker* and *Hugh F. Spinks,* for appellee Brush.

William H. Hodge, for appellee Polk.

GEORGE ROSE SMITH, Justice. Ronnie Brush, 21, brought this action for malicious prosecution against Don Parker, because Parker had wrongfully had Ronnie arrested for failing to surrender possession of rented land after having been served with a 10-day notice to vacate. Ark. Stat. Ann. § 50-523 (Repl. 1971). This appeal is from a verdict and judgment awarding Ronnie $5,000 as compensatory damages and $7,500 as punitive damages. For reversal Parker contends primarily that he had probable cause for the prosecution and that the damages are excessive. Our jurisdiction is under Rule 29 (1) (o).

In September, 1979, Parker bought a small trailer park from the other appellee, Eddie Polk, whom Parker brought into the case as a third party defendant. At the time of the sale Ronnie Brush was occupying a trailer on a trailer space in the park and had paid his rent on the space for about a month in advance. Polk, however, had forgotten to make a record of one of Ronnie's rental payments and erroneously informed Parker, the purchaser, that Ronnie was delinquent on his rent.

When Parker tried to collect past-due rent from Ronnie after Parker bought the trailer park, Ronnie insisted that his

rent was paid and offered to show Parker three canceled checks as proof. Parker refused to look at the checks and instead made telephone calls to Polk and had other conversations with Ronnie, trying to learn the facts. Finally Parker accepted Polk's statements that the rent was overdue and served Ronnie with a notice to quit. When Ronnie failed to remove his trailer by the tenth day Parker went to the prosecuting attorney's office and obtained a warrant for Ronnie's arrest. That warrant was never served.

After Ronnie had removed his trailer, Parker moved his own trailer onto the space and found that the sewer line serving the space was broken and clogged. Parker concluded that Ronnie had damaged the sewer, and for that reason he obtained a second warrant and had Ronnie arrested. The prosecution resulted in an acquittal, because Polk realized his mistake when he was shown the canceled checks.

Parker first contends that according to the undisputed evidence he had probable cause for prosecuting Ronnie and was therefore entitled to a directed verdict. The trouble is, probable cause must be based upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Malvern Brick & Tile Co.* v. *Hill,* 232 Ark. 1000, 342 S.W.2d 305 (1961). Ordinary caution is a standard of reasonableness, which presents an issue for the jury when the proof is in dispute or subject to different interpretations. Here it was for the jury to say whether Parker acted with reasonable caution in accepting Polk's disputed statements as to the truth, instead of taking further steps to get to the bottom of the dispute between Polk and Ronnie. The jury's verdict has settled that issue, against Parker.

It is also argued that the deputy prosecutor's decision to issue a warrant for Ronnie's arrest is a complete defense to this action. On the evidence, however, which we need not detail, the jury could have found either that Parker did not impartially state all the facts to the deputy or that he did not honestly and in good faith act upon the advice given, being motivated instead by his belief that Ronnie had damaged the

sewer line. On this point see *Oldham* v. *State,* 201 Ark. 903, 147 S.W.2d 361 (1941).

As to the damages, Ronnie was arrested and taken to jail, was booked, photographed, and fingerprinted, and had to remain at the jail for two hours while his wife raised money for his release on bond. He was subjected to a criminal trial, with legal expenses of $200. The awards, even if they cannot be described as modest after a long period of inflation, certainly do not shock the conscience of the court.

Lastly, Parker filed a third party complaint against Polk, seeking not contribution as between joint tortfeasors but complete indemnity for any judgment that Ronnie might obtain against Parker. It is now argued that the trial court should have submitted this indemnity theory to the jury. The only authority cited for this novel argument is *Larson Machine* v. *Wallace,* 268 Ark. 192, 212-215, 600 S.W.2d 1 (1980). There we held, among other things, that before a person can maintain an action for indemnity, there must be some special relationship between the parties, which did not exist when this claim arose, and that the claimant must have suffered an actual loss, which Parker had not suffered when this case went to the jury. We do not regard the present argument as warranting further discussion. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

Affirmed.

Robert Earl LARK *v.* STATE of Arkansas

CR 82-79 637 S.W.2d 529

Supreme Court of Arkansas
Opinion delivered July 6, 1982

John H. Bradley, for appellant.

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

FRANK HOLT, Justice. On February 27, 1981, appellant was arrested upon the filing of two petitions for the revocation of his suspended sentences. On March 11, 1981, while still incarcerated, the appellant filed a petition for a mental examination at the local mental health center. On March 31, 1981, the court determined and ordered that appellant be transferred from the county jail to this facility, which found him incapable to stand trial and recommended that he be committed to the state hospital in Little Rock at the earliest possible time. On April 14, 1981, the trial court ordered that the appellant be committed to the state hospital for treatment until he was fit to proceed with the revocation hearing. On June 2, 1981, a letter from the state hospital was filed with the court advising that the appellant was competent to stand trial. On June 11, 1981, he was returned to the jurisdiction of the trial court where he remained incarcerated until his revocation hearing on July 20, 1981. At the hearing the appellant filed a motion to dismiss the revocation petitions, because they were not heard within 60 days as required by Ark. Stat. Ann. § 41-1209 (2) (Repl. 1977). The court postponed the hearing until August 25, 1981, because the appellant had not been properly served with the petitions. However, upon the state refiling the petitions and complying with the requirements of personal service, a hearing was conducted on July 22, 1981. Thereupon, the court revoked appellant's suspended sentences. Hence this appeal.

The appellant asserts that the trial court erred in dismissing his motion to dismiss the revocation petitions because, excluding the period of delay caused by his mental examinations, they were not heard within 60 days. Section 41-1209 (2) provides in pertinent part:

> A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be conducted . . . within a reasonable period of time, not to exceed sixty days, after the defendant's arrest . . . .

In *Haskins* v. *State,* 264 Ark. 454, 572 S.W.2d 411 (1978), we said that the 60 day limitation, although not jurisdictional, "represents the period beyond which the hearing cannot be delayed if the defendant objects." Here, the defendant objected to the hearing. We have held that the 60 day limitation begins to run from the date of a defendant's arrest for the alleged violation of the terms of his suspended sentence. *Walker* v. *State,* 262 Ark. 215, 555 S.W.2d 228 (1977); *Blake* v. *State,* 262 Ark. 301, 556 S.W.2d 427 (1977); *Lincoln* v. *State,* 262 Ark. 511, 558 S.W.2d 146 (1977); and *Boone* v. *State,* 270 Ark. 83, 603 S.W.2d 410 (1980).

Neither party disputes that the period the appellant underwent mental examinations and evaluation is excluded. However, the question arises whether the 60 day period should be tolled when the defendant petitioned for a mental examination on March 11, 1981, or was not tolled until March 31, 1981, when a determination was made by the court on the petitions' merits and the examination was ordered. Also, the question is posed whether the excludable period should end when the appellant was pronounced fit to stand trial and the state was so notified on June 2, 1981, or when he was returned to the jurisdiction of the court on June 11, 1981.

We find no authority nor is any cited to us which is controlling when, as here, there is an excludable period of time to the 60 day limitation resulting from a mental examination. It appears that the underlying purposes of the 60 day limitation and the speedy trial rules, A. R. Cr. P. Rule 28, are somewhat similar. We have said that the underlying purpose of the 60 day limitation "is to assure the defendant is not detained in jail for an unreasonable time awaiting his revocation hearing . . . . " *Boone* v. *State, supra.* Here, the appellant was incarcerated from the time of arrest until his revocation hearing. We think it fair to look to the provisions contained in Rule 28 for guidance in computing excludable periods. Rule 28.3 (a) provides that the period of delay resulting from an examination and hearing on the competency of a defendant to stand trial, as well as the period of time he is incompetent to stand trial, is excluded. Here, as indicated, that period of time is unquestioned. Additionally,

Rule 28.3 (c) provides that a period of delay is excludable when a continuance is granted at a defendant's request and the period of delay shall be or run from the day the continuance is granted. It is unquestioned that the 60 day period began to run upon appellant's arrest February 27, 1981. Applying by analogy the recited speedy trial Rule 28 and the rationale in *Boone* v. *State, supra,* to the facts here, we hold that the excluded period began to run on March 31, 1981, when the court found that the appellant should undergo psychiatric evaluation and granted his petition. The period from February 27, the date of arrest, to March 31, is computed as being 32 days. See A. R. Cr. P. Rule 1.4. We need not determine if the excludable period ended June 2 or June 11 since by either computation there was ample time within the 60 days to conduct a revocation hearing. From June 2 to July 20 is 47 days or a total of 79 days (32 + 47) and from June 11 to July 20 is 38 days or a total of 70 days (32 + 38). Thus the appellant, who was incarcerated from the date of his arrest, did not receive a hearing within the required 60 days.

Since we find merit in this contention, we need not address appellant's other points relied upon for reversal.

Reversed and dismissed.

Norma Jean ROWELL et al *v.* Alvin AUSTIN et al

82-78 637 S.W.2d 531

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *Sam Hilburn* and *Joseph H. Purvis*, for appellants.

Givens & Buzbee, by: *Art Givens*, for appellees.

JOHN I. PURTLE, Justice. The Pulaski County Circuit Court reversed the Alcoholic Beverage Control Board's decision granting on-premise permits for the appellants. The trial court remanded the case to the ABC with directions to construe Ark. Stat. Ann. § 48-345 (Repl. 1977) in a manner to prevent the board from approving on-premise permits for the appellants. Appellants argue on appeal that the trial court erred in basing its decision on Ark. Stat. Ann. § 48-345 and ABC regulation 1.32 (6) (a) and further argue that the decision of the board was supported by substantial evidence. We agree with the appellants that the trial court erred in its order directing the board to reverse its prior decision.

On December 19, 1980, the appellants applied for permits to sell on premises alcoholic beverages at an establishment known as Shorty Small's Bar & Grill. Shorty Small's fronts onto Rodney Parham Road and on the property just to the east, across Shackleford Road, lies the Pleasant Valley Church of Christ, also abutting on Rodney Parham Road. Shackleford Road is 43 feet wide at this point.

On April 15, 1981, the on premises consumption permits were granted. On May 13, 1981, the appellees filed a petition in Pulaski Circuit Court seeking a review of the final order of the ABC Board. Judgment was rendered by the

circuit court on September 1, 1981, without considering anything except the record submitted before the ABC Board involving the hearing concerning these permits. A remand order was issued by the court stating in effect the matter was being returned to the board for a determination of Ark. Stat. Ann. § 48-345 and ABC regulation 1.32 in accordance with the construction given by the court. No specific instructions were included in the order. The appellants appeal from this order. On October 30, 1981, the appellants filed notice of appeal to the Arkansas Court of Appeals. The appellees filed a motion, January 8, 1982, to dismiss the appellants' appeal stating such appeal was untimely. After a response by the appellants the Arkansas Court of Appeals denied appellees' motion to dismiss. The Court of Appeals subsequently certified the case to us pursuant to Rule 29.

The facts in this case are not in issue. There is no dispute about the type of permits which appellants sought and were granted. During oral arguments both parties agreed that ABC regulation section 1.32 (6) is the regulation controlling the subject of this dispute. This regulation reads as follows:

> "*Permit not to be issued to premises which is less than 200 yards from church or schoolhouse.* No permit for the sale of alcoholic beverages shall be issued, nor shall any existing permit be transferred, to any location within two hundred (200) yards of any church or schoolhouse. However, since the intent of this regulation is to provide protection to churches and schools and to insulate them from alcoholic beverage outlets, the Alcoholic Beverage Control Department may issue permits, with the exception of retail liquor permits, within two hundred (200) yards of a church or schoolhouse upon receipt of a written waiver from managing officials of any church or school which is situated within the above area of prohibition. *In determining such distance, the measurement shall be made from the main entrance of the church or schoolhouse to the main entrance of the building of the premises sought to be permitted, measured by the shortest public thoroughfare.* (Emphasis supplied.)"

It was not argued in the circuit court nor before the board that this regulation was unconstitutional. Therefore, the question relating to this regulation is simply one of construction. The ABC Board has been granted regulatory power by the Arkansas General Assembly. The critical language in this regulation is the last sentence which provides that the distance shall be measured from the main entrance of the church or schoolhouse to the main entrance of the building which houses the premises under consideration for a permit. It further states that the distance shall be measured by the shortest public thoroughfare. In the present case the appellants have designated their south door, the one farthest from the church, as their main entrance, having closed an entrance on the east end of the building. The parties agreed that the distance from this southern entrance traversing the area of the nearest thoroughfare to the main entrance of the existing church building was 648 feet. Therefore, the distance is beyond that required by the regulation.

In the case of *Jones* v. *Reed,* 267 Ark. 237, 590 S.W.2d 6 (1979), we considered Ark. Stat. Ann. § 48-309 (Repl. 1977) and held that it defined the retail liquor business as used in relation to churches and schools. We quoted Ark. Stat. Ann. § 48-309 which is headed "Retailers permit," the concluding sentence of which states, "All such sales shall be in unbroken packages and the same shall not be opened or the contents or any part consumed on the premises where purchased." We now affirm the definition of the retail liquor permit as we determined it to be in *Jones* v. *Reed.*

The language of Ark. Stat. Ann. § 48-345 is obviously applicable to the retail liquor business and complements Ark. Stat. Ann. § 48-309. When the two statutes are read together it is obvious that the legislature intended to prevent retail "package" stores from operating within 200 yards of a school or church building.

The authority for all types of sales of alcoholic beverages is derived from "The Arkansas Alcoholic Control Act" (Act 108 of 1935, as amended, codified at Ark. Stat. Ann. § 48-101 et seq. [Repl. 1977]). This statute defines the terms

used in the rules and regulations concerning alcoholic beverages. The enforcement of the provisions of the act were left to the Department of Alcoholic Beverage control (then Commissioner of Revenues). Ark. Stat. Ann. § 48-203 (Repl. 1977) is the statute granting the powers, functions and duties of the department. The first grant is to allow them to grant and revoke for cause permits issued under the provision of the acts. The third grant gives the commission the power to adopt rules and regulations for the supervision and control of the manufacture and sale of alcoholic beverages (except wine) throughout the state so long as such rules and regulations are consistent with the law. Pursuant to this authority the board enacted section 1.32 (6) of their regulations. As previously stated, this provision simply provides that the measurements shall be made between the main entrance of the church and the main entrance of the bar by the shortest public thoroughfare. Under this definition the distance is 648 feet.

Review of decisions by the Alcoholic Beverage Control Board is governed by Ark. Stat. Ann. § 5-713 (Supp. 1981). The circuit court reviews the record established by the board in making its decision. The court is empowered to take testimony in the event of alleged irregularities and may hear oral arguments and receive written briefs. However, in the present case the matter was considered upon remand without additional evidence. The court must either affirm the decision of the agency or remand the case for further proceedings. The court is allowed to reverse or modify the decision if it is found that substantial rights of the petitioner have been prejudiced because of administrative actions. The grounds for such action by the trial court are if the board decision is: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedures; (4) affected by other error or law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. Apparently, the trial court thought the order of the board violated the first provision enumerated above. We do not agree. A proper administrative regulation has the same force and effect as a statute enacted by the legislature and is considered valid. The words in such regulations are

given their plain and ordinary meaning unless there is ambiguity. *Marion County Rural School District No. 1* v. *Polk,* 268 Ark. 354, 596 S.W.2d 700 (1980). The Administrative Procedures Act provides for judicial review of adjudications by boards and commissions. We have previously stated that in a review of the actions of administrative boards or agencies the circuit court is limited to whether there was substantial evidence to support the action taken and our review upon appeal is similarly limited. *Bank of Yellville* v. *First American S & L Ass'n.,* 276 Ark. 292, 634 S.W.2d 122 (1982). We think there is substantial evidence to support the decision of the board, and there is substantial evidence to support its decision on appeal. Therefore, the case is remanded with instructions for the trial court to withdraw its order directing the board to reconsider this matter and to enter an order affirming the action taken by the board.

Reversed and remanded.

Patricia Ann TILLOTSON *v.* FARMERS INSURANCE COMPANY et al

82-126 637 S.W.2d 541

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Cliff Jackson, P.A., for appellant.

Bailey, Trimble, Pence & Sellars, by: *R. Eugene Bailey* and *Rick Sellars,* for appellee.

JOHN I. PURTLE, Justice. An automobile driven by appellant Tillotson was involved in an accident with a vehicle driven by Mayhew, one of the appellees. The occurrence was on July 9, 1978, and appellant subsequently filed a suit for damages which is not involved in this appeal. On February 13, 1981, the insurance carrier for appellee Mayhew, Farmers Insurance Company, filed a complaint for declaratory judgment in the Second Division of the Pulaski County Circuit Court. The complaint for declaratory judgment named Donnie Edmond Mayhew, Patricia Ann Tillotson, Robert N. Cox and Janeil Cox, his wife, d/b/a Cox Fixture & Supply Company, and Maryland Casualty Company as defendants. On August 31, 1981, Tillotson filed a motion for summary judgment in which she sought a declaration that Farmers Insurance Group and Maryland Casualty Company be jointly declared to afford automobile liability coverage on the vehicle which Mayhew was driving on the date of the accident. On September 15, 1981, defendant Mayhew filed a motion for summary judgment. On September 15, 1981, a hearing was held on the various motions for summary judgments. The trial judge issued an order which was filed on September 16, 1981. The

court found that the vehicle driven by Mayhew was furnished for his business use all the time and that on some occasions he used it for personal use. The court held that Mayhew fell under the omnibus clause of the policy provided by his employer and was therefore covered under the liability policy issued by Maryland Casualty Company. The court reaffirmed its ruling that the coverage of Mayhew's private vehicle carrier, Farmers Insurance Company, did not extend to the vehicle he was driving at the time of the accident. The result of the judgment was that Maryland Casualty, Cox's liability carrier, had coverage for liability on the vehicle Mayhew was driving and Farmers Insurance, Mayhew's personal insurance carrier, was not responsible for coverage for this occurrence. Appellant appeals from the foregoing decision. She argues three grounds for reversal in her appeal: (1) the trial court erred in not dismissing the motions for summary judgment filed within ten days of the hearing on the motions; (2) the trial court erred in refusing to grant appellant's motion for summary judgment; and (3) the trial court erred in granting the motion for summary judgment on behalf of Farmers Insurance. We agree with appellant that Farmers Insurance should not have been granted a summary judgment.

The facts in this case reveal that Tillotson was driving her vehicle in Faulkner County, Arkansas, when a van driven by Mayhew allegedly crossed the center line causing an accident resulting in severe injuries and damages to appellant. It was undisputed that Mayhew had possession of the vehicle he was driving at all times. It was owned by Cox and furnished to him for his regular use in Cox's business. He was allowed to take the vehicle home at nights and on weekends. At the time of the occurrence in question he was driving the vehicle on a personal errand. The evidence before the court revealed that Mayhew used the Cox vehicle for personal business no more than once a week and possibly as infrequently as once a month. Tillotson filed suit against Mayhew for her damages on October 31, 1979. Robert N. Cox and Janeil Cox, his wife, d/b/a Cox Fixture & Supply Company, were named as additional defendants. We shall refer to them as Cox throughout this opinion. That suit is not involved in the present appeal. It has been put on the

back burner, pending resolution of the complaint for declaratory judgment and motions for summary judgments. Farmers Insurance Company filed a complaint for declaratory judgment on February 13, 1981. In the complaint for declaratory judgment Farmers admitted they insured Mayhew's personal vehicle, which was not involved in the accident. They further alleged that Maryland Casualty Insurance Company afforded liability coverage to Cox and that because Mayhew drove the vehicle frequently and regularly the Farmers' policy did not apply and Maryland Casualty was the only insurance carrier for Mayhew at the time of the accident. On August 31, 1981, appellant filed a motion for summary judgment. Various other motions for summary judgment were filed shortly before the hearing on appellant's motion on September 15, 1981. All of the motions for summary judgment were denied except that of Farmers which was granted. Some of the motions were not filed until less than ten days before the hearing was set on appellant's motion.

In view of the decision reached in this case we do not find it necessary to discuss the timeliness of the filing of the motions for summary judgment on behalf of the various parties. This appeal involves only the granting of the summary judgment to Farmers. An order granting a motion for summary judgment is an appealable order. *Widmer* v. *Fort Smith Vehicle & Machinery Corp.*, 244 Ark. 971, 429 S.W.2d 63 (1968). It is true that appellant's motion for summary judgment was denied and that the denial of the motion for summary judgment is not an appealable order. *Henslee* v. *Kennedy,* 262 Ark. 198, 555 S.W.2d 937 (1977). In view of the fact that appellant was named as a defendant in the suit for declaratory judgment filed by Farmers Insurance she is entitled to appeal the order granting the summary judgment. At the same hearing on September 15, 1981, the court granted appellant's motion for summary judgment against Maryland Casualty. The appellant is satisfied with that result and does not appeal from it.

This dispute involves the policy of insurance issued to Mayhew. It appears to be a standard automobile liability insurance policy with stated limits for each coverage includ-

ing bodily injury and property damage. It is admitted that the policy was in effect at the time of the occurrence here in question. The insuring clause states that the carrier will

> . . . pay all damages the insured becomes legally obligated to pay because of: (A) bodily injury to any person, and/or (B) damage to property arising out of the ownership, maintenance or use, including loading or unloading, of the described automobile or a *non-owned automobile.* (Emphasis supplied.)

Under the definition portion of the policy a non-owned automobile is described as follows:

> Non-Owned Automobile means an automobile not owned by or regularly or frequently used by the named insured or any resident of the same household, other than a substitute automobile.

It is clear that the insuring provision of the policy included a non-owned automobile. The vehicle Mayhew was driving was a non-owned automobile. We must now determine whether the non-owned automobile is excluded under the definition portion of the policy. A non-owned automobile is not excluded from the policy except if it is used regularly and frequently by the insured. Therefore, the definition clause requires a detrmination of whether this particular non-owned automobile was regularly or frequently used by the named insured. It is obvious that he regularly and frequently used the automobile in going to and coming from work and while on the job. However, such use is not involved in this particular occurrence. Mayhew was using the van for his own personal use, and the record reveals he made such use of the automobile from one to four times per month. We think the personal usage of the automobile is separate and distinct from the job-related use of the vehicle.

In the case of *The Travelers Indemnity Co.* v. *Hyde,* 232 Ark. 1020, 342 S.W.2d 295 (1961), we held that an exclusion for medical coverage while occupying a non-owned automobile, furnished for the regular use of the policyholder, rendered the policy ambiguous and its meaning a question

of fact. In *Hyde* the exclusion was under the exception section of the policy. If it were ambiguous, certainly the present one is at least as ambiguous. In discussing the exclusion of a vehicle furnished for the insured's regular use, we stated in the *Hyde* case:

> ... These provisions of the policy render it ambiguous. Just what is meant by "for the regular use of either the named insured or any relative?" If "for his regular use" means personal use, it is one thing; if partly for his personal use and partly for the use of the employer, it could mean something else. If the insured was to use it in a certain area for one purpose, and he was injured while on a trip outside that area, for another purpose, then there could be a different meaning. Standing alone the terms of the policy are not sufficient to clear up the ambiguity, and the stipulation is not sufficient to enable the court to say as a matter of law what the ambiguous provisions really mean. . . . Perhaps it can be inferred that exclusive use means regular use. On the other hand, it could be exclusive without being regular. A jury could find that the wording in the policy "for the regular use of the insured" means personal use. This language certainly has that connotation. And the jury could reach the conclusion that the term means "for the benefit of the insured." If this construction were put on the language by a jury, then under the facts as set out in the stipulation the insured would be entitled to recover.

We can see from the language quoted from *Hyde* that this court has held that this same language is so ambiguous as to become a jury question. Many times we have held that if there is any substantial evidence to establish an issue in favor of the claiming party the motion for summary judgment must be denied. *Cockman* v. *Welder's Supply co.,* 265 Ark. 612, 580 S.W.2d 455 (1979).

One of the very few cases attempting to define regular and frequent use is that of *Alabama Farm Bureau Mutual Casualty Ins. Co.* v. *Carswell,* 374 So.2d 250 (Ala. 1979), wherein "regular use" was defined as "principal use as distinguished from casual or incidental use." Frequent use

was defined as "an *often repeated* but irregular, casual or incidental use . . . (Emphasis supplied)." Under the terms of the policy and in accordance with *The Travelers Indemnity Co.* v. *Hyde,* supra, and the principle set forth in *Carswell* we think that Mayhew's use of the vehicle on personal errands is a proper matter for consideration in this case. The policy obviously excluded coverage while he had regular or frequent use of the vehicle. We hold that this means he was regularly and frequently using the vehicle from the time he left home to go to work until he returned to his home at the end of his work period. The use made thereafter for his personal convenience is the use we are considering at this time. Therefore, applying the definitions set forth in the *Carswell* case, we can see that the particular use of the vehicle at the time of the occurrence was outside the period when the vehicle was furnished for his regular and frequent use. To say the least, it is as ambiguous as the policy in the *Hyde* case. We hold that there was and is a genuine issue of fact to be determined with reference to the policy in question.

Under "conditions" set out in the policy, number 13 relates to other insurance. The other insurance provision reads as follows:

> With respect to a substitute or non-owned automobile, coverage A, B, F and G shall be excess insurance over any other collectible insurance of any kind available to the insured irrespective of whether such other insurance was obtained by a person other than the named insured.

Therefore, it appears that the Farmers policy coverage is excess to Maryland's policy in regard to claims arising out of the occurrence here in question. From the language contained in the policy, the provisions for non-owned automobiles would have given Mayhew coverage had he borrowed any other vehicle and become involved in a similar accident.

The case will be reversed and remanded with directions to proceed in a manner not inconsistent with this opinion.

HOLT, J., not participating.

Troy Anthony VEASEY *v.* STATE of Arkansas

CR 82-8 637 S.W.2d 545

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Richard E. Holiman, for appellant.

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

ROBERT H. DUDLEY, Justice. The appellant was tried and convicted of rape in violation of Ark. Stat. Ann. § 41-1803 (Repl. 1977) and received a thirty-five year sentence. Jurisdiction is in the Supreme Court pursuant to Rule 29 (1) (b). This appeal follows the denial of a motion for a new trial. We affirm the trial court.

The facts relating to the motion for a new trial establish that appellant's attorney stated by affidavit that two days after the trial he was in the corridor of the courthouse when Virgil Elmore, one of the jurors, approached him and said that the jury had assumed the appellant would serve considerably less than thirty-five years in prison because of the parole system. Appellant's attorney then filed a motion for a new trial, acknowledging our caveat[1] in *Sanson* v. *Pullum,* 273 Ark. 325, 619 S.W.2d 641 (1981), but alleging "the jury was given extraneous information that was improper concerning the parole system that greatly influenced the sentence to the prejudice of the defendant." A hearing was held on the motion and the trial court limited questioning to whether any extraneous prejudicial information was improperly brought to the jury's attention and whether any outside influence was brought to bear on any juror. Appellant objected to this restricted questioning and maintains that he should have been allowed to ask questions which address "the impropriety of a jury computing the sentence to be imposed on the basis of them applying one or more of their member's uninformed ideas of the workings of the parole system to compute a sentence to insure a certain actual incarceration time."

The questions and answers of Juror Elmore at the hearing on the motion for a new trial are representative of the testimony of the other jurors. They have been abstracted by appellant as follows:

> My name is Virgil Elmore. I do recall sitting on the jury trial of Troy Veasey.
>
> MR. HOLIMAN: [appellant's attorney] After you [were] seated in the box and sworn in as a jury panel, was there any extraneous or prejudicial information that was brought to bear upon your decision in that particular case?

---

[1]"We take this opportunity to state unequivocally, for the guidance of the bar, that in our opinion it is improper for a lawyer to interview jurors after a trial in an effort to obtain such inadmissible affidavits to impeach their own verdict."

MR. ELMORE: No. I simply observed and listened to the testimony and made my decision according to that testimony.

MR. HOLIMAN: Was there any outside influence brought to bear upon your decision in this particular case?

MR. ELMORE: No.

In *Andrews* v. *State,* 251 Ark. 279, 472 S.W.2d 86 (1971), we held that a trial court should not instruct a jury on the law of parole. In that opinion we stated:

> Their [the jury's] duty is to determine, within the limits of the statute, the punishment that should be meted out for the crime that has been committed, and such judgment should not be influenced by any event that might occur at some time in the future. The subject matter is entirely alien to a judicial proceeding since it is handled entirely by another department of government, the executive.

The appellant contends that *Andrews* governs the issue of discussion of parole and the subject may have been impermissibly allowed into the deliberations here. However, after *Andrews* we clarified our holding by explaining in *Woods* v. *State,* 260 Ark. 882, 545 S.W.2d 912 (1977) that a reference to the possibility of parole by a juror would not constitute reversible error:

> In *Andrews* we did not even intimate that the barest reference to the possibility of parole would be reversible error. Our holding was that the court should not attempt to explain to the jury the law governing the parole system. We adhere to that view, but no such explanation was attempted here. The challenged clause in the judgment certainly did not tell the jurors anything unknown to them, since it is hardly possible that even one person, much less twelve, old enough to serve on a jury would not know that Arkansas has a parole system.

We affirmed the *Woods* clarification in the recent case of *Ashby* v. *State,* 271 Ark. 239, 607 S.W.2d 675 (1980) and stated:

> . . . If the jury or any of them, did take the possibility of parole into consideration in their determination of appellant's sentence, any information they had concerning parole was independent knowledge which they had prior to trial.
>
> * * *
>
> . . . It would be highly unrealistic for this court to think that jurors do not consider the possibility of parole in arriving at a sentence in a criminal case. The outward expression of that by a juror is not grounds for a new trial.

The trial court was correct in refusing to set aside the verdict of the jury even if some jurors considered the possibility of parole. Thus, appellant's argument that the trial court erred by restricting his questioning of the jurors in order to establish the jury's consideration of parole is without merit. It is also without merit for a second reason.

The type of limited questioning appealed from is authorized and controlled by Rule 606 (b) of the Unif. Rules of Evid., Ark. Stat. Ann. § 28-1001 (Repl. 1977), which provides:

> (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset [assent] to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions

> whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

This rule states plainly that a juror may not testify as to the effect of anything upon his mind as influencing him to assent to the verdict. *Sanson* v. *Pullum,* supra. See also, *Ashby* v. *State,* supra.

Affirmed.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the results reached by the majority only because we have previously held the same conduct to be nonprejudicial. *Ashby* v. *State,* 271 Ark. 239, 607 S.W.2d 675 (1980). However, I cannot agree with the majority if they are holding that the only two questions which may be asked of a juror are: (1) was there any extraneous or prejudicial information brought to bear upon your decision in this particular case; and, (2) was there any outside influence brought to bear upon your decision in this particular case?

I do not believe the rule was intended to be restricted to these two specific questions. In the first place, I think the average juror would not have a complete understanding of what these general questions mean. More appropriate questions might be: "did the jury consider how long the defendant would serve under the present parole system;" "did the jury cast lots to determine the number of years they would impose in this case;" or, "did the jury look at a file which was left in the jury room." If one juror influenced the other jurors because of his erroneous belief about the possibility of parole, the whole verdict could be contaminated. If we refuse to allow the court to comment on the parole system, as we did in *Andrews* v. *State,* 251 Ark. 279, 472 S.W.2d 86 (1971), then certainly a juror should not be allowed to instruct the other members of the jury on the parole system. Rule 606 (b) of the Uniform Rules of

Evidence is set out in the majority opinion; however, I would like to repeat the last part of that rule:

> . . . but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

This rule is obviously intended to be a vehicle for use when there is evidence of prejudicial or improper conduct on the part of a juror.

In the case of *Lewis* v. *Pearson,* 262 Ark. 350, 556 S.W.2d 661 (1977), we reversed the trial court because of a racist remark made by a bailiff. When an investigator's file was left in the jury room with the defendant's name on the tab, we returned the case to the trial court for a determination of whether the jurors had made use of the file. *Hutcherson* v. *State,* 262 Ark. 535, 558 S.W.2d 156 (1977). In *Lewis* we reversed and remanded even though the juror admitted hearing the slur but maintained it did not sway her opinion. In *Hutcherson* we remanded the case to the trial court for the purpose of examining the jurors about the possibility of their having examined the investigator's file. In neither of these cases would the two fixed questions allowed by the majority opinion be appropriate or sufficient to learn whether the jurors had considered matters outside the evidence presented.

I believe the purpose of Rule 606 (b) is to insure that jurors are not questioned about matters which are properly before them or about their deliberations on matters properly before them. However, the rule obviously has some further purpose, else the language used would have been omitted. The other language in the rule indicates it is proper to question jurors about matters being considered in deliberations which were improper. Of course, a juror could not be questioned until there had first been presented to the court evidence that extraneous, prejudicial or outside influence had probably been used and considered by the jury in arriving at a verdict. A wooden application of the rule which

would restrict questions to the language in the rule is not, in my opinion, required. Such a strict application would not allow a juror to be asked whether he had accepted a bribe in the case. The questions should be limited to the purpose of the rule but questions should be presented in a manner which would apprise a juror of exactly what was being inquired into.

I agree with the results reached by the majority in this case.

Alvin LOVELACE *v.* STATE of Arkansas

CR 82-30 637 S.W.2d 548

Supreme Court of Arkansas
Opinion delivered July 6, 1982

William R. Simpson, Jr., Public Defender, and *Jeff Rosenzweig,* Deputy Public Defender, by: *Richard E. Holiman,* Deputy Public Defender, for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant Alvin Lovelace was charged with the June 25, 1981 aggravated robbery of the 7-11 convenience store at 1803 Broadway in Little Rock. A jury convicted appellant of aggravated robbery in violation of Ark. Stat. Ann. § 41-2102 (Supp. 1981) and he was sentenced to life imprisonment under the habitual criminal statute, Ark. Stat. Ann. § 41-1001 (Supp. 1981). Jurisdiction is in this Court pursuant to Rule 29 (1) (b). Appellant contends that the trial court erred in refusing to instruct the jury as to the lesser included offense of robbery. We affirm the trial court.

The evidence establishes that Lewis Parker was working the night shift at the 7-11 store when the robbery occurred. A man, later identified as appellant, came into the store shortly after 2:00 a.m. and asked to buy a pack of cigarettes. Parker bent down and reached under the counter to get the cigarettes. When he straightened up the man pulled a gun and said he wanted the money. Parker opened the cash register and then gave appellant the drawer containing the money. In the drawer there was a cluster of bills attached to a transmitting device. When the cluster of bills was removed the transmitting device activated a hidden camera. After appellant collected the money he told Parker not to make a move or he would kill him. Appellant repeated the threat as he left. Photographs taken by the hidden

camera reproduce part of the scene during the aggravated robbery. One of the photographs is of the robber holding a small revolver. The trial court gave an instruction on aggravated robbery but refused to instruct on the lesser included offense of robbery. Appellant appeals from that ruling.

Aggravated robbery is set out in § 41-2102 as follows:

> Aggravated robbery. — (1) A person commits aggravated robbery if he commits robbery as defined in Section 2103 of Act 280 of 1975 (Ark. Stat. Ann. § 41-2103) and he: (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or
>
> * * *

And robbery is set out in § 41-2103 (Repl. 1977) as follows:

> 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.
>
> * * *

Robbery is a lesser included offense of aggravated robbery. *Hill, et al* v. *State,* 276 Ark. 300, 634 S.W.2d 120 (1982); *Hamilton* v. *State,* 262 Ark. 366, 556 S.W.2d 884 (1977). In *Hill,* we noted:

> If there is any evidence to support the giving of the instruction on the lesser included offense, it must be given. *Sargent* v. *State,* 272 Ark. 336, 614 S.W.2d 503 (1981). But, if there is no rational basis for acquitting appellants of aggravated robbery and convicting them of the lesser offense of robbery, the lesser instruction need not be given. Ark. Stat. Ann. § 41-105 (3) (Repl. 1977); *Hamilton* v. *State,* supra.

The trial judge stated in *Hill* that he gave only the aggravated robbery instruction because there was no question that a deadly weapon was used. A similar situation exists here because all the testimony was that a gun was used and, uncontrovertibly there was no testimony indicating that a gun was not used. A photograph clearly reflects the use of a small pistol by the robber. Thus, there was no rational basis for acquitting appellant of aggravated robbery and convicting him of robbery. The appellant was guilty of aggravated robbery or nothing at all. Therefore, it was not error to refuse to instruct on the lesser included offense.

Affirmed.

Manuel STAFFORD *v.* CITY OF HOT SPRINGS, ACCIDENT REVIEW COMMITTEE and CIVIL SERVICE COMMISSION

82-127 637 S.W.2d 553

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Dan McGraw, for appellant.

Curtis L. Ridgeway, for appellees.

STEELE HAYS, Justice. Appellant, a Hot Springs fireman, was involved in an accident with another vehicle during an emergency run of the city fire truck. Over appellant's insistence that he was driving with due care, an Accident Review Committee found the collision was preventable, his speed being excessive for prevailing conditions. The committee assessed three penalty points against appellant under an Accident Review Point System and when he appealed the committee declined to reconsider its ruling.

Told that no further appeal rights were available, appellant filed suit in the Garland Circuit Court against the Accident Review Committee and the Civil Service Commission of Hot Springs, asking the court to order the commission to hear the appeal or, alternatively, to review and reverse the decision of the committee pursuant to the Arkansas Administrative Procedure Act, Ark. Stat. Ann. § 5-701 through 714.

The Circuit Court found it had no jurisdiction and granted defendants' motion to dismiss pursuant to ARCP Rule 12 (b) (6), a failure to state facts upon which relief could be granted, and appellant has appealed. Our jurisdiction is

invoked under Rule 29 (1) (f). We believe the trial court was correct and we affirm.

For reversal, appellant relies on Title 19, Chapter 16, Arkansas Statutes Annotated (Repl. 1980), entitled "Civil Service for Police and Fire Departments," which covers appellant. Section 19-1605.1 provides that no civil service employee shall be discharged or reduced in rank or compensation without his being notified in writing and given the opportunity to request a trial before the Civil Service Commission on the alleged grounds for discharge.

Appellant concedes he was neither discharged, suspended or reduced in rank or compensation, but, he argues, the three penalty points wrongly assessed against him have increased his susceptibility to those sanctions. He points out that the Accident Review Point System provides that his privilege to drive a fire truck is subject to three months' suspension upon an accumulation of 12 points, 6 months' suspension upon an accumulation of 18 points, and a one year suspension for 24 points and that termination, transfer or demotion may result if suspension under the point system prevents him from performing the primary job he was employed to do, i.e. drive a fire truck.

We agree with appellant that it is possible for an accumulation of points to result in the equivalent of a discharge or reduction in rank or compensation, but we do not agree that simply because three penalty points have been assessed he can demand a trial before the commission. Section 19-1605.1 limits the right to a trial to threatened discharge or reduction in rank or compensation and nothing in Title 19 suggests the Legislature intended the Civil Service Commission, in addition to the other duties imposed, must also hear minor employee grievances. The argument that an accumulation of additional points could subject him to a reduction in rank or compensation is theoretical, and we do not render advisory opinions. See *McCuen* v. *Harris,* 271 Ark. 863, 611 S.W.2d 503 (1981). If additional points, sufficient to impose discharge or reduction, are assessed in the future (and are not abated upon six months driving free of accidents or violations, as provided in

Section IV (A) of the Accident Review Point System) then appellant will be eligible for a trial under § 19-1605.1, in effect an appeal, and free to challenge any accumulated penalty points which he believes were wrongly imposed.

Appellant does not specifically rely on the Administrative Procedure Act on appeal, as he did before the trial court, but he does draw on language from the act, alleging that an inability to appeal the points imposed injures him in his business or property. But we have recently held the Administrative Procedure Act does not afford judicial review of the discharge of employees, as those determinations are administrative rather than adjudicatory. *Arkansas Livestock and Poultry Commission* v. *House,* 276 Ark. 326, 634 S.W.2d 388 (1982).

The order of dismissal is affirmed.

Ronnie Lee HARRISON *v.* STATE of Arkansas

CR 82-26 637 S.W.2d 549

Supreme Court of Arkansas
Opinion delivered July 6, 1982

John W. Settle, for appellant.

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

STEELE HAYS, Justice. Ronnie Lee Harrison was found guilty of the rape of a 19 year old woman in a Fort Smith laundromat. The jury recommended a life sentence and a $5,000.00 fine which the court imposed. Appellant alleges five points for reversal. We find no error and affirm the judgment.

When viewed in the light most favorable to the appellee, the proof was that about 11:00 p.m. on April 9, 1981, the victim observed a man she later identified as the appellant park his car and enter the lighted laundromat where she was folding her laundry. As no one else was present, she watched the appellant go to the coke machine and to the restroom where he stayed a few minutes. He came up behind her, put his hand over her mouth and pulled her into the restroom. He forced her to undress and lie on the floor, where the assault occurred. He left immediately and she called the police and had them come to her apartment. She was badly frightened and upset when the police interviewed her. Although there was no light in the restroom, the victim said she could see her assailant's face from the reflection from the moon. She described him as being approximately 25 years of age, 5 feet 11 inches tall, weighing around 160 pounds with medium length blondish-brown hair and small brown eyes, wearing a cowboy hat. The appellant was 21 years old, 5 feet 11½ inches tall, weighed 195 pounds and had medium length blondish-brown hair.

After describing the attack and her assailant, the victim went with the police to the hospital for a medical examination. Along the way they detoured to a shopping center parking lot where the appellant was being detained as a suspect. Both the appellant and his car generally matched the description given by the victim. While on the parking lot the victim remained in the police car about 20 feet away from the appellant. He had on a green cap instead of the cowboy hat worn at the laundromat. The victim was unable to identify the appellant as her assailant at this confrontation, which occurred approximately two hours after the attack and while she was described as still visibly shaken and upset.

Four days later, the victim was shown photographs of

five individuals, including the appellant, whom she readily identified as her assailant. She also identified a shirt recovered from appellant which she recognized as the one worn by the man who raped her. Ms. Carolyn Thomas, with whom appellant was living at the time, testified that on April 9 the appellant left the apartment about 10:00 p.m. dressed in a western shirt, cowboy hat, boots and jeans, which attire matched the description by the victim. Ms. Thomas said the shirt was the same one the appellant had worn when he left the apartment that night. She testified the appellant admitted to her he had raped a woman in the laundromat.

On April 14 appellant was arrested in Mena, Arkansas, and returned to Fort Smith by Detective Mike Brooks of the Fort Smith Police. After being given his Miranda rights and signing a waiver form, appellant made a full confession corroborating many of the details given by Ms. Thomas and by the victim. At trial the victim's identification of the appellant as the attacker was unequivocal.

First appellant contends the trial court erred in not suppressing the victim's in-court identification of the appellant, as being tainted by the confrontation on the parking lot shortly after the attack. He also contends the identification procedure was unconstiutionally unreliable and suggestive. Following a hearing, the trial court denied appellant's motion to suppress identification testimony. On appellate review, a trial court's decision on the admissibility of an identification should not be reversed unless, viewing the totality of the circumstances, it is clearly erroneous. *Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980); *Hinton* v. *State,* 260 Ark. 42, 537 S.W.2d 800 (1976). In *James & Elliot* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1980), we stated at 600:

> It is the likelihood of misidentification that taints the out of court identification process. In determining whether an in-court identification is tainted by pretrial occurrences, we consider the totality of the circumstances. In doing so, we consider the opportunity of the identifying witness to observe the accused at the time of the criminal act; the lapse of time between the occurrences and the identification; any inconsistencies of the

> description given by the witness; whether there was prior misidentification; the facts surrounding the identification; and all matters relating to the identification process. *Mayes* v. *State,* 264 Ark. 283, 571 S.W.2d 420 (1978). We have stated reliability is the linchpin in determining the admissibility of identification testimony. In the determination of the admissibility we consider the totality of the circumstances. *Lindsey & Jackson* v. *State,* 264 Ark. 430, 572 S.W.2d 145 (1978). In *Neil* v. *Biggers,* 409 U.S. 188 (1973), it was held that a "show up" rather than a line-up does not violate a defendant's constitutional right unless there are other circumstances rendering the identification unreliable.

The victim testified that her in-court identification of the appellant was based upon her recollection of the crime and independent of the parking lot confrontation. Furthermore, there was no substantial likelihood of misidentification, as there was independent evidence of his identity. *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982). The appellant's confession to Detective Brooks and his admission to Carolyn Thomas constitute strong and convincing evidence of his identity independent of the victim's testimony.

Any question that might have arisen from the victim's failure to identify the appellant in the parking lot confrontation was one of reliability and is normally for the jury to decide. In *Watkins* v. *Sowders,* 449 U.S. 341 (1981), the United States Supreme Court stated at 347, 348:

> It is the reliability of identification evidence that primarily determines its admissibility, *Manson* v. *Brathwaite,* 432 U.S. 98, 113-114; *United States ex rel Kirby* v. *Sturges,* 510 F.2d 397, 402-404 (CA7 1975) (Stevens, J.). And the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, as the cases before us demonstrate, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence. Thus the Court's opinion in *Manson* v. *Brath-*

waite approvingly quoted Judge Leventhal's statement that,

> "[w]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart — the 'integrity' — of the adversary process.
>
> "Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification — including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi." 432 U.S. 98, 114, n. 4 quoting *Clemons* v. *United States,* 133 U.S. App. D.C. 27, 48, 408 F.2d 1230, 1251 (1968).

Looking at the totality of the circumstances, we cannot say the trial court's ruling to admit the victim's identification testimony was clearly erroneous.

Next, appellant argues two points together: The trial court erred in not suppressing appellant's confession as a violation of the Fourteenth Amendment of the United States Constitution and Article 2, § 8 of the Arkansas Constitution; and second, in not clearly ruling the confession was involuntary. Taking the second point first, the record unmistakably shows the trial court ruled the statement was voluntary. In denying appellant's motion to suppress, the court said, "Motion to Suppress Statements will be overruled." (T. 85).

A review of the trial court's determination that a confession is voluntary is based on the totality of the circumstances and will not be reversed unless clearly against the preponderance of the evidence. *Freeman* v. *State,* 258 Ark. 617, 527 S.W.2d 909 (1975). The appellant contends Detective Brooks fabricated the confession and psychologically coerced him into signing it by telling him that mental health services would be forthcoming "when we are

able to acquire the services of an attorney." (T. 81). Detective Brooks' testimony refuted appellant's allegations of coercion and of any fabrication. Detective Brooks' testimony is bolstered by Ms. Thomas' testimony as to a confession prior to his arrest. Where the voluntariness of a confession is in issue, any conflict in the testimony of different witnesses is for the trial court to resolve based on the credibility of witnesses. *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). Apparently this conflict was resolved in the State's favor and we see no reason for the court's determination to be disturbed.

Another contention is his motion for a mistrial should have been granted because the prosecuting attorney's closing argument contained a comment vouching for the veracity of a witness. The comment was:

> Now, if you believe the defendant's version, that Mike Brooks promised him that he would never get the penitentiary on a rape case, which I'm certain Mike Brooks denied giving and I know he knows better than that, but he has denied that. . . . (T. 296).

After denying the motion for a mistrial, the trial court admonished the jury as follows:

> I will remind the jury that any statements or remarks of attorneys having no basis in the evidence should be disregarded by you. (T. 297).

The test is whether there was a manifest abuse of discretion by the judge in failing to act properly to an objection to improper remarks by the prosecutor. *Shaw* v. *State,* 271 Ark. 926, 611 S.W.2d 522 (1981). We cannot say the trial judge abused his discretion in denying a motion for a mistrial. The prosecutor's remark does not seem calculated and the judge promptly admonished the jury to disregard the remark. In *Parker* v. *State,* 265 Ark. 315, 578 S.W.2d 206 (1979), we stated at 332, 333:

> The trial judge has a very broad latitude of discretion in supervising and controlling the arguments of counsel

> and his action is not subject to reversal unless there is manifest gross abuse of that discretion or the matter complained of is a statement of the attorney's opinion made only to arouse passion and prejudice of the jury, and which necessarily has that effect. *Parrott* v. *State,* 246 Ark. 672, 439 S.W.2d 924; *Stanley* v. *State,* 248 Ark. 787, 454 S.W.2d 72; *Perry* v. *State,* 255 Ark. 378, 500 S.W.2d 387; *Willis* v. *State,* 220 Ark. 965, 251 S.W.2d 816. . . . It is also significant that the trial judge had instructed the jury that closing arguments of attorneys are not evidence and that arguments having no basis in the evidence should be disregarded. See *Stanley* v. *State, supra.*

Finally, appellant argues, without citing authority, the trial court erred in denying his motion for a mistrial based on the following objection during the cross examination of the rape victim:

> Q: Are you living now at the same place you were living at the time?
>
> PROSECUTING ATTORNEY: Your Honor, unless there is some purpose for this we would rather she not say what address she was living at. (T. 181).

The prosecuting attorney based his objection on relevancy grounds. Appellant now contends this objection was untimely and prejudicial. At trial when given the opportunity to show how the question was relevant, the appellant chose to withdraw the question. Under the circumstances of this case, we totally fail to see any prejudice so great as to require the drastic remedy of a mistrial. See *Cobb* v. *State,* 265 Ark. 527, 579 S.W.2d 612 (1979).

Affirmed.

Glenn BARNUM *v.* STATE of Arkansas

CR 79-190 637 S.W.2d 534

Supreme Court of Arkansas
Opinion delivered July 6, 1982

Robert A. Newcomb, for petitioner.

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

PER CURIAM. Petitioner Glenn Barnum 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). He was sentenced to a term of 24 years imprisonment for attempted capital murder and a term of 20 years imprisonment for aggravated robbery with the sentences to run consecutively. We affirmed. *Barnum* v. *State,* 268 Ark. 141, 594 S.W.2d 229 (1980). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37 for the purpose of vacating or setting aside his 20 year sentence for aggravated robbery.

Petitioner alleges that it was improper for him to be

convicted and sentenced for attempted capital murder and aggravated robbery since aggravated robbery was the underlying specified felony to the charge of attempted capital murder. He asserts, *inter alia,* that the conviction and sentence for aggravated robbery violates Ark. Stat. Ann. § 41-105 (Repl. 1977).

When a criminal offense, by its definition, includes a lesser offense, a conviction cannot be had for both offenses. § 41-105. *Rowe* v. *State,* 275 Ark. 30, 627 S.W.2d 16 (1982); *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981); *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). Section 41-105, supra, reads in pertinent part:

> (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 (required to establish the commission of the offense) charged; or
> >
> > (b) it consists of an attempt to commit the 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.

In proving the elements of attempted capital murder, it is

necessary to prove the elements of aggravated robbery. *Rowe* v. *State, supra.* Therefore, in light of our recent holdings in regard to Ark. Stat. Ann. § 41-105 in *Rowe, Simpson* and *Swaite, supra,* we hold that the sentences imposed on petitioner were in excess of the maximum sentence authorized by law. In accordance with Rule 37.1, we therefore set aside petitioner's conviction and sentence for the lesser included offense of aggravated robbery. *Rowe* v. *State, supra.* The conviction and sentence for attempted capital murder are not disturbed. Since the conviction and sentence for aggravated robbery are set aside, an evidentiary hearing in circuit court, as requested by the petitioner, becomes unnecessary.

Petition granted in part and denied in part.

Jerry OSBOURNE *v.* STATE of Arkansas

CR 80-154 637 S.W.2d 535

Supreme Court of Arkansas
Opinion delivered July 6, 1982

William McArthur, for appellant.

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

PER CURIAM. Appellant was convicted in White County Circuit Court of three felonies and judgment was entered on July 25, 1979. Notice of appeal was filed September 28, 1979, by the trial attorney, Bob Scott. On December 18, 1979, the trial court granted an extension of time until February 20, 1980, within which to file the transcript and record with this court. Apparently, Bob Scott did not notify appellant as to the time when the transcript was due nor did he take any action to perfect the appeal. For all intents and purposes, he seems to have unilaterally withdrawn from the case. On April 10, 1981, a hearing was conducted in the White County Circuit Court in which the court ruled that appellant was inadequately represented on his appeal. The trial court then granted appellant the right to file a belated appeal.

Rule 11 (h), Rules of the Supreme Court of Arkansas, places certain duties upon the trial attorney if he intends to withdraw from the case. We considered this matter in the case of *Finnie* v. *State,* 265 Ark. 941, 582 S.W.2d 19 (1979), and held that Rule 36.9, Rules of Criminal Procedure, allows the supreme court to act upon and decide a case in which neither the notice of appeal was timely given nor the transcript timely filed. In *Finnie* we held that it was the duty of the trial attorney to obtain permission from the trial court to withdraw from the case and the petition to withdraw should contain a statement of the reasons therefor. Also, we held that a copy of the request for withdrawal, if granted, should be sent to the appellant. Rule 36.9 provides that the supreme court may act upon and decide a case in which the notice of appeal was not given or the transcript untimely filed when a good reason for the omission was shown by affidavit. In the present case no good reason was shown by trial counsel. However, we think the motion for a belated

appeal was properly granted by the trial court because the trial attorney, Bob Scott, had apparently abandoned his client and left him without an appeal being perfected.

Under the circumstances of this case we think the belated appeal should be granted and we concur with the decision of the trial court to allow an appeal to be filed. A copy of this per curiam will be furnished to the Committee on Professional Conduct.

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

THE CELOTEX CORPORATION and KNOX GILL COMPANY *v.* THE LITTLE ROCK SCHOOL DISTRICT OF PULASKI COUNTY, Arkansas, A Body Corporate, et al

82-8 637 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered July 12, 1982
[Opinion Amended on Denial of Rehearing
September 13, 1982.]

House, Holmes & Jewell, P.A., by: *Robert L. Robinson, Jr.* and *Kathryn D. Holt*, for appellant Celotex Corporation.

Laser, Sharp, Haley, Young & Huckabay, P.A., by: *Peter B. Heister*, for appellant Knox Gill Company.

Wright, Lindsey & Jennings, for appellee Cromwell, Neyland, Truemper, Levy and Gatchell, Inc.

Friday, Eldredge & Clark, by: *Michael G. Thompson*, for appellee and cross-appellant Little Rock School District.

RICHARD B. ADKISSON, Chief Justice. This is a second appeal from a suit in which The Little Rock School District, hereinafter LRSD, seeks damages arising from the roofing of Parkview High School. This case was first before us in *The Little Rock School District* v. *Celotex Corporation*, 264 Ark. 757, 574 S.W.2d 669 (1978); Supplemental Order, 264 Ark. 768-A, 576 S.W.2d 709 (1979) and was remanded.

LRSD originally filed this action in Pulaski County Circuit Court on March 25, 1975, against Celotex Corporation, the manufacturer of the roofing material, and Knox Gill Company, the roofing subcontractor, alleging breach of implied and express warranty and negligence. Celotex and Knox Gill filed third-party complaints against Cromwell, Neyland, Truemper, Levy and Gatchell, Inc., hereinafter Cromwell, the architectural firm, alleging negligence. Knox Gill also filed a cross-complaint against Celotex Corporation alleging negligence and breach of warranty.

On the first appeal this Court held that all grounds for relief between the parties were barred by the statute of limitations, except for express warranty which was held to be a question for the jury.

After remand to the circuit court LRSD amended its complaint against Celotex Corporation to allege fraudulent

misrepresentations and requested punitive damages. Knox Gill amended its cross-complaint against Celotex Corporation to ask for similar relief. The trial court, by order dated September 22, 1981: (1) denied Celotex's motion to strike and dismiss the fraudulent misrepresentation and punitive damage claims; (2) dismissed Celotex's third-party negligence complaint against Cromwell; (3) dismissed LRSD's negligence count against Celotex and Knox Gill. All the parties appeal. We affirm.

Celotex argues the trial court erred in failing to strike and dismiss the amended complaints for fraudulent misrepresentation of LRSD and Knox Gill. The trial court, in refusing to dismiss, found "factual issues which must await disposition upon submission of proof." The trial court's order refusing to dismiss is not a final order which may be appealed under Rule 2 of the Arkansas Rules of Appellate Procedure, Ark. Stat. Ann., Vol. 3A (Repl. 1979). The denial of a motion to strike portions of a pleading is not a final order under Rule 2. *See also Williams* v. *Varner,* 253 Ark. 412, 486 S.W.2d 79 (1972); *Stacker & Dugan* v. *Southwestern Co.,* 245 Ark. 350, 432 S.W.2d 481 (1968).

But, Celotex argues that the refusal to strike is an appealable intermediate order under Rule 2 (b) which provides:

> An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

Celotex contends that the dismissal of Celotex's third-party negligence complaint and the dismissal of LRSD's negligence claim against Celotex and Knox Gill are the final orders which make Rule 2 (b) applicable. We disagree. The dismissal of these claims is not a final order for purposes of this case because these claims were previously disposed of by the Court in the first appeal. There, by supplemental per curiam order, we granted Cromwell's petition for rehearing, holding that negligence causes of action were barred by the statute of limitations. By the granting of that petition, all claims against Cromwell were dismissed, including those of

Celotex, Knox Gill, and LRSD. That holding became the law of the case and is controlling upon this Court in a second appeal. Furthermore, although the per curiam's dismissal of the negligence claim did not expressly apply to a party other than Cromwell, the order's effect was to dismiss LRSD's negligence claim against Celotex and Knox Gill, Knox Gill's negligence claim against Celotex, and Celotex's negligence claim against Knox Gill.

The above holding as to the meaning of our supplemental opinion disposes of the other issues argued on appeal.

Affirmed.

Carl FRIEND *v.* Bobby GOSLEE

82-122 637 S.W.2d 568

Supreme Court of Arkansas
Opinion delivered July 12, 1982
[Rehearing denied September 13, 1982.]

Hobbs, Longinotti & Bosson, P.A., by: *Richard W. Hobbs,* for appellant.

Gibbs & Hickam, by: *Marcia Renaud Hernsberger,* for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellee, Bobby Goslee, filed a complaint in Garland County Circuit Court alleging that appellant, Carl Friend, an out-of-state resident, owed him $20,000 plus court costs on two promissory notes. Following appellant's failure to answer pursuant to ARCP Rule 12 (a), judgment by default was entered. On appeal, we affirm.

Service on the complaint was had on September 28, 1981; on October 9 the court denied appellant's motion for additional time in which to respond holding that the motion gave insufficient reasons as to why more time was needed; on October 21 appellee filed a motion for default judgment to which appellant responded by correctly stating that he was not in default because as an out-of-state resident he had 30 days to answer a complaint under Rule 12.

On October 26 appellant filed a second motion for additional time setting out the reasons why more time was needed. The court never acted on this motion and instead entered default judgment against appellant on November 5. Appellant filed his answer on November 10, and on November 18 filed a motion to set aside the default judgment. The motion was denied on January 13, 1982.

Appellant argues that the court erred in granting a default judgment because appellee's motion for default judgment was filed before appellant was actually in default. Appellee's motion was filed on October 21, yet appellant's 30 days in which to answer under Rule 12 did not expire until October 28. However, the trial court did not enter the judgment until November 5, at which time appellant actually was in default; therefore, appellant's argument is without merit.

Appellant also argues that the trial court erred in finding him in default while appellant's second motion for additional time in which to answer was pending. A motion for additional time in which to answer does not auto-

matically extend the time for filing an answer under Rule 12. Since the trial court did not act upon the motion, appellant should have filed his answer within the prescribed time instead of filing it 13 days after the time had expired.

Appellant also argues that he was entitled to five additional days to reply to appellee's response to his motion for additional time before a default judgment could be entered. This issue is resolved by our holding that the original motion did not extend the time for filing an answer.

Although we recognize that ARCP Rule 55 governs default judgments, we do not consider its applicability to this case because it was not raised in the trial court or argued on appeal.

Affirmed.

AIRCO, INC. *v.* SIMMONS FIRST NATIONAL BANK, Guardian, et al

82-12 638 S.W.2d 660

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Wright, Lindsey & Jennings, for appellant.

Whetstone & Whetstone, by: *Bernard Whetstone,* for appellees.

GEORGE ROSE SMITH, Justice. On May 14, 1980, Georgia Huchingson underwent surgery at a hospital in Little Rock. In connection with the operation, certain drugs had impaired her ability to breathe during the surgery; so the anesthetist had to provide artificial breathing for the patient. During the operation the artificial breathing procedure malfunctioned for several minutes, causing Mrs. Huchingson to suffer serious lung injury and irreversible brain damage. This action for compensatory and punitive damages was brought by Mrs. Huchingson's guardian and by her husband against various local defendants and against the appellant, Airco, Inc., which had manufactured a machine used in the artificial breathing procedure.

A day or two before trial, liability for compensatory damages was admitted both by Airco and by the partnership of doctors that had provided the anesthesiological services. The plaintiffs then dismissed all their causes of action except the admitted claims and the cause of action against Airco for punitive damages. The jury awarded compensatory damages of $1,070,000 against the partnership and Airco and punitive damages of $3,000,000 against Airco, whose net worth had been shown to exceed $607,000,000. The compensatory award has been paid.

For reversal Airco argues only that there is no substantial evidence to support a punitive damage award. The pivotal issue was submitted to the jury in AMI 2217, which

includes this admittedly correct statement of the law: "Before you can impose punitive damages, you must find that Airco, Inc. knew or ought to have known, in the light of the surrounding circumstances, that its conduct would naturally or probably result in injury and that it continued such conduct in reckless disregard of the circumstances from which malice may be inferred." AMI Civil 2d, 2217 (1974). Specifically, it is insisted that the proof does not show that Airco should have known that injury was natural or probable or that Airco, instead of being merely negligent, continued its conduct in reckless disregard of the consequences. The case comes to us as involving products liability. Rule 29 (1) (m).

We need not describe the artificial breathing apparatus in complete detail. Two machines are used, side by side near the operating table. The anesthesia machine, not in issue here, provides, through a system of similar black hoses, a continuous flow of mixed gases that serve as fresh air. The air travels in a circuit. It enters the patient through a mask, equipped with valves, that is held against the patient's face. When the air leaves the patient's lungs, it returns to the mask and travels through a different hose back to the anesthesia machine, which has an absorber to remove carbon dioxide.

The flow of air to the patient's lungs must have alternate positive and negative pressure, so that the lungs will expand and contract as in natural breathing. That alternating pressure is provided, during a typical operation, part of the time by a flexible bag which an anesthetist squeezes and releases by hand and part of the time by the second machine, a ventilator that also creates alternating pressure.

For various reasons it is usually necessary to switch back and forth from the bag to the ventilator. The Airco ventilator used in Mrs. Huchingson's case had two ways for the anesthetist to make the switch. One method was entirely manual: To change, for example, from the bag to the machine, the anesthetist would simply remove the bag from the absorber, connect a hose in its place, and start the

ventilator machine. That method takes about ten seconds and involves no substantial hazard to the patient.

The other method eliminates the manual procedure, using instead an optional accessory called a selector valve. This small device is to be attached to the ventilator. It has three "ports" of the same size, open pipes over which a hose or the neck of a bag may be slipped. When properly used, hoses are attached to the two ports on the sides of the device and a bag may be attached to the middle port, which extends downward. The device has a straight handle with two possible positions, pointing down when the bag is in use and horizontally when the ventilator is in use. The anesthetist turns the handle to make a desired switch.

What happened during Mrs. Huchingson's surgery was this: Before the operation began, a hose had been properly attached to the right-hand port on the selector valve, with the other end of the hose open for later connection to the absorber. Someone, however, had incorrectly put another hose on the middle port, where only a bag was meant to be connected. When the nurse-anesthetist, an employee of the partnership, decided to stop using a bag at the absorber, she removed it and by mistake attached in its place the hose hanging from the middle port. The effect of the improper connections was to permit the anesthesia machine to continue to pump air into the patient's lungs, with no way for the air to escape. The ensuing build-up of pressure and lack of oxygen resulted in serious damage to the patient's lungs and brain.

The plaintiffs' proof, consisting mainly of expert testimony, tended to show that Airco designed, manufactured, sold, and persisted in selling the selector valve even though Airco should have realized originally and should also have learned before 1980 that the device was so inherently dangerous that it ought never to have been put on the market. The foreseeable danger was just what happened during Mrs. Huchingson's surgery — human error brought about by the presence of several identical black hoses and by the necessity for connecting them correctly to three similar ports that were too close together and that lacked adequate

labels and warnings. The danger would have been eliminated had Airco substituted for this particular selector valve either of two available alternatives: the manual system for which the ventilator was designed or a selector valve having only two ports instead of three.

The plaintiffs called as their first witness Wayne Hay, an Airco staff engineer, who had designed both the ventilator and the selector valve in 1973 when Airco decided to manufacture its own ventilators instead of selling one made for it by another company. From the beginning Hay was aware of the hazard in the use of the selector valve: "[S]ince you have a choice now, you can make the wrong choice." Before the ventilator and selector were marketed, they were field tested at about 30 representative sites throughout the country. Reports were unfavorable. One said that no one liked the bag/ventilator valve; it could have killed the patient. Other reports said the selector was dangerous and could kill people. Nevertheless, the company manufactured and sold the selector valve. Hay testified that since the users would be professional people, they should have common sense enough to learn all the hazards before using the selector. Hay also defended the company's action because the selector was offered as an optional accessory. "The user can buy it or not as he chooses. If he chooses to buy it, the choice is his, not mine. That's a professional choice of his. I see no reason why we should refuse to sell it if he wants it, and there is an obvious market for it." Hay had seen a 1977 article about an incident similar to the Huchingson case. He said he probably read follow-up letters to the editor saying that the selector valve was dangerous and shouldn't be on the machine, but they didn't tell him anything he didn't already know. Since no other employee or officer of Airco testified, the jury doubtless accepted Hay's testimony as stating the company's position.

Another witness was Dr. Susan Dorsch, an experienced anesthesiologist from Florida. She believed strongly that the selector valve should not be on the market. She approached the matter by using a "benefit to risk ratio." She believed that the risks were overwhelming as compared to the benefit of convenience. She said it was easy to make a misconnec-

tion, because the ports were the same size and close together. Such a misconnection could kill the patient or cause irreparable damage to the lungs and brain within a very short time. Dr. Dorsch also pointed out that while using the ventilator the nurse-anesthetist has a lot of things on her mind: She must regulate the amount of anesthesia, watch the blood pressure, check the cardiac monitor, squeeze the bag to ventilate the patient, and watch the patient's chest. Dr. Dorsch also cited a 1972 article that referred to accidents similar to the Huchingson incident, involving an increase in breathing pressure resulting from a misconnection.

Two members of the defendant partnership testified (one by deposition) that the selector valve was dangerous. They did not learn until after the Huchingson incident that the ventilator could be used without the selector valve, which they said they would never use again. One of them said that the selector valve "is absolutely a time bomb, and anybody that sits there and connects it a few thousand times, they're going to misconnect it sooner or later." Dr. Drinker, a bio-medical engineer from Boston, testified that the selector valve is lethal. He did not think that the selector fulfills any necessary function, but it introduces the risk of an accidental connection resulting in death or serious injury.

Another witness, Dr. Leslie Ball, was a safety engineer with 43 years' experience. He had read the depositions, had examined the operating room and equipment, and in other respects had familiarized himself with the Huchingson case. His purpose was to determine the foreseeability of the injury that occurred. He testified: "And it was very clear that what did happen was just exactly the sort of thing the safety engineer, through predictive analysis, would expect, not very often, but everything that did happen, each event, both what happened to the equipment and what happened to the people, was foreseeable by a reasonably competent engineer." Dr. Ball believed that the risk presented by the selector valve was catastrophic and should have been eliminated by the manufacturer, either by not selling it or by making it completely safe. He thought that the first time a similar accident happened, as reported in the trade lit-

erature, the selector valves should have been recalled. The witness concluded that the selector valve is "grossly in violation of safety engineering principles and never should have been put on the market."

There was other testimony, with very little to the contrary, but the proof we have narrated brings the case within the requirements of AMI 2217. A jury question was presented.

Airco argues that it took a combination of nine separate acts of negligence (most of which are attributed to the nurse-anesthetist) to bring about Mrs. Huchingson's injuries; so that consequence is said not to have been natural or probable. The exact combination of circumstances is immaterial. What does matter is that serious injury to *someone,* brought about by human error attributable to the design of the selector valve, was both a natural and a probable consequence of Airco's conduct. Certainly the jury could have so believed, with substantial evidence to support its conclusion. Moreover, that possibility of injury could have been eliminated had Airco simply put the ventilator on the market without the optional but lethal selector.

It is also argued that Airco, like the tortfeasor in *Forrest City Machine Works* v. *Aderhold,* 273 Ark. 33, 616 S.W.2d 720 (1981), was guilty only of simple negligence rather than of that persistent reckless disregard of consequences that is essential to liability for punitive damages. The two cases are decidedly dissimilar. Airco knew that the patient's very life always depended upon the artificial breathing supplied by the ventilator. Consequently the marketing of an optional, unnecessary, and lethal selector valve is not comparable to the sale of farm machinery which, in *Aderhold,* did not necessarily involve a similar continuous possibility of death or serious injury. Furthermore, it does not appear that in the *Aderhold* case there was proof similar to that now before us — that the manufacturer knew from the outset, by its own testing, that an unnecessary component of the product was so deadly that it should never have been made available to the public. On the record as a whole we hold that the issue of punitive damages was properly submitted to the jury.

Affirmed.

PURTLE, J., not participating.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree in every respect with the majority opinion and concur simply to point out I believe the plaintiffs in *Forrest City Machine Works* v. *Aderhold,* 273 Ark. 33, 616 S.W.2d 720 (1981) had as strong or stronger case for punitive damages which the majority found wanting.

HAYS, J., joins in this concurrence.

Jerry M. HERRON *v.* James JONES, III et al

82-41 637 S.W.2d 569

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Bailey, Williams, Westfall, Lee & Fowler, by: *James A. Williams;* and *Friday, Eldredge & Clark,* by: *Phillip Malcom,* for appellant.

Henry & Duckett, by: *David P. Henry* and *James M. Duckett,* for appellees.

GEORGE ROSE SMITH, Justice. This medical malpractice suit was brought by the appellees, the surviving husband and minor children of Shirley L. Jones, whose death is alleged to have been caused by the negligence of the appellant, a physician. In December, 1981, the suit had been pending for 16 months, all discovery had been completed, and the case was set for a four-day trial in February. On December 16 the plaintiffs' attorneys, Henry & Duckett, filed a motion asking that all defense counsel — the firm of Friday, Eldredge & Clark, Phillip Malcom (the member of the Friday firm handling the case), and a Texas law firm acting as co-counsel — be disqualified from further participation in the case because Pat Brown Damon, a legal secretary who had worked for Henry & Duckett for eleven months, had become a secretary for the Friday firm, and particularly for Malcom, in November, 1981. The motion for disqualification asserted that Canons 4 and 9 of the Code of Professional Responsibility, 33 Ark. L. Rev. 643 (1980), would be violated by the lawyers' continued participation in the case.

The trial judge, relying primarily on *State of Arkansas* v. *Dean Foods Products Co.,* 605 F.2d 380 (8th Cir. 1979), ruled that defense counsel were all disqualified from proceeding further in the case, not because there was any actual impropriety but because there was a violation of Canon 9:

"A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The case comes to this court for an interpretation of our Code of Professional Responsibility. Rule 29 (1) (c).

Preliminarily, we must pass upon the appellees' motion to dismiss the appeal on the ground that an order disqualifying counsel is not a final order within Rule 2 of the Rules of Appellate Procedure. It is certainly not final in the sense that the case is still to be tried on its merits, but the appellant argues that we should treat the disqualifying order as falling within an exception recognized in federal procedure, by which an order is appealable if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

Even though orders disqualifying counsel are a comparatively recent development in the law, the appealability of such orders has already given the federal courts much difficulty. At first it was held in some circuits that all rulings on motions to disqualify counsel were final and appealable, whether the motion was granted or denied. In at least three circuits, however, the courts of appeal have overruled prior cases in reaching what is now the prevailing position: An order denying a motion to disqualify counsel is not appealable, although an order granting such a motion is appealable. *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir. 1980); *Melamed* v. *ITT Continental Baking Co.,* 592 F.2d 290 (6th Cir. 1979); *Firestone Tire & Rubber Co.* v. *Risjord,* 612 F.2d 377 (8th Cir. 1980). The Supreme Court settled the issue by affirming, in effect, the *Firestone* case. *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368 (1981), vacating the intermediate court's order for want of jurisdiction, but recognizing its correctness.

In harmony with the federal courts' conclusions, we have no doubt that an order disqualifying counsel *should* be appealable. This is true not only because a litigant may be erroneously deprived of representation by the counsel of his

choice, but also because if the order of disqualification is not appealable the litigant will be compelled to employ other counsel and to submit to a useless trial before he learns by appeal that the disqualification order was wrong and he is entitled to start all over again.

We are fortunate, however, in not being bound, as the federal courts are, by a statute restricting appellate review to final orders. 28 U.S.C. § 1291. When our Rules of Appellate Procedure were drafted and adopted in 1978, there was no immediate necessity for either the drafting committee or the court to consider the appealability of orders disqualifying counsel. That necessity now confronts us. We are not willing, however, to embrace the federal exception to the ordinary requirement of finality — an exception that has been a prolific source of uncertainty, for who can predetermine with assurance when an issue is "important" and "completely separate from the merits of the action" and "effectively unreviewable" on final appeal? We therefore prefer the simple course of amending Appellate Procedure Rule 2 to provide that an order disqualifying counsel is appealable. A per curiam order to that effect is being entered today. For a comparable situation see *Gallman* v. *Carnes,* 254 Ark. 155, 492 S.W.2d 255 (1973).

On the merits, the proof is that before Mrs. Damon left Henry & Duckett she was cautioned not to disclose confidential information about this case. When she became a secretary at the Friday firm, she was told at the outset that she would have nothing to do with this case, for which the file was kept in Malcom's own office. Mrs. Damon herself stated in an affidavit that she had had no contact with the case since being employed by the Friday firm, had not spoken to anyone in the firm about the case, and would not do so in the future.

Thus, there is no suggestion of impropriety in fact. Instead, appellees emphasize the language of Canon 9, that a lawyer must avoid even the appearance of impropriety. Granted. But we must keep in mind that the *Dean Foods* case and similar decisions have all dealt with the situation in which the lawyer himself has changed from one firm to

another, with a possible conflict of interest. Here, however, it was not a lawyer but a legal secretary who changed her employment. We have no doubt that the Canon 4 duty to preserve the confidences of a client applies to all the employees of a law firm, but Canon 9 is directed specifically to lawyers and to no one else. Counsel for the appellees conceded at the oral argument that they have found no case in which a lawyer has been disqualified in circumstances similar to those now presented.

The proof demonstrates beyond question that every precaution was taken to avoid any disclosure of confidential information by Mrs. Damon and that no such disclosure occurred. Moreover, there is much testimony that temporary secretarial help is continually found to be necessary by many law firms in Pulaski County. The representative of a concern engaged in the business testified that her firm provides the temporary services of experienced legal secretaries on a regular basis to between forty and fifty law offices in the community. Twenty percent of that company's secretaries work for from eight to ten different law firms in a year; the other eighty percent work for from two to eight firms in a year. There was also testimony that law firms prefer to employ legal secretaries with prior experience, so that permanent secretaries as well as temporary ones frequently move from one law office to another. Thus complete avoidance of a situation like that now presented is impossible.

We need not detail the abundance of similar testimony, which was uncontradicted. We are convinced that any appearance of impropriety, any presumption of impropriety, that might have arisen in this instance from Mrs. Damon's change of jobs was effectively overcome by the undisputed testimony. The trial judge was mistaken in sustaining the motion to disqualify defense counsel.

Reversed.

Orbin Joe BALL et al *v.* Sheila Ball CURTIS
and Bradley CURTIS

82-124 637 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Joseph Boeckmann, for appellants.

Michael Everett, for appellees.

GEORGE ROSE SMITH, Justice. In four cases we have held that when the title to land is vested in a life tenant with contingent remainders that will not vest until the life tenant's death, a court of equity has the power upon a proper showing to order a sale of the land for reinvestment. *Walker* v. *Blaney,* 225 Ark. 918, 286 S.W.2d 479 (1956); *Wing* v. *Wing,* 212 Ark. 960, 208 S.W.2d 776 (1948); *Hardy* v. *Hilton,* 211 Ark. 991, 204 S.W.2d 163 (1947); *Bedford* v. *Bedford,* 105 Ark. 587, 152 S.W. 129 (1912). In all those cases, however, when the suit was brought there was in being a member of the class of possible remaindermen, who could be made a party to the case as the representative of other contingent remaindermen as yet unborn. In the case at bar the life tenant, Sheila Ball Curtis, age 30, has never had a child; so there is in being no member of the class comprising her bodily heirs. The question is whether in this situation a court of equity has the power to order a sale of the land for reinvestment. We hold that the power exists and affirm the chancellor's decree ordering a private sale of the land. (The

Court of Appeals transferred the case as involving the construction of a will. Rule 29 [1] [p].)

Orbin Ball died in 1968, survived by three children. His will left various separate tracts of land to each of his children for life, with remainder to his or her bodily heirs. The will made no disposition of the possible reversion and contained no residuary clause; so the three children inherited the reversion that remained in the testator's estate.

Sheila Ball Curtis and her husband brought this suit to obtain a sale, for reinvestment, of 120 acres of the lands left to Sheila and her bodily heirs. Sheila's brother and sister were made parties to the case; so all the necessary parties are before the court. The sister's two minor children were also made defendants. The plaintiffs made a sufficient showing that the 120 acres are not as productive as other investments would be and that a favorable price has been negotiated with a purchaser.

Upon the only question at issue, the rule is that a court of equity has the power to order a sale for reinvestment even though no member of the class having the contingent future interest is yet in existence. Restatement of the Law, Property, § 179 (1936); Powell, Real Property, § 292 (1981); Comment, Alienability of Contingent Remainders, 2 Ark. L. Rev. 87 (1948). Where no bodily heirs of the life tenant are yet in being, as here, the life tenant herself is a proper person to represent her unborn descendants. Restatement, § 184 (d).

The chancellor correctly ordered a sale for reinvestment, but the decree contained no directions with respect to the reinvestment. See the *Walker* and *Bedford* cases, supra. The cause is therefore remanded for further proceedings.

Affirmed and remanded.

Richard DIETZ, Administrator of Adoption, Arkansas Social Services Department *v.* Michael BEVILL and Mary Edith BEVILL

82-129 637 S.W.2d 555

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Breck G. Hopkins, for appellant.

Highsmith, Gregg, Hart & Farris, by: *Josephine Linker Hart,* for appellees.

FRANK HOLT, Justice. The Arkansas Social Services petitioned the probate court for an appointment as guardian with the power to consent to the adoption of appellee Michael Bevill's two minor children, Carri LeeAnn and Teresa Michelle, 7 and 9 respectively. Their mother is deceased. These two children have been in the custody of the Arkansas Social Services from December, 1978, until the time of the hearing in their action in August, 1981. The court struck the responsive pleadings filed on behalf of appellee Michael Bevill and appellee Mary Edith Bevill, the paternal grandmother, insofar as such pleadings related to custody, habeas corpus, and Mary Edith Bevill's prayer that she be granted guardianship. However, the court granted her prayer to intervene. The petition of Arkansas Social Services to be appointed guardian with consent to adoption was denied as the court found the petitioner failed to meet its burden by clear and convincing evidence.

The appellant first contends that the probate court erred in disregarding the best interests of the children. Upon hearing all the testimony, the court stated:

> There's been some allusions to the fact that — or arguments to the effect that the court in making a decision ought to consider the best interests of the child and that is as opposed to being with the natural parents as opposed to being in an adoptive home. That's a laudable purpose, but that's really not the issue in this case, the best interests of the children, but it always has to be in the back of the court's mind.

We feel the court properly followed the statutory framework set forth in Ark. Stat. Ann. § 56-128 (Supp. 1981), which provides "that before entering a guardianship order the court shall find from the evidence that . . . . the surviving parent . . . . is unfit to have the child for any of the following reasons . . . . " It appears that the legislature intended that the

court first make the determination that the parent is fit or unfit. If found unfit, then the court addresses the issue of the best interests of the child.

Appellant next contends that the court erred in permitting the intervention of Mary Bevill and considering her testimony which was not relevant or material to the petition before it. We cannot agree. It is true that Mrs. Bevill, the paternal grandmother, had no court ordered visitation rights nor was she acting in *loco parentis*. However, she had previously assisted her son in caring for the children in her home for about a year and a half based on a custody award of the juvenile court. She was planning to help him in the future should Michael gain custody of the two children. It appears she has demonstrated a sufficient interest in the children to entitle her to intervene and testify. Suffice it to say that appellant has not demonstrated any prejudice by the intervention which was limited to the testimony of Mrs. Bevill.

Appellant finally asserts that the court erred in finding that the Social Services' proof falls short of establishing by clear and convincing evidence that appellee Michael Bevill is an unfit parent. We must agree. Appellant urges three grounds for the termination of his parental rights: § 56-128 (D), abandonment; § 56-128 (F) 3, neglect; and § 56-128 (H), lack of regular visits with the children or contact with the physical or legal custodian of the children.

The evidence shows that Michael Bevill, prior to the guardianship proceeding, made no efforts to gain custody of the children who had been in the Social Services' custody since 1978 or approximately three years; that twice since 1978 he voluntarily committed himself to a mental institution for approximately six weeks total; for over two years after the children were placed in foster care, he never inquired of the Social Services' worker about seeing the children nor called about their welfare, sent them Christmas cards or presents; he did not provide a social worker with an address, which was requested, so he could benefit from their rehabilitation efforts; he told the social worker to contact him through his mother, who testified she didn't tell Social Services where he was because she didn't know; he has lived

alone and provided no monetary support for these two children for over three years, although he had been employed at different times in Arkansas, Missouri and Texas and earning over $200 a week during part of this time; he was unemployed for approximately a third of the time since 1977; he has three children by a former marriage, which resulted in divorce, and these children live with his parents because he couldn't take care of them; he has been arrested for public drunkenness six or seven times in the past ten years; the only support he ever provided his other three children was to occasionally send his parents $25 or $30 a week; he presently has no job and has never had any savings; and if he regains care and custody of these two children, he would leave them with his parents until he gets a job and buys a home. The guardian *ad litem* recommended that the Social Services' petition be granted.

Michael Bevill asserts he contacted Social Services about a month prior to this action concerning custody of his children. According to him the Social Services didn't contact him about providing support and he didn't know where the children were and was not allowed visits. However, he admitted he saw the children three or four times a year and that he had not provided any financial support since 1977, when he and his children's mother were divorced. As indicated, their mother died in 1978.

Even though someone else, such as the grandparents or the Social Services, as here, has custody of a child, that does not relieve the father of the obligation to support the child; he must furnish support and this duty is a personal one which cannot be excused on the basis of the conduct of someone else unless that conduct prevents him from performing his parental duty; and this duty to support is paramount even though not ordered to do so by the court. *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979). Here, we think the evidence is clear and convincing that the appellee Michael Bevill has demonstrated such an irresponsible attitude toward his children without any justifiable cause that appellant's petition for guardianship with the right to consent to adoption should be granted.

Reversed and remanded.

Donald Brian (Punk) HAWKSLEY *v.* STATE of Arkansas

CR 82-86 637 S.W.2d 573

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Jeff Duty, for appellant.

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

FRANK HOLT, Justice. A jury found appellant guilty of burglary, aggravated assault, criminal mischief, and two counts of battery and imposed sentences totalling ten years. All charges stem from an incident occurring around 7:30 a.m., February 27, 1980, when the appellant entered an apartment occupied by Cathy Chastain and Robert Clayton. A fight erupted. Chastain and Clayton received injuries requiring medical treatment.

We first consider appellant's argument that the court erred in admitting into evidence, over appellant's objections, proof of disorderly conduct, escape, and criminal mischief in the second degree which involved other persons and occurred several years prior to the incident here. During cross-examination of the appellant, the following exchange took place:

> Q. Do you remember an incident in July of '77 in which you were convicted of escape and disorderly conduct and criminal mischief in the second degree?
>
> (Defense Counsel):
>
> Object to that. I'd like to approach the bench on that....
>
> (Prosecuting Attorney):
>
> Your honor, they have raised the issue of self defense.... This goes specifically to acts of conduct or misconduct .... This is for impeachment. They have raised the issue of self defense and I think I can show what he's been doing all his life, whether it has to do with violence....

Following a colloquy between the state and the defense attorneys, the court overruled the objection, stating "It's an incident involving violence"; neither a conviction nor arrest makes any difference, and therefore, appellant could be asked about whether he was involved in violence in a particular incident.

The trial court erred in overruling appellant's objec-

tion, which we feel was sufficient. Rule 608 (b) of the Uniform Rules of Evidence provides that the trial court may, if it finds good faith and the probative value of the testimony outweighs the prejudicial effect, allow questions about certain offenses if the misconduct relates to honesty and truthfulness. "Questions regarding appellant's violent nature and destruction of property are wholly unrelated to his propensity for honesty, and therefore, improper." *Divanovich* v. *State,* 271 Ark. 104, 607 S.W.2d 383 (1980). See McCormick, Evidence, § 43 (2d Ed. 1972); 3 Weinstein's Evidence § 608[05] (1981).

Rule 609 deals with impeachment by evidence of conviction of crime. Section (a) provides:

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

Thus, before the evidence of convictions of crimes was admissible the court had to be satisfied they were crimes either (1) punishable by imprisonment in excess of one year or (2) involved dishonesty or false statement. Once counsel raises the issue of whether the defendant's prior convictions should be excluded from trial, the trial judge has the duty to see that he is informed of the relevant considerations before admitting the evidence. Clearly, the disorderly conduct, § 41-2908, a class C misdemeanor, was not admissible. Escape ranges from an admissible class C felony, first degree escape, § 41-2810 to an inadmissible class A misdemeanor, third degree escape, § 41-2812. Criminal mischief in the first degree, § 41-1906 can be admissible as a class C felony or inadmissible as a class A misdemeanor, depending on the value of the property destroyed. Criminal mischief in the second degree, § 41-1907, is an inadmissible misdemeanor. The state did not prove, nor did the trial judge make

sufficient inquiry in the conference at the bench, to determine if the convictions were for crimes punishable by imprisonment in excess of one year and thus admissible into evidence.

The convictions were not admissible as convictions of crimes involving dishonesty and false statement. Those convictions are peculiarly probative of credibility and are always to be admitted without regard to grade of offense or length of sentence. Examples are perjury, subornation of perjury, criminal fraud and embezzlement. Thus, the prior convictions were not admissible for attacking the credibility of appellant under Rule 609.

Neither was the evidence admissible under Rule 404 to prove a trait of character. First, appellant on direct examination did not testify to a character trait of non-violence and so no rebutting evidence was admissible. Rule 404 (a) (1). Second, it was not admissible under 404 (b) to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Two of the charges in the present case were battery in the first degree and aggravated assault. The testimony concerning prior crimes was not relevant to prove intent to commit the crimes charged. For a complete discussion of cases involving evidence admissible to prove intent see *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954); and *Moore* v. *State,* 227 Ark. 544, 299 S.W.2d 838 (1957). Here, the evidence of other crimes was not admissible and was prejudicial to the appellant.

We feel it necessary to discuss other contentions raised by appellant in view of a possible retrial. Appellant contends that the verdicts of guilty as to the charge of burglary and criminal mischief were not supported by the evidence, and the trial court erred in overruling his motion for a directed verdict on those counts. We cannot agree. In *Harmon* v. *State,* 260 Ark. 665, 543 S.W.2d 43 (1976), we said:

> It is well established that a directed verdict is only proper where there are no factual issues to be deter-

> mined by the jury and on appeal, the evidence will be reviewed in the light most favorable to the appellee and the judgment will be affirmed if there is any substantial evidence to support it. *Munn* v. *State,* 257 Ark. 1057, 521 S.W.2d 535 (1975).

Substantial evidence is evidence which is of sufficient force that it will compel a conclusion one way or another beyond suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). In order for the state to prove the charge of burglary, it must show that the appellant entered or remained unlawfully in Chastain's apartment with the purpose of committing an offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977) and Commentary. The appellant argues that admittedly he had a key to Chastain's apartment with the right to come and go as he pleased; that he kept some of his clothes there and spent several nights there each week; that he had contributed substantially to her financial support; that the fact they had previously lived together at other locations indicated that he had consent to enter her apartment; and also when he went in the apartment, it was "uncertain as to what he had in mind"

The day before the incident appellant inquired at Chastain's place of employment as to her whereabouts and was informed she had left with Clayton; that night Chastain received several threatening phone calls from appellant and finally she unplugged the phone; between the time Chastain and Clayton parked their cars outside Chastain's apartment and the fight the following morning, Clayton's car had been pushed sideways into Chastain's vehicle, causing extensive damage to both cars; tire tracks near Clayton's car were made by tires similar to those on appellant's car; Clayton's car sustained approximately $1,500 damages; at approximately 7:30 a.m. appellant forcibly entered Chastain's apartment, splintering the door jam and forcing a chain lock from the wall; he observed Clayton in bed undressed; Chastain was in her night gown; the appellant was asked to leave; a fight broke out resulting in Chastain's and Clayton's injuries and medical treatment.

We feel the evidence was sufficient for the jury to infer the appellant entered or remained unlawfully in Chastain's apartment with the intent to commit an offense punishable by imprisonment. We also find the evidence sufficient to enable the jury to infer that the appellant purposely destroyed or damaged the vehicles of Chastain and Clayton in excess of $500. Ark. Stat. Ann. § 41-1906 (Repl. 1977).

The appellant next contends the trial court erred in refusing to permit testimony concerning his and Chastain's plans and plane reservations to travel to Mexico which were made about two weeks prior to the altercation and in failing to allow appellant to introduce evidence as to a $1,100 commission he gave Chastain about two months before the incident here. We agree that the court should have permitted the evidence. The state attempted to show Chastain had been trying to "break up" her relationship with appellant. The evidence as to their plans to travel together and the real estate commission were relevant to rebut the state's theory. Uniform Rules of Evidence, Rule 402. Also evidence that a civil suit had been filed by Clayton against appellant as a result of the fracas had a bearing on the extent of the bias of the witness and was admissible. See *Goodwin* v. *State,* 263 Ark. 856, 568 S.W.2d 3 (1978). In *Wright* v. *State,* 133 Ark. 16, 201 S.W. 1107 (1918), we said: "Pecuniary interest, personal affection or hostility, a quarrel or prejudice may always be shown to discredit a witness."

Appellant asserts the trial court erred in admitting statements of Chastain, given to the investigating officers, to be introduced as "binding" on the appellant as direct evidence of wrongdoing on his part toward her and failing to limit the introduction of statements to impeachment purposes only. We find no merit in this argument. First, we observe that her transcribed statements were neither read to the jury nor introduced in evidence. Further, she and appellant have married since the incident involving the alleged offenses upon her and, understandably, she appeared to be a reluctant witness. The state merely read portions of her statements in questioning her on direct examination about her past relationship with appellant and his conduct toward her. She admitted that everything in her statements

was true. We do not perceive that this procedure was "binding" upon appellant, and no error is demonstrated.

We also find no merit in appellant's contention that the court erred in permitting Clayton to detail conversations concerning the relationship between Chastain and appellant that he had with Chastain out of the presence of the appellant. On cross-examination of Clayton, appellant's counsel asked Clayton whether Chastain "let you know she had this relationship with" appellant. We feel this opened the door for the later questions on redirect by the state concerning the status of their relations.

We deem it unnecessary to discuss any of the remaining contentions raised by appellant as they are not likely to reoccur in a new trial.

Reversed and remanded.

THE FIRESTONE TIRE & RUBBER COMPANY
v. Artie LITTLE

82-17 ___ S.W.2d ___

Supreme Court of Arkansas
Opinion delivered July 12, 1982
[Substituted Opinion on Denial of Rehearing delivered October 4, 1982.]

Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., and *Rose Law Firm, P.A.,* for appellant.

Niewald, Risjord & Waldeck, Kansas City, Mo., and *Shackleford, Shackleford & Phillips, P.A.,* for appellee.

DARRELL HICKMAN, Justice. This is a products liability case. In 1978, Artie Little, age 82, was walking by the roadside in Strong, Arkansas, when she was hit with a rim that came off the wheel of a passing truck. She filed suit for damages against the owner of the truck and trailer, Harvey Shelton, the owner of a service station who fixed a flat on the wheel of the trailer that day, Jackson Smith, and Firestone, the manufacturer of the rim. At trial, the jury exonerated both the owner of the truck and the service station owner, and awarded Artie Little $150,000 compensatory damages, and $200,000 punitive damages against Firestone.

The judgment has to be reversed because Firestone asked the day before trial whether the plaintiff and the two other defendants, Shelton and Smith, had entered into a "Mary Carter Agreement." A Mary Carter agreement is one

in which a plaintiff secretly agrees with a defendant that if the plaintiff recovers from another defendant, the agreeing defendant's liability will be reduced. Those agreements were so named when one arose in Florida in *Booth* v. *Mary Carter Paint Company,* 202 So.2d 8 (Fla. App. 2d 1967). Firestone's counsel asked before trial if any agreements had been made whereby Shelton's or Smith's liability would be reduced if Artie Little recovered against Firestone. Smith's and Shelton's attorneys objected and the trial court did not order the disclosure of any such agreement. On appeal, the appellee argues that Firestone knew or suspected such an agreement existed several months before trial and should have attempted to discover that information far in advance of the day before trial. We do not find Firestone waived their right to object.

There seems to be little doubt of the existence of some sort of agreement and we hold that the trial court was wrong in not requiring the agreement to be disclosed. Furthermore, we join those states that hold such an agreement is not only discoverable but also may be admitted into evidence.

The state courts that have considered this question are split to some degree on whether such an agreement is unethical or against public policy. *See Lum* v. *Stinnett,* 488 P.2d 347 (Nev. 1971), and *Lubbock Manufacturing Co.* v. *Perez,* 591 S.W.2d 907 (Tex. Civ. App. 1979). But we have no hesitation in joining those that require a full disclosure in cases such as this. *General Motors Corp.* v. *Lahocki,* 410 A.2d 1039 (Md. App. 1980); *Gatto* v. *Walgreen Drug Co.,* 337 N.E.2d 23 (Ill. 1975); *Ward* v. *Ochoa,* 284 So.2d 385 (Fla. 1973); *Pellett* v. *Sonotone Corp.,* 160 P.2d 783 (1945); *See* 65 ALR3d 602. The testimony of Shelton and Smith was critical to Artie Little's case against Firestone. And, as it turns out, their testimony was no doubt a strong factor in the jury's determination that Firestone's RH5° rim was the sole cause of the accident and the complete exoneration of Shelton and Smith. It is readily apparent why the jury should know of any deals these parties made. As the Florida court said in the case of *Ward* v. *Ochoa, supra*:

Secrecy is the essence of such an arrangement, because

> the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's conduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret 'Mary Carter Agreement.'
>
> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion.

Firestone's most ardent argument is that the case should be dismissed because it is impossible that the wheel in evidence is the accident wheel.[1] The entire lawsuit focuses on the RH5° rim base which Firestone had manufactured from 1946 to 1973. It is not disputed that almost twenty-five million such rims were manufactured. The rim base consists of two parts, an outer ring, which is the part that supposedly flew off and struck Artie Little, and the base itself, which is the widest part of the rim and on which a disc is either bolted or welded. The disc is the part that contains the bolt holes. Besides the bolt holes, the disc has several large hand holes.

Firestone's argument that the wheel in question could not have caused the accident is premised on the testimony of the truck driver, Shelton, and Smith, the wheel introduced into evidence, testimony of certain Firestone employees, and other exhibits. The testimony was: The owner, Shelton, said he bought the trailer in question in 1968 and had never changed the wheels. The previous owner testified there had never been a multi-piece wheel on the trailer. (That would exclude the wheel in question.) Baker, the driver, said the day before the accident he noticed the left front outside wheel on the tandem trailer was flat. The next morning Jackson

[1]Firestone concedes the wheel introduced was manufactured by Firestone. The outer ring was manufactured in 1960, the inner ring in 1971.

Smith fixed the flat with Baker's help. Baker left Smith's station and drove about four blocks when he saw Artie Little walking along and then saw her disappear. He stopped his truck and ran to her assistance. He found that the tire that had been fixed had exploded and Artie Little was thrown into a ditch. Apparently the rim had come off and struck her. The base and tire were still on the truck, but the tire was in shreds. What happened next to the outer rim and wheel is somewhat in dispute.

Smith said the ring and rim were brought to his station where he kept them inside the building on a junk pile until someone picked them up. The truck owner, Shelton, said he picked them up at the accident scene, took them home and cut out the "eye" of the disc so it could not be used by anyone else. The "eye" is merely the center of the disc where the bolt holes are located. Baker, the driver, said he also went to Shelton's. Shelton said he had both the remaining disc and the ring which were picked up at his place by one of the lawyers. The "eye" he cut out was never produced. It was this wheel assembly that was introduced by Artie Little as the Firestone product that caused the accident. Shelton testified that he was convinced that the wheel assembly in evidence was the one that came off the truck; Baker testified that the wheel in evidence was exactly like the accident wheel.

Firestone produced evidence that the wheel in evidence had only five "hand holes" and they never produced a "five hand" hole assembly that only had six bolt holes — it either had eight or ten bolt holes. A technical adviser for Firestone examined the trailer and testified that the axle on Shelton's trailer could only take a six bolt wheel. Furthermore, when the assembly was shown to Jackson Smith at trial, he said that the assembly could not have been the one he put on that day because the outer ring would easily slip off the base and it would not hold as an RH5° should. He said, however, that he was not mistaken that the wheel he put on the truck that day was an RH5°; he had handled thousands of them. Furthermore, he said he knew they were dangerous and had cautioned his customers that used them.

Mr. Roger B. McCarthy, an engineer from California employed by Failure Analysis Associates, said he tried to duplicate the rim assembly in evidence. He said such an assembly would not hold sufficient pressure to be driven (which would be 85 to 90 pounds), and would come apart at about 45 pounds pressure. He said he filled the tire three times with water and it came apart each time at about 45 pounds.

Firestone's argument, of course, is one that should be made to the jury. We cannot find that it was physically impossible that the wheel actually introduced was not the accident wheel. *General Motors Corp.* v. *Tate,* 257 Ark. 347, 516 S.W.2d 602 (1974), is cited by the appellant as controlling on the issue of the weight to be given the defendant's evidence of the physical impossibility of the accident occurring in the way the plaintiff claims. We held in *General Motors* that such evidence may not be arbitrarily and capriciously disregarded by the trier of fact. In this case the defendant's facts were disputed. The appellee produced witnesses that said the wheel in evidence *was* the accident wheel. While Firestone raised serious questions about the authenticity of this rim, it was for the jury to decide which witnesses to believe. *Circle Realty Co.* v. *Gottlieb,* 267 Ark. 160, 589 S.W.2d 574 (1979). Actually we cannot say it was essential in this particular case that Artie Little produce the accident wheel.

There is no doubt Firestone was harmed by the admission of certain documentary evidence, and its admissibility was the subject of most of the other objections raised by Firestone. One of the most damaging documents was a letter written in 1969 to an attorney involved in litigation over a multi-piece wheel. It was written by Paul Hykes, an engineer who worked for the Budd Company, which bought the Firestone RH5° rims and used them in the manufacture of wheels. The letter said, in part:

> I am convinced that the RH5° Rim, aside from the safety aspect, has more than its share of field failures.
>
> The RH5° Rim is a clever design, two continuous

rings vs. one split ring on other two piece demountable side ring rim and designs or one split lock ring on the three piece versions. This permits lighter weight, lower cost. The material used is comparable to that used in other designs of rims. Its faults are:

1. It is more subject to dangerous wear than many other designs.

2. The only time that this dangerous wear can be detected is when the rim is dismantled.

3. It can be put together improperly and subsequently blow-apart when new.

4. It is easier to put it together improperly when it is badly worn.

5. It is more difficult to detect improper assembly on the RH5° than it is on competing rims.

From the foregoing, you can readily understand why I ask the question, 'Why has this Rim not been removed from the market?'

The letter was accepted into evidence as notice to Firestone in 1969 that its rim was deficient in several respects. Firestone argued that it was hearsay, irrelevant and not authenticated. After the trial, Firestone took Hykes' deposition and apparently he significantly qualified the statements in the letter. The letter was admitted to prove notice to Firestone, not to prove the truth of the assertions in the letter and, therefore, was admissible under Ark. Stat. Ann. § 28-1001, Rule 801 (Repl. 1979). We cannot say the trial court abused its discretion in allowing the letter; on retrial Firestone should be permitted to introduce Hykes' deposition taken after the trial.

Another objection concerning the same letter arose because W. H. Sanders, a lawyer for Firestone, wrote to other counsel for Firestone, and attached the Hykes letter. Sanders' letter was admitted into evidence; it said:

> Dear Jim:
>
> With an appalled silence I hand you herewith the report from the former Executive Engineer of the Budd Company.
>
> I am at a loss to know why Budd personnel, or former personnel, are so critical of a product that Budd sold.
>
> I would be most interested to know where Budd stands on this matter and whether it endorses the position taken by Morrison and Hykes.
>
> I still can't bring myself to believe, or really give any credence to these criticisms of this rim. If these men are right, then the rim should not be sold, but it is sold, it is apparently providing good service, and from what Mr. McCusick had to say, I gather that these men could not come up with a safer type of rim to use.

The letter made its way to the Budd Company and Budd surrendered it in a lawsuit in answer to a discovery motion. Firestone argues the letter was inadmissible under Ark. Stat. Ann. § 28-1001, Rule 502, which provides a privilege for confidential attorney/client communications. We deem the privilege waived. Firestone should have never allowed the letter into the hands of Budd; by doing so Firestone has waived any right to claim the privilege. Ark. Stat. Ann. § 28-1001, Rule 510.

On rehearing, the appellant argues that a letter written by Mr. Lynn L. Bradford in October, 1979, Acting Director of the Office of Defects Investigation Enforcement of the National Highway Traffic Safety Administration, was not admissible as notice to Firestone because it was written after the accident in question. In our first opinion issued in this case we held that we could not say the trial court was wrong in finding that the letter was admissible. The arguments made by Firestone on appeal were that the letter was hearsay and Mr. Bradford did not have the legal authority to demand a recall. On rehearing, Firestone argues that the letter could

not be notice because it was mailed after the accident in question. We reconsider this issue only because the matter will arise again on retrial and we should dispose of it. The letter was written after the accident in question and on the face of it we cannot say the letter referred to accidents or incidents which occurred before the accident in question, although it is very likely that is the case. On a retrial the letter should not be admitted because any probative value is outweighed by possible prejudice.

Firestone suggests throughout its brief that complaints made to Firestone are not evidence that there was a defect in the design of the wheel or that Firestone was under any duty to take any action. Subject to the trial court's discretion, evidence of the complaints is admissible as notice and is not hearsay. *See* McCORMICK'S EVIDENCE § 249 (1972 ed.). Moreover, it was up to the trial judge to decide whether these documents were relevant. *See* Ark. Stat. Ann. § 28-1001, Rule 104. And, it is within the province of the jury to decide if the evidence actually amounted to notice to Firestone.

Firestone argues that many other evidentiary decisions made by the trial judge were in error. Evidence of the National Highway Transportation Safety Association's investigation of the RH5° wheel, evidence that the Utah Industrial Commission issued a tentative order banning the RH5° wheel in Utah,[2] and nine memorandums, most of them interoffice between Firestone employees which discuss problems with the RH5° wheel, were admitted into evidence over the objection of Firestone. All posed questions of notice and relevancy and were subject to the trial judge's discretion. The evidence of 145 prior accidents involving the RH5° wheel admitted was also relevant to the question of notice. *Arkansas Power & Light* v. *Johnson,* 260 Ark. 237, 538 S.W.2d 54 (1976); McCORMICK'S EVIDENCE § 200 (1972 ed.).

Firestone argues that proffered testimony of Roger

[2]Firestone sought to introduce the final order of the Commission which did not ban the wheel. The order was not on Firestone's pretrial list and the judge excluded it. No doubt it should be admitted on a retrial, if properly presented, to rebut the claim for punitive damages.

McCarthy regarding the accident rate associated with the RH5° wheel as compared to other sorts of accidents, as well as other proffered testimony, should have been admitted. McCarthy was allowed to testify extensively. The admission and exclusion of expert testimony is a matter which lies within the sound discretion of the trial judge, and we find no reversible error. *White* v. *Mitchell,* 263 Ark. 787, 568 S.W.2d 216 (1978); *Phillips Construction Co.* v. *Williams,* 254 Ark. 824, 496 S.W.2d 417 (1973).

The trial judge, in all of these evidentiary matters, must be afforded broad latitude. He, alone, has heard and seen all the evidence and he, alone, is in the best position to decide what evidence would aid the jury and what would only confuse the issues. And, unless we can say he was clearly wrong, we will not substitute our judgment for his. Ark. Stat. Ann. § 28-1001, Rule 104; *See Arkansas State Highway Commission* v. *N.W.A. Realty Corp.,* 262 Ark. 440, 557 S.W.2d 620 (1977) and 3 WEINSTEIN'S EVIDENCE par. 702[2] (1981).

It is unlikely that the remarks made by Artie Little's counsel regarding a former employee of Firestone's who was terminated after giving a deposition will occur on retrial. These and other remarks of counsel which were objected to are unlikely to occur during a retrial.

Firestone was precluded from admitting evidence of their long-term support of an Occupational Safety and Health Administration regulation that required employers to train their employees in the proper servicing of multi-piece wheels. There was evidence that in 1976 Firestone considered placing warning labels on the rim, but employees could not agree on what the warning should say. An expert on communications advised that a warning might cause more harm than good and the idea was dropped. Instead, Firestone launched a program to educate users how to properly service the rim. We think that the evidence should have been admitted to rebut Artie Little's allegations that Firestone's conduct was willful and wanton and for that purpose alone. *See Johnson* v. *Niagara Machine and Tool Works,* 666 F.2d 1223 (8th Cir. 1981).

On rehearing, Firestone argues that the jury's answer to one interrogatory, that Firestone did not supply the wheel in a defective condition which rendered it unreasonably dangerous, precludes that issue from being relitigated. This case was submitted on alternative theories of liability and AMI Instruction 1012 was given to the jury. The alternative theories were strict liability and negligence. The jury was asked to answer two interrogatories regarding Firestone's fault. The jury was asked:

> Do you find from a preponderance of the evidence that Firestone Tire and Rubber Company manufactured a RH5° wheel assembly which was supplied in a defective condition which rendered it unreasonably dangerous, and that its defective condition was a proximate cause of the occurrence?

The jury answered no. The jury was also asked:

> Do you find from a preponderance of the evidence that Firestone Tire and Rubber Company was guilty of negligence which was a proximate cause of the occurrence?

The jury's answer was yes, one hundred percent. Firestone's argument is that the jury, in effect, returned separate verdicts, and the jury's answer of "no" to the first interrogatory precludes a retrial on the issue of strict liability for a manufacturing defect because it is *res judicata.* Firestone cites *Womack* v. *Brickell,* 232 Ark. 385, 337 S.W.2d 655 (1960) as authority for its position. We disagree that the issue of strict liability is *res judicata.* We do not find that the interrogatories in this case amounted to separate verdicts. The appellee could not have appealed from the finding by the jury that Firestone was not liable under the strict liability theory. In the *Womack* case, either party could have appealed from the jury's finding. In a law case the verdict is an entirety which cannot be divided. *Wilson* v. *Davis,* 230 Ark. 1013, 328 S.W.2d 249 (1959).

There was substantial evidence in the record to support the jury's finding of negligence on the part of Firestone. The

jury could have decided that Firestone was negligent in ignoring the notice it had received regarding the problems with the RH5° or in failing to warn of the dangerous propensities of the RH5° wheel. Since there was substantial evidence to support one of the several theories of liability, the appellee is not precluded from presenting its case on either or both theories on a retrial.

We have reviewed the record and find no other reversible errors.

Reversed and remanded.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I would hold that the issue as to defective manufacturing of the wheel is *res judicata* on retrial.

Noel Richard BELANGER *v.* Brenda Joyce Packor BELANGER

82-100 637 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered July 12, 1982
[Rehearing denied September 13, 1982.*]

Hoofman & Bingham, P.A., by: *John Biscoe Bingham;* and *Scott Manatt,* for appellant.

Burris & Berry, for appellee.

DARRELL HICKMAN, Justice. The only real issue in this case is whether the chancellor improperly awarded alimony. We conclude that he did and reverse the decree of the chancellor.

Noel Richard Belanger and Brenda Joyce Belanger were married in New Hampshire in 1968. They lived together until they separated in 1978; at that time they were living in North Carolina. An attorney in North Carolina prepared a

*DUDLEY, J., not participating.

property settlement agreement and although the written agreement was not produced, there is no doubt that Noel Belanger signed it and that Brenda Belanger complied with it. In the agreement, the Belangers agreed to sell the houses they owned in Florida and North Carolina and split the proceeds, which they did. Each got $10,400 from the Florida property. Mr. Belanger got a 1978 Chevrolet and Mrs. Belanger got a 1966 Buick. They also divided other personal property. They agreed to keep two acres of real property they owned in New Hampshire.

Mr. Belanger moved to Arkansas and filed for divorce in Clay County in 1978. The chancellor awarded a divorce to Mrs. Belanger which was not contested as to grounds. After hearing the testimony of the parties, the chancellor found that the following items constituted marital property pursuant to Arkansas law:

1. $1,600 in a North Carolina savings & loan.
2. A Corvette belonging to Mr. Belanger.
3. A Chevrolet belonging to Mrs. Belanger.
4. A Ford pickup belonging to Mr. Belanger.
5. Five guns belonging to Mr. Belanger.
6. One canoe belonging to Mr. Belanger.
7. 250 shares of stock.

The chancellor ordered that if the parties could not agree to a division of the property it would be sold and the proceeds evenly divided. Then he made an award of $500 per month alimony to Brenda for a period of forty-eight consecutive months. The chancellor said he was making this award because, "I think the alimony award that I will make will even out what interest she might have in that property." "That property" to which the chancellor was referring was an interest Mr. Belanger had acquired in a residence in Pocahontas, Arkansas. Mr. Belanger had entered into a lease-purchase agreement, paid $5,000 down and agreed to pay $5,000 more six months later toward a total purchase price of $68,000. The other piece of property was a residence located in Corning, Arkansas. Legal title to the property was

in the name of Mr. Belanger's parents but the chancellor found Mr. Belanger had equitable title to it since he had made most of the payments.

The alimony award was used as a substitute for awarding Mrs. Belanger an interest in the real estate — and not for any other reason. Since the chancellor found that the real estate was not marital property, a division could not be made through an award of alimony. The chancellor made no findings that would justify the award according to Ark. Stat. Ann. § 34-1214 (Supp. 1981).

Mrs. Belanger's attorney claims that the property settlement agreement was never introduced, there was no pleading or claim that it should be enforced, and, therefore, it cannot control. But that agreement and the subsequent action of the parties were the focus of the dispute, and the court no doubt considered the agreement in making his decision. Mrs. Belanger did not deny its existence; in fact she testified:

> Q. Did y'all agree to divide everything between you and take what each party wanted at that point in time?
>
> A. Yes, sir.
>
> Q. Your answer is yes you did reach that agreement?
>
> A. Yes, sir.

And she conceded that the agreement was carried out. The Belangers no doubt entered into an agreement in North Carolina and performed according to the agreement. Mr. Belanger took his part of the proceeds from the sale of their property, investing it in Arkansas, and Mrs. Belanger received her portion of their property. The parties were bound by their acts and neither sought to reject the division of property.

The effect of the chancellor's alimony award is to allow Mrs. Belanger to receive her portion of the property settlement as well as all or a part of Mr. Belanger's share of that settlement.

Consequently, the alimony award was improper and in that regard the decree is reversed and the cause remanded for any other proceedings.

Reversed and remanded.

Billy A. PUTERBAUGH, d/b/a PUTERBAUGH CONSTRUCTION COMPANY & PUTERBAUGH ENTERPRISES, INC. *v.* L. Weems TRUSSELL, Individually, and L. Weems TRUSSELL, Executor of the Estate of Nona Lee TRUSSELL, Deceased

82-135 637 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., for appellant.

Samuel N. Bird of *Williamson, Ball & Bird*, for appellee.

DARRELL HICKMAN, Justice. A Dallas County jury returned a verdict for $15,000 against Billy Puterbaugh. The verdict was reduced to judgment on June 19, 1979. Puterbaugh filed a timely notice of appeal and a motion for a new trial. A hearing on the motion for a new trial was conducted on August 27, 1979. On December 30, 1980, sixteen months after the hearing, Judge Melvin Mayfield denied the motion.

Puterbaugh states, and it is not refuted, that he only learned of the order through a conversation with a local attorney on April 6, 1981. On May 19, 1981, Puterbaugh filed a motion to have the jury verdict set aside. A hearing was had on that motion on August 5, 1981, before Circuit Judge Don Gillaspie, Judge Mayfield's successor. On August 21, 1981, Puterbaugh amended his motion to request both that the jury verdict be set aside and that the denial of the motion for a new trial be set aside because of lack of notice. Judge Gillaspie entered an order on September 21, 1981, which denied the motion to set aside the judgments, and ruled that Puterbaugh failed to demonstrate any unavoidable casualty, because he had failed to show that he was not negligent. From that ruling comes this appeal.

At the hearing before Judge Gillaspie, the clerk of the court when Judge Mayfield's December order was entered, testified that Judge Mayfield mailed a copy of his order to Puterbaugh's counsel on the day it was entered. She said that the judge addressed the envelope himself, using the address

for counsel shown on all the correspondence and pleadings in the case file.

The issue before us is whether the trial judge abused his discretion in finding that Puterbaugh was not the victim of an unavoidable casualty. *Davis* v. *McBride,* 247 Ark. 895, 448 S.W.2d 37 (1969); ARCP Rule 60 (c) (7). We cannot say the judge was wrong in his determination and, therefore, we affirm.

There was evidence that neither Puterbaugh nor his counsel made any inquiry as to the status of the motion for a new trial in the sixteen months between the hearing and the entry of the order denying the motion, or in the four months between the time the order was entered and Puterbaugh got actual notice of the order. As we said in *Davis* v. *McBride, supra*:

> Parties served with summons must thereafter take notice of the pendency of the suit and subsequent proceedings. A party seeking relief against a judgment on the ground of an unavoidable casualty must show that he has been diligent and without negligence.

And, while there may have been no actual notice to Puterbaugh or his counsel, Puterbaugh did learn of the order on April 6, 1981, and waited over thirty days to challenge the order.

Puterbaugh argues that Judge Gillaspie refused to set aside Judge Mayfield's order because the motion for relief was not filed within thirty days after Puterbaugh got actual notice of the order. No doubt that was a consideration but Judge Gillaspie found:

> That the defendants have failed to demonstrate an unavoidable casualty or misfortune preventing appeal in that more than thirty (30) days elapsed between the time that actual and admitted knowledge of the entry of the December 30, 1980, Order was received by the defendants and the filing of their Motion for Relief. Clearly defendants have demonstrated a lack of dili-

gence in these proceedings since entry of the original judgment.

We interpret those findings to mean that the judge did not find that Puterbaugh was without negligence, and, therefore, he was not entitled to relief on the ground of unavoidable casualty. That was a decision within the judge's discretion and to overrule it we would have to find an abuse of discretion — a finding we cannot make.

Affirmed.

Dixie BOWEN *v.* Joe T. DANNA and Kathryn S. DANNA

82-91 637 S.W.2d 560

Supreme Court of Arkansas
Opinion delivered July 12, 1982
[Rehearing denied September 13, 1982.]

A. Wayne Davis, for appellant and cross-appellee.

Lewis E. Epley, Jr. of *Epley, Epley & Castleberry, Ltd.,* for appellees and cross-appellants.

ROBERT H. DUDLEY, Justice. This "foreclosure" suit is for acceleration of the maturity of a debt evidenced by a promissory note, for judgment on that promissory note, for judgment on the amount the mortgagees paid for an insurance policy to protect the security and for foreclosure of the mortgage securing the debt. The appellees, the Dannas, sold their home in Eureka Springs to James A. Bowen and appellant Dixie Bowen. As a part of the consideration the Bowens executed a promissory note and a mortgage which contained clauses providing for acceleration of maturity in the event of default. Prior to suit being filed, James A. Bowen, a separate defendant who was not married to Dixie Bowen, conveyed all his interest in the home to Dixie Bowen who alone appeals. The complaint alleges and the proof shows that the Bowens were consistently late in making the monthly installment payments but appellees accepted all payments until the month suit was filed. The Bowens did not pay the real estate taxes and, as a result, the property was sold to the State at a tax sale two weeks before the complaint was filed. The property was redeemed by appellant Dixie Bowen about two weeks after the filing of the complaint. In addition, after this suit was filed the company insuring the property gave notice to the parties that the policy was about to expire. Subsequently, the policy was allowed to expire.

Still later, the insurance company mailed reinstatement notices to the parties and appellees, the Dannas, paid the premium to have the policy reinstated. Eighteen days after the appellees had reinstated the policy, the appellant, who had insufficient funds in her bank account on that particular day, tendered a post-dated check as reimbursement to appellees. They refused to accept the post-dated check and, instead, amended their complaint to allege failure to maintain insurance on the premises as an additional basis for judgment and foreclosure.

The chancellor held that the failure to maintain insurance coverage was the default of a specific condition which authorized appellees to accelerate the maturity of the debt. Consequently, judgment was granted for all principal, unpaid interest to date of judgment, interest accruing from judgment until collected, payments for maintaining insurance coverage, attorney's fees and the property was ordered sold if the judgment was not paid within 90 days. The Court of Appeals, by a written opinion handed down on March 10, 1982, reversed the trial court. However, upon the filing of a petition for rehearing the Court of Appeals withdrew its opinion and certified the case to this court under Rule 29 (1) (c) as the case involves the interpretation of an act of the General Assembly. We affirm the trial court.

The appellant first argues that the chancellor erred in refusing to apply Ark. Stat. Ann. § 85-1-208 (Add. 1961), the "good faith requirement" for acceleration of the maturity date, which is as follows:

> Option to accelerate at will. — A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

The question is whether the phrase "in the event of default," as contained in the note and mortgage in this case, should be considered in the same light as "at will" or "when he deems himself insecure" or words of similar import contained in the statute. If they are the same, a requirement of good faith attaches to any acceleration of maturity provision, whether exercisable "at will" of the creditor or only upon the occurrence of a specific event which is exclusively in control of the debtor. The chancellor found the requirement was not applicable because the promissory note did not provide that the holder could accelerate it at will or when he deems himself insecure but could only accelerate it upon default by the debtor in making the payments or in keeping the premises insured or in paying the taxes. We affirm.

In the original opinion of *Seay* v. *Davis,* 246 Ark. 201, 438 S.W.2d 479 (1969), we applied the good faith requirement to an acceleration clause in a note and mortgage even though there was default in a specific condition. "The note in this case falls within the intent of the code, its language being that in the event of default the note may be accelerated 'at the option of the holder.'" However, in a supplemental opinion, *Seay* v. *Davis,* 246 Ark. 627, 438 S.W.2d 479 (1969), we modified our opinion:

> In a petition for rehearing the appellants insist that the Code applies only when the contract permits the creditor to accelerate the maturity "at will," or words to that effect, whereas here there is also a condition in the contract that the debtors must be in default. The Commissioners' Comment to the cited section of the Code lends support to the appellant's argument, for it refers to an acceleration "at the whim and caprice of one party." . . .
>
> We think it proper to modify our original opinion by leaving that question open for future decision . . .

The Court of Appeals in the case of *Rawhide Farms, Inc.* v. *Darby,* 267 Ark. 776, 589 S.W.2d 210 (Ark. App. 1979), applied the statute in a case involving default in a specific condition, but in so holding, erroneously relied only upon

the original *Seay* v. *Davis* opinion as can be seen from the following quote at page 782:

> Although that section seems designed to apply only to "acceleration at will" clauses, it was applied in the *Seay Case* where the mortgage clause was described by the Arkansas Supreme Court as providing for acceleration *in the event of default* at the option of the holder.

The Court of Appeals recognizing the statutory interpretation issue has now certified this case to us.

The author of an article in 11 Boston Col. L. Rev. 531 notes that:

> . . . Clauses which allow acceleration on the occasion of the insecurity of the creditor are expressly allowed under Section 1-208 of the Code. *Section 1-208 is not concerned with default type acceleration clauses.* The Code implicitly allows a default type acceleration clause since on default a secured party has the right to repossession of the collateral without judicial intervention; the creditor need only enumerate the occasions of default within the contract. [Emphasis supplied.]

The North Carolina Court of Appeals interpreted the good faith clause in like manner in *Matter of Sutton Investments, Inc.,* 266 S.E.2d 686 (N.C. App. 1980). There the buyer of a shopping center did not keep up with the payments so the seller declared the entire balance due under authority in the deed of trust permitting acceleration for failure to make payment when due. The buyer asserted that the seller's lack of good faith should preclude him from further action. The court noted:

> . . . This contention is without merit. The statute relied upon is that portion of the Uniform Commercial Code which imposes a good faith requirement upon the exercise of a secured creditor's option to accelerate "at will" or "when he deems himself insecure." "These clauses are clearly distinguished from default-type clauses . . . where the right to accelerate is conditioned

> upon the occurrence of a condition which is within the control of the debtor" . . . the right of acceleration upon which Richardson's rights depend in the present case is conditioned upon the occurrence of an event within the complete control of the debtor, i.e., compliance with the terms and conditions contained in the Note and the Deed of Trust. Thus, assuming arguendo that G.S. 25-1-208 is applicable to real property transactions, it is inapplicable to the type of acceleration clause at issue in the present case.

The Missouri Court of Appeals also treated the question in *Don Anderson Enterprises, Inc.* v. *Entertainment Enterprises, Inc.,* 589 S.W.2d 70 (Mo. App. 1979). A monthly payment due on the purchase price of a sale of three taverns was not made and the seller accelerated the entire amount due pursuant to the sale agreement and the note. The court noted:

> Defendants' brief contains a second point which can be dismssed with a brief discussion. The contention is that the trial court erred in failing to give any accord to the "good faith" requirement of Section 400.1-208 RS Mo. 1978. The statute clearly reflects that it is concerned with situations where a creditor can deem itself "insecure" and accelerate the balance due "at will." Neither the sale agreement nor the note in the present case provided for such an option. Section 400.1-208 RS Mo. 1978 is inapplicable to this case.

Likewise, we hold that Ark. Stat. Ann. § 85-1-208 is inapplicable where the right to accelerate is conditioned upon the occurrence of an event, such as a lapse of required insurance coverage, which is in the complete control of the debtor. To this extent we modify *Rawhide Farms, Inc.* v. *Darby,* supra, and we affirm the chancellor's refusal to apply the statute. Consequently, we do not address appellant's arguments which are based solely upon the statute.

The appellant next contends that there should not be an acceleration of the maturity of the debt because there was substantial compliance with the requirement of insurance.

She offered a post-dated check 18 days after appellant had reinstated the policy and she obtained a separate policy 4 months and 12 days after reinstatement. At trial, she testified that she stood ready to make reimbursement. Thus, she contends, that by the date of the decree of foreclosure she had substantially complied with the required condition.

Clearly a court of equity can relieve a debtor from the hardship of acceleration of maturity. "Apart from the Code . . . a court of equity will protect a debtor against an inequitable acceleration of the maturity of the debt." *Seay* v. *Davis,* supra at 628. Equitable grounds which can prevent a default type of acceleration of maturity include accident, mistake, fraud or inequitable conduct of the creditor. *Johnson* v. *Guaranty Bank & Trust Co.,* 177 Ark. 770, 9 S.W.2d 3 (1928). However, the chancellor found no equitable grounds to prevent acceleration:

> . . . Dixie Bowen has failed to show . . . any fraud or other inequitable conduct . . . or sufficient accident or mistake on her part by which the court can relieve her from acceleration . . .
>
> * * *
>
> . . . the plaintiffs have shown . . . that they are entitled to acceleration . . . by reason of . . . Dixie Bowen's allowing the insurance coverage . . . to lapse without showing sufficient excuse on her part for permitting the insurance coverage to lapse. Had the plaintiffs not acted to obtain their own insurance coverage, the property would have been uninsured for a period of at least one month . . .

The chancellor's finding of facts will not be reversed unless clearly erroneous. ARCP Rule 52 (a); *Sharp County* v. *Northeast Arkansas Planning and Consulting Co.,* 269 Ark. 336, 602 S.W.2d 627 (1980). On the facts before us, we cannot state that the chancellor was clearly in error in finding that appellant failed to prove fraud or inequitable conduct on the part of the appellees or that she failed to prove accident or mistake on her part.

Appellant next contests (1) the payment of attorney's fees and (2) the amount of those fees. Appellant, for the first time on appeal, raises a technical argument involving a difference in the language of the note and the mortgage concerning default. The point should have been raised in the trial court if the validity of attorney's fees was to be put at issue. Even in trial de novo of an equity case, issues cannot be first raised on appeal. *Ragge* v. *Bryan,* 249 Ark. 164, 458 S.W.2d 403 (1970). Therefore we do not consider the argument that the awarding of attorney's fees was invalid.

The argument going to the amount of attorney's fees is on a different footing. Appellant in her answer pleaded "that an award equal to ten percent of the unpaid principal and interest would be unconscionable." After the trial court awarded ten percent of the unpaid principal and interest as attorney's fees, or $9,427.68, the appellant filed a motion asking the trial court to modify that amount. However, appellant withdrew the motion without presenting any evidence on the point. Thus, while the issue is before us, the appellant has made no showing of an abuse of discretion by the trial judge in setting the fee. The record does not disclose the time, labor or overhead involved, nor does it disclose the customary charge of the bar for similar services. We only know the amount of the unpaid principal and interest, the amount of the fee and that this particular action was a complex foreclosure involving a trial on the merits, with subsequent appeals to the Court of Appeals and now the Supreme Court. The amount of attorney's fees is within the sound discretion of the trial court and will not be modified unless there is a showing of an abuse of that discretion. *New Hampshire Ins. Co.* v. *Quilantan,* 269 Ark. 359, 601 S.W.2d 836 (1980). On the limited record before us we cannot state that there is an abuse of that discretion.

The appellees have cross-appealed and advance two additional reasons to affirm the judgment. They contend that the trial court erred in not finding a default for failure to pay taxes and in not finding a default for failure to timely make installment payments. However, there is no need to decide if there are two additional reasons for granting the same relief. "A cross appeal is required only when the

appellee seeks affirmative relief that he failed to obtain in the trial court, not when he won the case below and merely asks that the judgment be affirmed." *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979).

Affirmed on direct and cross-appeal.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority opinion in this case for several reasons. The first payment on the promissory note in this case was due on January 1, 1977. The note was in the original amount of $92,000 and was secured by a real estate mortgage on the property in question. It is not disputed that almost all of the payments, in the amount of $1,000 per month, were tendered and accepted routinely up to two weeks past their due date. The appellant had initially made a $36,000 payment when she purchased the property. When the May 1, 1979, payment was received by the appellees on May 12th it was refused and returned to the appellant. They also refused the payments for June, July and August. Apparently, all other monthly installments were paid into the registry of the court up to the date of the trial.

The promissory note in question provided, "if default be made in the payment of any installment when due, either principal or interest, then all remaining installments shall, at the option of the holder, become due and payable at once." The trial court allowed payment of attorney's fees on the balance of the note at 10%. However, there was no finding by the court that the appellant was in default on the note. Therefore, there should have been no attorney fees allowed because none are provided for in the mortgage. The mortgage required the appellant to pay the taxes and insurance on the property and provided that in default of payment on the note or upon failure to keep the insurance and taxes paid appellees could exercise an option to declare the balance due. The power reserved to the appellees in the mortgage was that they would have the right to take possession of the property without process of law and to sell it at public sale with or without notice to the appellant.

Since the court did not find that the appellant defaulted on either payment of the taxes or in the payment of principal and interest on the note, they will not be considered further in this dissent. I will only state that the property was redeemed before the end of 1979 which was less than three months after the due date.

Although the suit was filed on December 12, 1979, the appellees did not amend their complaint to allege a forfeiture on the insurance clause until June 26, 1980. Obviously, this was an afterthought and put in merely for the purpose of insuring their ability to reclaim this property upon which they had collected an initial payment of $36,000 and a considerable amount through monthly payments. The appellant had tendered to the appellees the payment of the insurance premium on March 10, 1980, which was more than three months prior to the filing of the suit. Appellant alleged she was ready, willing and able to pay this insurance premium at all times after tender of the payment on March 10, 1980. The decree of the chancellor was not filed until February 19, 1981. The record indicates that all payments had been made into the registry of the court up until this date. Also, the taxes had long since been paid and additional insurance had been enforced on the policy for about a year.

I agree with the majority that Ark. Stat. Ann. § 85-1-208 (Add. 1961) does not apply in this case because there was no acceleration "at will" clause in the note or mortgage. In other words, the security had never been in danger and there was no reasonable expectation on the part of the appellees that their security was in danger. In my opinion, the foreclosure was unconscionable, inequitable and undertaken solely for the purpose of attempting to cause the appellant to forfeit the considerable amount of money which she had paid on this property. The law abhors a forfeiture. We have held that courts of equity will protect a debtor against an inequitable acceleration of the maturity of the debt. *Crone* v. *Johnson,* 240 Ark. 1029, 403 S.W.2d 738 (1966); *Pulaski Federal Savings & Loan Ass'n.* v. *Woolsey,* 242 Ark. 612, 414 S.W.2d 633 (1967). Therefore, I would reverse the decision of the trial court.

Bruce BURTON *v.* BANK OF TUCKERMAN

82-120 637 S.W.2d 577

Supreme Court of Arkansas
Opinion delivered July 12, 1982

David Hodges, for appellant.

James A. McLarty of *Pickens, Boyce, McLarty & Watson,* and *C. Eric Hance,* for appellee.

ROBERT H. DUDLEY, Justice. In 1972 the Circuit Court of Jackson County entered a judgment for the appellee Bank of Tuckerman and against appellant Bruce Burton. The judgment was not satisfied and in August 1980 appellee sought to revive the judgment by causing a writ of scire facias to be issued. The writ ordered appellant to appear in court within twenty days and show cause why the judgment

should not be revived and the execution levied. Appellant received a copy of the petition for writ of scire facias as well as the writ of scire facias by certified mail at his address in Memphis, Tennessee. He filed a response denying the allegations in the petition and alleging that it was barred by the statute of limitations. No further action was taken until April 1981, when the appellee filed a second petition for writ of scire facias, obtained a writ directing the appellant to show cause why the judgment should not be revived and caused a warning order to be issued by the clerk commanding the appellant to appear. An attorney ad litem was appointed and constructive service was completed. Appellant challenged the court's jurisdiction and asked the court to quash the second writ. The trial court granted appellee's second petition and ordered the judgment revived and the lien continued for a three year period from the date of the entry of the order. The question on appeal is whether this judgment was properly revived by a scire facias writ pursuant to Ark. Stat. Ann. § 29-601 et seq. (Repl. 1979). Jurisdiction is in this court pursuant to Rule 29 (1) (c). We affirm.

The appellant first argues the original judgment lien had expired by the time of the filing of the action and cites §§ 29-131 and 29-602 for this contention. Section 29-131 provides "liens . . . shall continue in force for three [3] years from the date of the judgment and may be revived." Section 29-602 recites "The plaintiff . . . may at any time before the expiration of the lien on any judgment, sue out a scire facias to revive the same." Appellant contends that action must be taken within the first three years while the lien is in effect or else a revivor action is not allowed. However, in the case of *Bird* v. *Kitchens,* 215 Ark. 609, 221 S.W.2d 795 (1940), we interpreted the statute to mean:

> . . . while the judgment lien expires at the end of this three year period, unless revived, the judgment itself remains in full force and effect for ten years, and the execution may be issued at any time within this ten year period.

The reference to the ten year period is found in § 29-601:

> No scire facias to revive a judgment shall be issued but within ten [10] years from the date of the rendition of the judgment; or if the judgment shall have been aforetime revived, then within ten [10] years from the order of revivor.

The import of this statute was explained in *General American Life Insurance Co.* v. *Cox,* 215 Ark. 860, 223 S.W.2d 775 (1949):

> . . . By its terms it grants the full period of ten years within which the writ may issue. To require that the judgment also be taken within ten years would have the effect of reducing the time allowed for issuance of the writ, since provision is made for the filing of an answer and for a hearing upon the question of revivor.

The judgment here was entered in October 1972. The appellee sought to revive the judgment in August 1980. Pursuant to § 29-601 a scire facias may issue because the ten year limitation had not run. Appellee concedes the original judgment lien expired but according to § 29-607, "... if the lien of any judgment or decree shall have expired before suing out the scire facias, the judgment of revival shall only be a lien from the time of the rendition of such judgment." The trial judge correctly revived the judgment lien for a three year period beginning in September 1981.

Appellant also argues that the service of process was not proper because personal service must be utilized before constructive service. Appellee first served appellant pursuant to the long-arm statute, Ark. Stat. Ann. § 27-2502 (Repl. 1979) by sending the petition and writ by certified mail to appellant's address in Memphis. Appellee then employed a second procedure found in § 29-604 which authorizes a method of services when a defendant cannot be found. This second form of effecting service was used because appellant, residing in Memphis, could not be found in this state within the intent of § 29-604. The method of service used was proper and the appellee complied with the posting requirements of § 29-605. The trial court was correct in ordering the judgment revived and the lien continued.

Affirmed.

Felix D. TAYLOR; Joseph TAYLOR, Jr.; Claude V. NICHOLSON; Clarence T. NALLS, Jr.; and J. H. BOOKER *v.* Stephen SAFLY, Secretary, Arkansas State Board of Law Examiners; Charles B. ROSCOPF, Chairman, Arkansas State Board of Law Examiners; ARKANSAS STATE BOARD OF LAW EXAMINERS

79-170 637 S.W.2d 578

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Petitioners, *pro se.*

G. Ross Smith, P.A., for respondents.

STEELE HAYS, Justice. This original action was filed on April 30, 1979, by petitioners, who are black, seeking admission to the bar of Arkansas without the requirement of an examination, and for the adoption of amendments to the rules of the Supreme Court governing admission to the bar. Petitioners are graduates of law schools accredited by the American Bar Association and have taken the examination of the State Board of Law Examiners at least twice, in some instances three times, and have failed to achieve a passing grade.

No evidence has been taken, consequently the only record before us is a brief stipulation of facts giving the name, age, law school and the dates and times each petitioner (other than Mr. Booker) has taken the bar examination. The stipulation recites that under Rule XII of the Rules Governing Admission to the Bar of Arkansas graduates of an accredited law school are not automatically

admitted to the bar but are required to take an examination. Petitioners' prayer for relief is that they be immediately instated as attorneys-at-law and solicitors in chancery without further qualification.

The original petition and supporting brief and argument allege a pattern and history of racial discrimination in Arkansas under segregation laws and practices. Petitioners all attended segregated grade schools and some attended black colleges. Three are graduates of the University of Arkansas School of Law, one a graduate of Howard University School of Law and one Lincoln University School of Law. Without attempting to repeat petitioners' lengthy recitation, it can be said their brief adverts to the more obvious evils prevalent under segregation.

Petitioners also allege deficiencies in the procedures of the bar examination and grading practices, citing much statistical data relative to the percentage of successes and failures by black applicants and the number of black lawyers in practice in ratio to black populations of Arkansas counties, et cetera. It would serve no useful purpose to attempt to summarize the assertions.

Four points are argued in petitioners' brief as grounds for the relief sought:

I

Petitioners should be admitted as attorneys-at-law and solicitors in chancery because of past and present racial discrimination by the State of Arkansas and the State Board of Law Examiners which are violative of petitioners' right to equal protection of the law.

II

Petitioners should be admitted as attorneys-at-law and solicitors in chancery because the State Board of Law Examiners and the rules of this court violate petitioners' right to due process of law.

III

Petitioners should be admitted as attorneys-at-law

and solicitors in chancery since Ark. Stat. Ann. §§ 25-103 (1962, Repl.) has not been repealed.

IV

The court should use its powers under Amendment 28 and its inherent powers to insure equity in bar admission rules.

We need not consider the arguments originally presented, however, because Mr. Felix Taylor, spokesman for the petitioners, acknowledged in oral argument that during the three years this cause has been permitted to lie dormant, changes have occurred affecting the petitioners themselves and the relief sought. One petitioner is deceased, two are practicing elsewhere and one is no longer in Arkansas. Of the four points originally argued, Mr. Taylor asks only that we address the fourth, by directing the Board of Law Examiners to adopt procedures enabling an applicant to have access to the questions, his own answers and model answers. Similar procedures were ordered by the Alaska Supreme Court in *Application of Peterson,* 459 P.2d 703 (1969), so that a failing applicant would have some explanation and review wherein his answers were deficient. The Alaska Supreme Court stressed that procedures for review were essential to fair process and should be "as fully protected as these same occupational rights are when questions of moral character or discipline of the applicant are involved." The court held that minimum standards of basic procedural fairness required that the applicant have access to the examination, his answers and model answers of the particular examination.

While we are reluctant to order the State Board of Law Examiners unilaterally to incorporate a review process into its practices, we are agreed the proposal has sufficient merit to justify our requesting the Board to give serious consideration to the proposal. We recognize that there may be practical problems involved, but there are obvious benefits as well, certainly to those who fail, if not to all in the broad sense of fair play. For an applicant to muster and invest the resources of time and effort necessary to meet pre-law and law school requirements, to graduate from an accredited law

school, prepare for and undergo a rigorous bar examination, only to fail it, and again, and be told he is not entitled to know how he failed or why, only that he failed, has obvious shortcomings. The process offends a sense of fairness, at least viewed from the standpoint of the candidate whose career plans are shattered.

We reject the argument that such a step will inevitably lead to appeal — testing the sufficiency of the applicants' answers against the model. But even if it did, is that, too, not to be accorded as a minimum standard of basic procedural fairness? In *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957), the Supreme Court said:

> We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland,* (U.S.) 4 Wall. 33, 379, 18 L.Ed. 366 [370].

Speaking for the court in *Goldsmith* v. *United States Board of Tax Appeals,* 270 U.S. 117 (1926), dealing with the application of a certified public accountant to practice before the Board of Tax Appeals, Chief Justice Taft said:

> The rules adopted by the Board provide that "the board may in its discretion deny admission, suspend or disbar any person." But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.

In conclusion, we invite the Board to weigh whether the simple expediency of requiring each examiner to prepare a model answer as he prepares his questions is not worth the modest effort required. If for the sake of anonymity the examiner is unwilling to meet with the few failing candidates who might request a conference, then the model

answers could at least be supplied to the secretary for dissemination to those who request them. On balance, our own view is that the added burden would be outweighed by the benefits inherent in a fairer, more open system.

For the reasons stated, the petitioners' request that we order the Board to adopt a review procedure is now denied.

GEORGE ROSE SMITH, HICKMAN and DUDLEY, JJ., concur.

DARRELL HICKMAN, Justice, concurring. I disagree that we should suggest the committee consider model answers. We should either require such a practice or not. I would not require it.

GEORGE ROSE SMITH, J., and DUDLEY, J., join in this concurrence.

O. Porter HILLARD et al *v.* J. T. STEPHENS d/b/a STEPHENS PRODUCTION COMPANY et al

81-231 637 S.W.2d 581

Supreme Court of Arkansas
Opinions delivered July 12, 1982
[Rehearing denied September 13, 1982.]

Putman, Gallman & Dickson, by: *James W. Gallman;* and *Niblock & Odom,* by: *Walter R. Niblock* and *Priscilla Karen Pope,* for appellants/cross-appellees.

Spence A. Leamons and *Ball, Mourton & Adams,* by: *E. J. Ball,* for appellees/cross-appellants.

Warner & Smith, by: *Gerald L. DeLung* and *G. Alan Wooten,* for *amicus curiae* Tenneco Oil Co. and Shell Oil Co.

MILAS H. HALE, Special Justice. This case is before the Supreme Court pursuant to Rule 29 (1) (n) as it presents issues of first impression regarding gas rights. Appellants, plaintiffs below, the "Hillards," are lessors of seven gas leases in Franklin County, Arkansas. Appellees, "Stephens," are the lessees.

The first lease was executed on or about February 6, 1957, and all of the gas produced from the wells, except that part used, retained and/or purchased by the Hillards under the leases and as modified by letter agreements was sold for use off of the premises under long-term gas purchase contracts. Stephens paid appellants over the years based on "net proceeds" which Stephens received for the sale of the gas under the long-term gas purchase contracts. Appellants contend that royalties have been underpaid.

All of the gas leases were on the same oil and gas lease form then in use in the State of Arkansas, and more particularly, the Arkhoma basin of Arkansas, but each such lease contained certain modifications. The first five of these leases provide for a royalty to the lessor as follows:

> 3. (b) The Lessee shall pay Lessor as royalty for gas the equal one-eighth (1/8) of the value of such gas calculated at the rate of "~~five cents~~" *Prevailing Market Price at Well* per thousand cubic feet while the same is being sold or used off the premises, measured according to Standard Measurement Law in the State in which the above described land lays.

The term "five cents" as set out in the foregoing provision was struck out and the term "prevailing market price" was inserted therein. Stephens paid royalty to the Hillards and the Hillards accepted the royalty payments without complaint until this suit was filed on June 28, 1979, based on the "net proceeds" from the Ark-La contracts.

Two of the leases provided for a royalty to lessor as follows:

> 3. (b) The Lessee shall pay Lessor as royalty for gas the equal one-eighth (1/8) of the value of such gas calculated at the rate of ~~five~~ *seven (7)* cents per thousand cubic feet while the same is being sold or used off the premises, measured according to the Standard Measurement Law of the State in which the above described land lays.

The term "five" as set out in the foregoing provisions of the two leases was struck out and the term "seven (7)" was inserted therein. Stephens paid royalty to the Hillards under these two leases from the commencement of production of natural gas to July 21, 1970, computed on the "net proceeds" received from the Ark-La contracts. After July 21, 1970, Stephens paid royalty to the Hillards computed at a set amount of approximately $ .16 per MCF and was unable to explain why it did not compute the royalty based on the "net proceeds" received from the sale of the gas as in the past. The Hillards accepted the royalty payments from Stephens without complaint until this suit was filed on June 28, 1979.

On June 30, 1981, the trial court held:

1. That the "prevailing market price at the well" provision of the royalty clause in the first five of the leases requires that Stephens' royalty obligation be settled on the basis of "current sales" of the gas on a daily basis through November 8, 1978, and thereafter by reference to § 105 of the Natural Gas Policy Act of 1978, 15 U.S.C.A. § 3315 which fixes the maximum price for such gas at the price specified in the existing contracts under which Ark-La purchased the gas from Stephens; and

2. That Ark. Stat. Ann. § 53-511 (Repl. 1971) converted the two leases from the fixed price of $0.07 per MCF leases to "proceeds" leases and required that Stephens' royalty obligation be settled on the basis of the "net proceeds" received by Stephens for the sale of the gas to Ark-La under the contract. The trial court awarded Hillards a judgment for $193,749.00, with prejudgment interest. Hillards appealed and Stephens cross-appealed.

The Hillards contend on appeal:

1. That with respect to the first five of the leases, they are entitled to a royalty computed on the current market value of the gas in the field determined on a daily basis the moment the gas is produced and/or delivered to Ark-La under the gas purchase contracts;

2. That with respect to the last two of the leases (the fixed price leases of $0.07 per MCF) they were entitled to a royalty computed on the "net proceeds" received by Stephens from Ark-La from the sale of the gas under the contracts, because these leases were converted into "proceeds leases" under § 53-511, and alternatively, they own all of the gas produced under these two leases on and after June 28, 1974, because these two leases were forfeited retroactively by Stephens under Ark. Stat. Ann. § 53-514 (Repl. 1971).

Stephens contends on cross-appeal:

1. That the "prevailing market price at the well" under the five leases is determined by the contracts between Stephens and Ark-La, for the sale of the gas and Stephens' payment to the Hillards of the royalty computed on the price per MCF received by Stephens under the long-term contracts discharges in full its obligation to pay royalty.

2. That § 105 of the Natural Gas Policy Act (NGPA), 15 U.S.C.A. § 3315, determines the "market value" of the Hillard gas on and after its effective date on November 9, 1978, and Stephens' payment to the Hillards of the royalty computed pursuant to § 105 of the NGPA, 15 U.S.C.A. § 3315 (the price specified in the Ark-La gas purchase contracts) discharges in full its obligation to pay royalty.

3. That payment of royalty to the Hillards computed at the rate of $0.07 per MCF as specified in the last two leases discharges in full its obligation to pay royalty because §§ 53-511 and 53-514 do not apply to gas leases, since these gas leases constituted a present sale of gas in place with all the title to such gas being vested absolutely in Stephens and none in the Hillards.

4. That if §§ 53-511 and 53-514 convert the fixed price leases (the 0.07 per MCF) into proceeds leases, then all the gas leases are converted into proceeds leases by the statute.

5. Other grounds for relief based on the doctrines of estoppel and laches and Stephens objects to the awarding of pre-judgment interest.

The first issue to be decided here is whether the "contract price" that Stephens receives according to the gas purchase contracts with Ark-La is the "prevailing market price at well" under the five leases. We hold that it is. The gas lease constitutes a present sale of all of the gas in place at the time such lease is executed; and as the gas leaves the well head, the entire ownership thereof is in the lessee, none being reserved in the lessor. Once the lessee-producer drills a well resulting in the commercial production of natural gas on the leased premises, the lessee-producer has the immediate duty to market the gas. In order to market such gas effectively, it is the custom in the industry and is usually necessary for the lessee-producer to sell the gas under a long-term gas purchase contract. In *Tara Petroleum Corporation* v. *Hughey,* 630 P.2d 1269, 1273 (Okla. 1981), the Oklahoma Supreme Court stated:

> We have recognized this necessity of the market, and we believe that lessors and lessees know and consider it when they negotiate oil and gas leases. Lessors and lessees also know that during the term of a gas purchase contract gas prices may increase, perhaps substantially. During the term a producer's revenues, fluctuations in the production aside, will not increase. Yet if royalty must be paid on the basis of a "current," steadily-increasing "prevailing price," then the lessor's share will take an even larger and larger proportion of the producer's revenues.

Following the foregoing quotation, the *Tara* court considered an example of how the lessor would continue to receive a larger portion of the revenues for the sale of the gas, if the lessor's contention were followed. Similarly, in this case, on December 1, 1981, Stephens would be receiving from Ark-La under the gas purchase contracts the sum of $0.3390 per MCF for the Hillard gas, and the Hillards contend that they are entitled to be paid royalty computed on a "prevailing market price at well" of about $2.40 per MCF with their royalty portion amounting to $0.30 per MCF, while Stephens' revenues per MCF will remain constant. If this were true, then Stephens will keep only $0.0390 per MCF from the

$0.3390 proceeds received. As stated by the Oklahoma court in *Tara,* supra, p. 1273:

> This would not be fair to the producers . . . We do not believe that the lessors in this case . . . ever contemplated that the lessors' royalty could be over half of what the producers . . . received for the gas. The better rule — and the one we adopt — is that when a producer's lease calls for a royalty on gas based on the market price at the well and the producer enters into an arm's-length, good faith gas purchase contract with the best price and term available to the producer at the time, that price is the "market price" and will discharge the producer's gas royalty obligation.

See also, *Henry* v. *Ballard & Cordell Corp.,* 401 So.2d 600 (La. Ct. Appeals, 1981). We recognize that the Texas courts have taken a different approach, see *Texas Oil & Gas Corp.* v. *Vela,* 429 S.W.2d 866 (Texas 1968) and other Texas cases that followed it.

Here, the gas purchase contracts under which the Hillard gas was sold to Ark-La were effective as long as natural gas was produced from the Hillard wells. At the time these contracts were executed, all natural gas produced in Arkansas was then being sold to either Ark-La, or Arkansas Western Gas Company, or Arkansas Oklahoma Gas Company under long-term contracts. None of Arkansas production was sold or used outside the State of Arkansas. Stephens placed in evidence a substantial number of such gas purchase contracts that accounted for the sale of substantially all of the production in Arkansas with computerized graphs reflecting the comparison of the price per MCF of the Hillard gas received by Stephens under its contract with the price per MCF under the other Stephens gas purchase contracts, and in each such case the price per MCF of Stephens gas was substantially greater than the price per MCF received by the other producers in the field. In this respect, the circuit court found as a matter of fact that Stephens had fulfilled its obligations to market the Hillard gas and stated:

> The Court, however, is of the opinion that the gas sale contracts entered into between Stephens Production Company and Arkansas Louisiana Gas Company were negotiated at arms-length and in good faith. Although there was no testimony introduced, questions were raised in the interrogatories to establish the percentage of interest of Stephens in Arkansas Louisiana Gas Company. The Court cannot conceive of businessmen of the caliber of the Stephens accepting a lesser amount for the sale of gas, the total of which would come directly to them, than they would receive as stockholders in a large gas distribution company which they would have to share with other stockholders and after additional distribution and administrative expense would reduce it further. The Court finds nothing in the record by which anyone in the early 1960s could have anticipated or predicted the inordinate increase in gas prices that has occurred in the 1970s.

We believe that this interpretation of "prevailing market price at the well" is consistent with the intent and understanding of both Homer Hillard, the Hillards' predecessor in title, and Stephens, and it is the only interpretation that operates fairly for the producer. It is not unfair to the Hillards. As long as the gas purchase contracts were reasonable when entered into, and as long as the law recognizes long-term gas purchase contracts as binding in the face of escalating prices, the law should not penalize Stephens who was forced into the gas purchase contracts in a large measure by its duty to the Hillards to market the gas efficiently and effectively. However, if the long-term gas purchase contracts executed by Stephens and Ark-La were not reasonable when entered into, if they are not at a minimum fair and representative of other contracts negotiated at the time in the field, then a different result obtains, because Stephens has not then protected its lessors (the Hillards) in discharging its duty to market the gas efficiently and effectively and there is no policy in the law requiring the courts to protect the lessee (Stephens) in interpreting the leases. But here the evidence contained in the record makes it abundantly clear and the trial court so found, that the Stephens and Ark-La purchase contracts were fair and

reasonable and that Stephens had discharged its obligation to the Hillards to market the gas efficiently and effectively. In any event, the burden of proving that the gas purchase contracts between Stephens and Ark-La were unfair or unreasonable at the time they were entered into is on the Hillards, *Tara,* supra, and in this case there is no hint that the contracts were unfair or unreasonable. Nor is it fair for the trial court to impose its own methodology and interpretation.

Since here the Stephens-Ark-La contract price per MCF of gas is the "prevailing market price at well," the lessors (the Hillards) were not entitled to any additional royalties from the producer (Stephens). In this respect the judgment is reversed on cross-appeal.

The last two leases provide for a royalty per MCF to the lessor (Hillards) as follows:

> 3. (b) The Lessee shall pay Lessor as royalty for gas the equal one-eighth (1/8) of the value of such gas calculated at the rate of ~~five~~ seven (7) cents per thousand cubic feet while the same is being sold or used off the premises, measured according to the Standard Measurement Law of the State in which the above described land lays.

The Hillards contend and the trial court held that the Hillards were entitled to have their royalty payments due them under these $0.07 per MCF leases computed on the "proceeds" received by Stephens under the long-term gas purchase contracts between Stephens and Ark-La because § 53-511 converted these last two leases from "fixed price" leases into "proceeds" leases. Section 53-511 provides:

> It shall be the duty of both the lessee, or his assignee, and any pipe line company, corporation or individual contracting for the purchase of oil or gas under any oil, gas or mineral lease to protect the royalty or lessors interest by paying to such lessor or his assignees the same price including such premiums, steaming charges, and bonuses of whatever name, for royalty oil or gas

> that is paid such operator or lessee under such lease for the working interest thereunder.

Although the foregoing statute has been in effect since 1929, no cases were found where the statute was interpreted insofar as it applies to the production and marketing of natural gas.

If, as the trial court held, § 53-511 converts all "fixed price" gas leases into "proceeds" leases, it follows that fixed prices favorable to a lessor or higher "fixed price" leases would be converted into "proceeds" leases. That is not the intent of the statute. Nor is it to prohibit fixed price contracts for oil and gas leases. Absent indications previously referenced, it is clear that §§ 53-511 and 53-514 are inapplicable in this case and could not under the circumstances cause Stephens to forfeit the leases to the Hillards.

We hold that Stephens' payment of royalty to the Hillards computed at the rate of $0.07 per MCF discharges its obligation to pay royalty under these leases.

Stephens contends that it is entitled to a judgment against the Hillards for the excessive payment of royalty under these $0.07 per MCF leases because it paid excess royalties. The record disclosed that Stephens did pay the Hillards additional royalties but the record fails to disclose evidence that such royalty paid was due to a "mutual mistake of fact" on the part of both Stephens and the Hillards. We hold that Stephens is not entitled to a judgment against the Hillards for the excessive royalty payments under the $0.07 per MCF leases.

Several other issues were raised on appeal. Holding as we have, we find it unnecessary to decide those questions.

The trial court is affirmed in part and reversed in part.

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

GEORGE O. JERNIGAN, Special C.J., joins in the opinion.

HICKMAN, J., concurs in part and dissents in part.

DARRELL HICKMAN, Justice, concurring in part, dissenting in part. The trial judge in a comprehensive and detailed set of findings meticulously gave his reasons for his decision in this complicated lawsuit. The majority has reversed those findings in every respect.

This is an oil and gas case and essentially there were two kinds of leases in question. The leases were signed by Homer Hillard and his wife as landowners and Stephens Production Company as lessee. Homer Hillard died and his heirs pursued this lawsuit to interpret and enforce the leases according to the law.

The first set of leases in question contained a clause which read:

> The lessee shall pay lessor as royalty for the gas equal one-eighth of the value of such gas calculated at the rate of *prevailing market price at well* per thousand cubic feet . . . " [Emphasis added.]

The threshold question concerning the interpretation of this italicized language, which is largely ignored by the majority, is whether the language is plain and unambiguous. The trial court found that it was and, therefore, did not consider the abundant testimony offered by the Hillards and Stephens as to what the parties actually meant; or what "prevailing market price at well" meant to the oil and gas business community in the Arkhoma Basin where the land is located. So, to the trial court, the issue was not what the parties may have actually intended but whether the parties should be bound by the plain and ordinary meaning of the language in the lease. The trial court found:

> . . . This court is not convinced that these words should not be considered in their ordinary and commonly understood meaning.
>
> Even though the witnesses who testified and who were handling the day-to-day business for Stephens Production Company may have had in mind that the amount which Arkansas Louisiana Gas Company was

> willing to pay for the gas at that time constituted the prevailing market price, it may have been an unfortunate selection of words which did not in reality express Stephens' real intent.
>
> The words 'market price' have a very common and ordinary meaning with which all of us are familiar. They are used in various transactions and simply refer to what the commodity will bring when placed on the market. And, of course, the word 'prevailing' refers to the conditions in existence at any given time and are changeable from day-to-day or at other given periods.
>
> It is my view, therefore, that the testimony as to the intent of the parties was not necessary to arrive at an interpretation of the words used in the lease with reference to the rate of royalty payments and, even though the Court heard this testimony, it has not influenced this finding.

Why does the majority find that "prevailing market price at well" cannot have a commonly understood meaning? The majority simply does not satisfactorily answer that question but considers only what it determines to be the real intent of the parties. Necessarily this means that careful consideration should be given to all evidence presented to the trial court during this lengthy trial. That the majority has not done.

Stephens argued to the trial court, and on appeal, that the language is ambiguous and that it was actually meant to create a "proceeds" lease; that is, the Hillards were to be paid a royalty from the proceeds Stephens received from a long term sale agreement it had made with Arkansas Louisiana Gas Company. There was evidence that officers of Stephens knew what a "proceeds" lease was and they could have easily inserted that term but chose not to. Instead, Stephens prepared and signed the lease which contained the common phrase "market price." I would submit Stephens knew exactly what it was doing. As the court stated in *Lightcap* v. *Mobil Oil Corporation,* 221 Kan. 448, 562 P.2d 1 (1977), when it considered similar leases: "There are two commonly recog-

nized types of leases employed in the gas industry, 'proceeds' leases and 'market value' leases." There is no doubt there were lengthy negotiations between Hillard and Stephens and there is evidence that unless Stephens had signed such a favorable lease agreement with Hillard, he would have gone to a competitor. In that regard, the court made this finding:

> Both parties admit that Arkansas Louisiana Gas Company, Arkansas Western Gas Company, and Arkansas Oklahoma Gas Company were all three buying and transporting gas intrastate from or in the Arkhoma Basin during this period although not a highly competitive situation. And, yet, there was testimony that Arkansas Western Gas Company maintained a pipeline not more than one mile from some of the Hillard Wells. This clearly could have constituted a competitive situation for the purchase of the Hillard gas; and since Mr. Walker testified that the negotiations between Stephens and Arkla were arms length and resulted from lengthy and extended conferences, it is the Court's opinion that Mr. Walker would not have hesitated to have gone to Arkansas Western had there been a substantial price differential.

Several states have considered the effect of similar language in natural gas leases. Generally Oklahoma and Louisiana have sided with the producers and the lessees in determining that the phrase "market value at well" actually means "proceeds." *Tara Petroleum Corporation* v. *Hughey,* 630 P.2d 1269 (Okla. 1981); *Henry* v. *Ballard & Cordell Corp.,* 401 So.2d 600 (La. Ct. Appeals, 1981). The leading authorities for the other position, and that adopted by the trial court, are the states of Texas, Montana, and Kansas. *Texas Oil & Gas Corporation,* 630 P.2d 1269 (Okla. 1981); *Montana Power Company* v. *Kravik,* 586 P.2d 298 (Mont. 1978); *Lightcap* v. *Mobil Oil Corporation, supra.*

Finding that the language of the lease should be given its ordinary meaning, the trial court proceeded to determine the market price. In doing so, the court, in my judgment, correctly rejected the exaggerated claims of both the lessors and the lessees, finding a reasonable middle ground. The

lessors essentially wanted the trial court to consider interstate sales in determining the market value; the lessees wanted the court to make the lease over into a "proceeds" lease, or at least limit the market to Franklin County. The trial court recognized the peculiar matter of the market in the Arkhoma Basin, there being essentially no strong competition between buyers and, as the finder of fact, used the available evidence to determine a fair market value. In doing so, the trial court considered the "fair field price", which is a price determined by the Arkansas Public Service Commission. Certainly, I would not agree that the fair field price would always be the controlling factor of the market value, but it was a factor to be considered and because of the peculiar nature of the market in that area, I cannot say the trial court was clearly wrong in its finding regarding the market value.

I agree with the majority that Act 222, Acts of Arkansas, 1929, [Ark. Stat. Ann. §§ 53-509 — 514] does not void the second types of leases. The Act is penal in nature and must be strictly construed. It only allows for three remedies: Forfeiture of rights, treble damages, or criminal sanctions. Ark. Stat. Ann. §§ 53-514 and 53-515. There are no provisions in the Act to revise the lease as the trial court did. Furthermore, the Act was obviously designed to penalize lessees that received kickbacks, or otherwise dealt improperly to deny a lessor his usual minimum royalty. There is no evidence at all Stephens acted in any way improperly. In fact, to the contrary, it appears the leases were entered into at arms length in every respect.

Frank BROWN, Jr. *v.* STATE of Arkansas

638 S.W.2d 263

Supreme Court of Arkansas
Opinion delivered July 12, 1982

Anthony W. Bartels and *Jim Burton,* for appellant.

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

PER CURIAM. Frank Brown, Jr., by his attorneys, has filed for a rule on the clerk.

His attorneys, Anthony W. Bartels and Jim R. Burton, have attached an affidavit admitting that the record was tendered late due to a mistake on their part.

We find that such an error, admittedly made by the attorneys 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.

Vester Mae ELLIS *v.* STATE of Arkansas

637 S.W.2d 588

Supreme Court of Arkansas
Opinion delivered July 12, 1982

James E. Smedley, for appellant.

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

PER CURIAM. The appellant has filed a second motion for belated appeal after we rejected his first motion. In an attached affidavit, attorney James E. Smedley concedes that it was his mistake in not timely filing the appeal. Therefore, pursuant to the Rules of Criminal Procedure and *Nelson* v.

State, 272 Ark. 287, 613 S.W.2d 598 (1981), the belated appeal is granted.

Rules of Criminal Procedure, Rule 36.26, reads:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

The method for taking the appeal is set out in Rule 36.9.

We rendered an opinion on this subject in the case of *Finnie* v. *State,* 265 Ark. 941, 582 S.W.2d 19 (1979). In *Finnie* we stated:

> Even though the trial court was without authority to grant the appeal, this Court had such authority. No request has previously been made to this Court for belated appeal. We held in *Goodwin* v. *State,* 261 Ark. 926, 552 S.W.2d 233 (1977), that filing of notice of appeal within the time prescribed by Rule 36.9 is not jurisdictional as to this Court.

We went on to explain that if counsel intended to withdraw from the case he must comply with Supreme Court Rule 11 (h). We also pointed out that an attorney, in obtaining permission to withdraw from a case, should include a statement of the reasons therefor in his motion. A copy of the motion should be sent to the defendant and if the motion to withdraw is granted a copy of the order should be furnished to the defendant.

In view of the fact that the present attorney did not follow the procedure prescribed for withdrawal, we must still consider him the attorney of record and hold him responsible for the duties imposed upon him by the rules, statutes and opinion of this court as recited above. The belated appeal will be granted and a copy of this opinion forwarded to the Committee on Professional Conduct.

Honorable Frank WHITE, Governor and Raymond PRITCHETT *v.* H. T. HANKINS

82-39 637 S.W.2d 603

Supreme Court of Arkansas
Opinion delivered July 19, 1982
[Rehearing denied September 13, 1982.]

Steve Clark, Atty. Gen., by: *Frederick K. Campbell,* Asst. Atty. Gen.; *Thomas B. Keys* and *Christopher O. Parker,* for appellants.

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellee.

FRANK HOLT, Justice. The issue in this case is whether the appellant Governor Frank White's appointment of appellant Raymond Pritchett, confirmed by the senate, to the Arkansas State Highway Commission was contrary to Amendment 42, Ark. Const. (1874), which provides "that no two Commissioners shall be appointed from any single Congressional District." Shortly after the appointment appellee sought a declaratory judgment that Patsy Thomasson, an existing member of the Commission, and Raymond Pritchett were both residents of Pulaski County or the same Congressional District. The appellee later filed a motion for summary judgment together with a discovery deposition of Thomasson, a copy of her voter registration card from Cleveland County, an affidavit showing the exercise of her voting rights in that county, her appointment showing her address as Rison, Cleveland County, maps showing the existing Congressional Districts (6) when Amendment 42 became effective in 1952, and the present Congressional Districts (4) following the 1970 census. The appellee took a voluntary nonsuit as to Thomasson. The appellants resisted the motion for summary judgment alleging that factual matters remained in dispute and a hearing on the merits was necessary. Also, they sought dismissal of the action. The trial court granted appellee's motion for summary judgment, holding that Pritchett and Thomasson were both residents of Pulaski County, which is located in the old (1951) Fifth Congressional District; therefore, Pritchett's appointment is null and void inasmuch as it contravenes Amendment 42 which was enacted in 1952. The court considered the Congressional Districts, six in number in 1951, "frozen" by that amendment. Hence this appeal.

Appellants first contend the appellee lacked standing to bring this action as he has shown no injury in fact nor alleged grounds sufficient to show he is the proper party to bring this action. Appellee's complaint states: "The Plaintiff claims standing to seek this declaration as a citizen and taxpayer of the state and as a resident of Northeast Arkansas who is now deprived of representation on the Arkansas State

Highway Commission as a result of Governor White's appointment of Raymond Pritchett to that body." He further alleged that he was a resident of Independence County which placed him in the old (1951) Second Congressional District and that he (his Congressional District) is without representation. He did not allege nor does he contend that he is entitled as a matter of right or law to have a Commissioner from his Congressional District — he merely argues that he has standing as a citizen and taxpayer to object to the improper appointment of Pritchett. The trial court agreed stating that as a taxpayer, appellee had a right pursuant to Art. 16, § 13, Ark. Const. (1874), to challenge the appointment of Pritchett, who, as a Commissioner, would be responsible for spending tax dollars levied on the people of this state. Art. 16, § 13 provides:

> Any citizen of any county, city, or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

In *Green* v. *Jones,* 164 Ark. 119, 261 S.W. 43 (1924), we held that under Art. 16, § 13, that each citizen and taxpayer has an interest, where his pecuniary or property rights are involved, in seeing that no administrative board shall discharge its duties in a manner violative of the statute creating it. We feel this reasoning is applicable here. It is clear that the State Highway Commission is entrusted with the authority and responsibility, among other things, of spending large sums of state funds. Therefore, the trial court correctly held that appellee has standing to challenge the appointment.

We next consider and agree with appellants' contention that the trial court erred in holding that Amendment 42 requires selection of highway Commissioners on the basis of the 1951 Congressional Districts. The trial court's interpretation of Amendment 42 would require a finding that it was intended to "freeze" the six 1951 Congressional Districts as the relevant boundaries for the selection of Highway Commissioners. Amendment 42 § 2 provides:

> Within ten days after the convening of the General Assembly of the State of Arkansas in the year 1953, the Governor, by and with the advice and consent of the Senate, shall appoint five persons who are qualified electors of the State to constitute the State Highway Commission .... The Commissioners to be appointed from the State at large; provided, however, that no two Commissioners shall be appointed from any single Congressional District.

The Highway Commission established by Amendment 42 is, in a large measure, patterned after the Game and Fish Commission which was established by Amendment 35. Both use Congressional Districts as a criterion in the selection of Commissioners. Congressional Districts are known to change with population fluctuation, and their use insures a periodically updated rough balance of population and geographical considerations. In construing a similar provision in Amendment 35, which is self-executing as is Amendment 42, we said in *Drennen* v. *Bennett, Atty. General,* 230 Ark. 330, 322 S.W.2d 585 (1959):

> In the oral argument before this Court, appellant made the contention — not contained in the pleadings —that when Amendment No. 35 was adopted in 1944 it 'froze' the Congressional Districts insofar as the Amendment No. 35 was concerned. That is to say, appellant argued that the words, 'Each Congressional District must be represented on the Commission', meant that each Congressional District *as Congressional Districts were constituted in 1945* must be represented on the Commission. We think such contention is unsound for at least two good reasons of statutory construction.
>
> In the first place: constitutional provisions operate prospectively and do not operate retrospectively unless the language used or the purpose of the provision indicates that such operation was intended (16 C.J.S. 121). If the framers of Amendment No. 35 had intended to say what the appellants now claim, then the framers of the Amendment would have said, 'Each Congres-

sional District *as now constituted* must be represented on the Commission'. The failure to place the italicized words in the Amendment shows the fallacy of the appellants' argument.

Secondly: we know that when Amendment No. 35 was adopted, there had been, theretofore, a series of Acts changing the Congressional Districts in Arkansas; and if the framers of the Amendment had intended that the Congressional Districts could not be changed, insofar as Amendment No. 35 was concerned, they would have been obliged to say so. By the Act of January 3, 1853, Arkansas was divided into two Congressional Districts; by the Act of April 24, 1873, there were four Congressional Districts; by the Act of March 23, 1883, there were five Congressional Districts; by the Act of April 9, 1891, there were six Congressional Districts; and by the Act of May 23, 1901, there were seven Congressional Districts. So, with a long history of changes in Congressional Districts, it was certainly clear that Congressional Districts would continue to be changed as population requirements rendered such changes necessary or advisable. So the Amendment No. 35 did not 'freeze' the Counties comprising the various Congressional Districts.

We feel this reasoning is controlling here and hold that Amendment 42, § 2, did not "freeze" the Congressional Districts as they existed in 1951, but rather it reflects a method and desire of the framers to insure equal representation of the Highway Commission from all parts of the state with an odd number (to avoid tie votes) constituting that membership. Historically, they were aware of the fluctuation in the number of Congressional Districts following each census or every ten years. If they had intended that the Congressional District boundaries be inflexible, even though they historically change, the drafters could have said so or used another method such as dividing the state into geographical areas, which would not be subject to changing boundaries. Arkansas presently has four Congressional Districts and five Highway Commissioners. As the legislature has recently recognized, it would be impossible to

comply strictly with § 2 of Amendment 42 requiring that no two members be from the same district, inasmuch as two members of the Commission would certainly have to be residents of the same district. See Ark. Stat. Ann. § 76-201.1a (Repl. 1981) and the preamble of the Act. We take judicial notice of the fact that as the present Commission is constituted all four districts are represented regardless of whether Thomasson is considered to be from Pulaski or Cleveland County. The prohibition against two members serving from the same district cannot control here; that provision, of course, is not stricken and will be effective if Arkansas were to have five or more Congressional Districts.

Since one district of the present four Congressional Districts must always have two of the five members of the Commission, it is irrelevant whether Thomasson is or is not a qualified elector from Pulaski or Cleveland County. Therefore, the appointment of appellant Pritchett is permissible.

Reversed and dismissed.

PURTLE, J., concurs.

HAYS, J., dissents.

JOHN I. PURTLE, Justice, concurring. I concur in the results reached by the majority but for a different reason. The language relating to the qualifications and appointment of members of the State Highway Commission is found in § 2 of Amendment 42 to the Constitution of the State of Arkansas. The language is as follows:

> Within ten days after the convening of the General Assembly of the State of Arkansas in the year 1953, the Governor, by and with the advice and consent of the Senate, shall appoint five persons who are qualified electors of the State to constitute the State Highway Commission for terms of two, four, six, eight and ten years respectively. The terms of the persons so appointed shall be determined by lot. The Commissioners to be appointed from the State at large; provided,

> however, that no two Commissioners shall be appointed from any single Congressional District . . .

The language above-quoted is clear and simple to the effect that no two commissioners shall be appointed from any single congressional district. At the time Amendment 42 was adopted and went into effect, the state had six congressional districts. Therefore, there was no problem in appointing five members with no two being qualified electors of the same district. The same would hold true when the state was reduced to five congressional districts following the 1960 federal census. However, it was not known, and could not reasonably have been anticipated, that in 1970 the state would be reduced to four congressional districts. When the state was reduced to four districts then it was no longer possible to comply with the mandatory requirement that no two commissioners should be qualified electors of the same district. Therefore, it is obvious to me that the intent of the wording in the amendment was to freeze the number of districts at six. By giving Amendment 42 this interpretation it becomes obvious that there would never be a conflict with having more commissioners than there were congressional districts.

It is argued that Amendment 35 was the same type of amendment relating to the Game and Fish Commission. The qualifications in Amendment 35 are as follows:

> Commissioners shall have knowledge of and interest in wildlife conservation. All shall be appointed by the Governor. The first members of the Commission shall be appointed by the Governor for terms as follows: one for one year, one for two years, one for three years, one for four years, one for five years, one for six years and one for seven years. Each Congressional District must be represented on the Commission.

From a plain reading of Amendment 35 it would not matter how many congressional districts existed in the state of Arkansas, so long as there were no more than seven and that each district would be represented on the commission. There is no prohibition against more than one commis-

sioner residing in the same district. This subject was treated in the case of *Drennen* v. *Bennett, Attorney General,* 230 Ark. 330, 322 S.W.2d 585 (1959). The complaint in that case alleged that one district did not have a representative on the Game and Fish Commission. However, Dr. J. H. Burge of Lake Village was serving as a member at large and resided in the district which claimed not to have a representative. In *Drennen,* the court stated:

> The fact that Dr. Burge was and is designated as "member at large" does not gainsay the fact that he resides in the present 6th Congressional District.

Therefore, the court held that each congressional district was at that time represented by a member on the commission. I concur with the reasoning in that holding. The court rejected the argument that the amendment, in stating that each congressional district must be represented, meant the districts as they existed in 1945. It was completely unnecessary to rule on this contention because the court had already properly disposed of the argument presented by the appellants.

The difference in Amendment 35 and Amendment 42 is that the latter states that no two commissioners shall be appointed from any single district. The only way this could possibly be done is to treat the districts as being frozen at the time the amendment became effective or, in any event, not to allow the number of districts to be reduced below five. Amendment 35 allowed more than one member from each district but required that there be at least one member from each district. Amendment 42 prohibits two commissioners serving who are qualified electors of the same district. There is no mention of domicile or residence in this amendment. The proof is clear and unequivocal that Patsy Thomasson was and is a qualified elector of a different district from that of Commissioner Pritchett. However, there must be no other members who are commissioners from the same present congressional district. In order to avoid further litigation I would simply hold that the districts from which the commissioners are to be appointed were frozen as of 1953. If the authors of Amendment 42 had meant to hold highway

commissioners to the same standard in qualificiations as game and fish commissioners, they would have used the same language as in Amendment 35.

STEELE HAYS, Justice, dissenting. I agree with the majority that the appellee had standing to challenge the appointment of Mr. Raymond Pritchett to the Highway Commission. However, I disagree that it was error for the trial court to interpret Amendment No. 42 as requiring that the six congressional districts be treated as "frozen" for purposes of the appointment of Highway Commissioners. I believe the trial court was correct and any other interpretation leads, eventually, to the destruction of the clear intent of the Constitutional Amendment. Since I come to that view I disagree, of necessity, that it is irrelevant whether Ms. Patsy Thomasson is "from" Pulaski County or Cleveland County within the meaning of the amendment. I regard that as the crucial issue.

Section 2 of Amendment No. 42 reads, in part:

> The Commissioners to be appointed from the State at large; provided, however, that *no two Commissioners shall be appointed from any single Congressional District.* (My italics.)

I cannot say the trial court was mistaken in finding that Ms. Thomasson and Mr. Pritchett were "from" the same congressional district as the word is ordinarily used and understood. A person is "from" the place where his home and job are located, where he keeps his bank account, the place he gives as his address on his driver's license and tax returns, where he pays real and personal property taxes. Applying such criteria to Ms. Thomasson the court found she was "from" the same congressional district as Mr. Pritchett, whose residency in Pulaski County was not disputed. She did maintain her voting registration in Cleveland County but that appears to have been motivated by sentiment alone and cannot outweigh the strong evidence that her home and employment for ten years have been in Pulaski County.

I agree with Justice Purtle that the result reached in *Drennen* v. *Bennett, Attorney General,* 230 Ark. 330, 322 S.W.2d 585 (1959), was the correct decision on the facts, but I believe it is a mistake to accept the dictum of the case as precedent for a presumption that the Legislature intended the boundaries of congressional districts to change as congressional seats increase or decrease unless the words "as now constituted" are used. The argument would have been more persuasive if the framers of Amendment No. 42 had had the benefit of the decision in *Drennen* v. *Bennett* before they drafted the amendment, but they did not, as the amendment was adopted nearly a decade earlier. *Texarkana Special School Dist.* v. *Consolidated School Dist. No. 2,* 185 Ark. 213, 46 S.W.2d 631 (1932). The dictum of *Drennen* v. *Bennett* is unreliable as precedent for this because: it could lead to a result clearly inconsistent with the express language of the amendment itself. The *Drennen* court noted that Arkansas had consistently gained congressional seats: in 1853 there were two, by 1873 there were four, by 1883 five, by 1891 six, and by 1901 *seven* congressional districts (which remained fixed for fifty years). However, had Arkansas continued to *gain* seats (as might have been expected) and added a district as a result of the approaching 1960 census, the dictum of *Drennen* v. *Bennett* would have been impossible to follow, as Arkansas would have had *eight* congressional districts and a Constitution that fixed its Game and Fish Commission at *seven* members, yet mandating that each district "*must* be represented" — a literal impossibility.

Similarly, to follow the same flawed reasoning in this case results in the destruction of the plain objectives of Amendment No. 42. The amendment states simply that "no two Commissioners shall be appointed *from* any single Congressional District." It would be impossible to make that provision any clearer. Yet the decision reached today, using rules of construction which are to be followed *only* when statutes or constitutional provisions are ambiguous, effectively invalidates that provision.

Amendment No. 42 was overwhelmingly adopted by the electorate. It had a two-fold objective recognized as historical fact: to remove the Highway Commission from

politics, so far as possible, and to preserve *regional representation* within the five member commission. Today's decision permits two members to be "from" the same congressional district, the 5th, and leaves two districts, the 2nd and 6th, unrepresented. I believe the result defeats the letter and the spirit of our Constitution as amended and I would affirm the trial court.

WARREN-MERRITT ENTERPRISES, INC. et al *v.* Donald H. BRIDGES and Wade THOMAS

82-118 637 S.W.2d 601

Supreme Court of Arkansas
Opinion delivered July 19, 1982
[Rehearing denied September 13, 1982.]

Callahan, Wright, Crow, Bachelor & Lax, by: *Carl A. Crow, Jr.,* for appellants.

Hobbs, Longinotti & Bosson, for appellees.

JOHN I. PURTLE, Justice. The trial court found that the airport commission for the city of Hot Springs, Arkansas, was operating within its authority when it authorized appellee to operate vehicles for hire between the airport and other points, although such vehicles were not licensed pursuant to an ordinance enacted by the city council. There were several other matters considered by the trial court. This appeal is from that portion of the decree denying an injunction against appellee's continued operation of Airport Limousine Service without first obtaining a permit and license approved for that purpose by the Hot Springs City Council.

Appellants urge that the airport commission of the city of Hot Springs is not empowered to authorize operation of motor vehicles for hire as such power is vested exclusively in the city of Hot Springs. The trial court reached the correct decision although relying in part on the wrong authority. We affirm its decision.

Resolution No. 399 by the city of Hot Springs, Arkansas, approved the original airport limousine franchise agreement between the city of Hot Springs and the appellee's assignor on June 8, 1953. The Airport Limousine Service has continued to operate since that time. Resolution No. 546 of the city of Hot Springs approved the second airport limousine franchise agreement between the city and the Airport Limousine Service on March 4, 1963. On January 4, 1965, the appellee, Bridges, acquired the right to operate the limousine franchise service and has continued to operate said service since that date. The court found that the city council never formally confirmed the assignment to appellee Bridges of the rights under the second airport limousine franchise agreement. In 1968, the city of Hot Springs enacted Ordinance No. 2963, codified in the Hot Springs Code as §§ 4-12.11 through 4-12.20 which created the Hot Springs Airport Commission. Section 4-12.15 lists the duties and powers of the airport commission as follows:

> The airport commission as hereunder appointed shall have full and complete authority to manage, operate, improve, extend and maintain the Hot Springs Muni-

> cipal Airport, its related properties and facilities, and shall have full and complete charge of said airport, its related properties and facilities, including the right to employ or remove any and all assistants and employees of whatsoever nature, kind or character, and to fix, regulate and pay their salaries, it being the intent of this article and the act under which it is authorized to vest in said airport commission unlimited authority to operate, manage, maintain, improve and extend said Hot Springs Municipal Airport, its related properties and facilities, and to have full and complete charge therefor.

The appellants operate a fleet of taxicabs pursuant to authority granted by the Hot Springs City Council. In fact, the taxicabs operated by the appellants were acquired from the appellee. The appellants obtained their present license from the city of Hot Springs although they were granted the franchise by the airport commission. Both the Airport Limousine Service and the taxicabs obtain their license from the city of Hot Springs. The basic question presented to this court is whether the airport commission may grant authority, on a bid basis, to operate an airport limousine service for persons who are arriving and leaving from the Hot Springs Municipal Airport. There is no dispute but that the city issued the first franchise for an airport limousine service and continued to do so until they created the airport commission at which time they apparently attempted to give the commission the authority to award a franchise for the operation of the airport limousine service. We have set forth above the powers delegated to the airport commission. There is no specific authority to award a franchise to operate a limousine service. However, the commission sought bids and renewed the agreement for Airport Limousine Service which was in existence at the time of the creation of the commission. The franchisee is required to obtain a license from the city of Hot Springs. For a period of almost 30 years the Airport Limousine Service has operated from the Hot Springs airport and for about 18 years has rented a stand for the Airport Limousine Service across the street from the Oaklawn Race Track.

In the case of *Bridges* v. *Yellow Cab Co.*, 241 Ark. 204, 406 S.W.2d 879 (1966), the present appellee brought an appeal against the Yellow Cab Company in an argument over the operation of the same limousine service at the municipally owned airport. The question presented was not exactly the same but we did hold that Bridges had a right to operate. Airport Limousine Service has an exclusive franchise granted by the City of Hot Springs. Therefore, we have expressed by precedent that the city of Hot Springs has the power to authorize the right of Airport Limousine Service to operate. The question before us is whether the city of Hot Springs has, indeed, authorized the operation of Airport Limousine Service. The city of Hot Springs has been aware of this decision as it continued to issue the license for the service which we upheld in the foregoing opinion. We must determine whether the powers enumerated in setting up the airport commission included, at least by implication, the power to award a franchise for an airport limousine service. We do not think that the ordinance creating the airport commission granted the commission sole authority to grant such a franchise. However, since the commission is responsible to the city government and the city has continued to honor and approve the franchises granted by the commission by collecting a fee and licensing each vehicle, we think the city has ratified the actions of the commission.

Affirmed.

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

ROBERT H. DUDLEY, Justice, dissenting. In 1965 the City of Hot Springs enacted a comprehensive "vehicles for hire" regulatory ordinance, the cornerstone of which is that no vehicle for hire may be operated within the city without the issuance of a permit by the city council. Appellees' airport limousines are vehicles for hire which are operated within the city and appellees do not have the required permit.

Instead of having a permit issued by the city council, the appellees have a permit issued by the airport commission. The majority opinion quotes the 1968 airport commission ordinance and then states: "There is no specific authority to

award a franchise to operate a limousine service." That ordinance does nothing more than empower the commission to manage the "airport, its related properties and facilities."

The last sentence of the majority opinion declares the rationale that the permit from the city council has been obtained through the doctrine of ratification: "However, since the commission is responsible to the city government and the city has continued to honor and approve the franchises granted by the commission by collecting and licensing a fee on each vehicle, we think the city has ratified the actions of the commission." Yet, nothing in the record and nothing in the majority opinion indicates that since the enactment of the "vehicles for hire" ordinance in 1965 the city council has ever approved, or ratified, or even known about, the airport limousine franchise given by the airport commission. In addition, it is undisputed that the city clerk's issuance of licenses to appellees was unauthorized.

The city council has not issued a permit. The city council has not ratified a permit. Therefore, I respectfully dissent.

I am authorized to state that Chief Justice ADKISSON and Mr. Justice HICKMAN join in this opinion.

Bonnie Barbara NICHOLS *v.* Grace CLEVELAND, Guardian of Mary Alice NICHOLS

82-136 637 S.W.2d 609

Supreme Court of Arkansas
Opinion delivered July 19, 1982

Ross & Ross, by: *Mark Ross,* for appellant.

No brief for appellee.

JOHN I. PURTLE, Justice. In August 1980 Grace Cleveland, acting as guardian of Mary Alice Nichols, filed suit No. 80-684 in the Garland County, Arkansas, Chancery Court. She sought to set aside a deed from Mary Alice Nichols to Bonnie Rowland, a/k/a Barbara Nichols, a/k/a B. B. Nichols. Both Grace Cleveland and Barbara Nichols are daughters of Mary Alice Nichols. Appellee alleged the deed was a forgery and that Mary Alice Nichols was incompetent on July 24, 1976, when the deed was signed. Upon request of the appellant, Chancellor Chesnutt recused

himself from the case. Chancellor Gayle Ford was assigned by Chief Justice Fogleman to try Case No. P79-345 in the Probate Court of Garland County, Arkansas, and was authorized to handle all ancillary proceedings in connection with that case. The probate case dealt with the issue of vacating the guardianship of Mary Alice Nichols.

Chancery Case No. 80-684 was decided by Chancellor Gayle Ford sitting on exchange for Chancellor Chesnutt, by a decree dated June 10, 1981. In the final order, from which this appeal is taken, he determined that the incompetent did not intend to divest title from herself and invest title in the defendant during her lifetime. He also held that the deed and accompanying bill of sale should fail as an attempted testamentary disposition of the real property involved in this case. The deed of July 24, 1976, which purported to convey the property from Mary Alice Nichols to the appellant was cancelled. There were no other findings of fact or conclusions of law accompanying or included in the decree. There was no order at any time made which allowed the pleadings to be amended to conform to the proof.

On appeal the appellant alleges (1) there was insufficient evidence to show the deed to be forged as alleged in the complaint and the court made no such findings; (2) there was insufficient evidence to show Mary Alice Nichols was incompetent on the date the deed was executed; (3) the court erred in refusing to grant a new trial because the decree was based upon grounds not raised by the pleadings; (4) the court erred in refusing to grant a continuance until the probate case seeking to vacate the guardianship was heard; and (5) the court erred in entering an order denying a new trial after the court had recused from the case.

The facts and pleadings are very complicated due in large part to the appellant's pro se actions which included one 20 page typewritten pleading. There were many other handwritten exhibits and pleadings included. Also, the case had undergone the recusal of two chancellors. Additionally, the attorney for the appellant was allowed to withdraw after the trial.

A deed was either forged or executed by Mary Alice Nichols in which the property in question was conveyed to the appellant on July 24, 1976. A bill of sale of the same date on the same land was also allegedly executed by Mary Alice Nichols. In fact, Mary Alice Nichols had executed the deed to the same property to her son, Royce, on April 6, 1976. The deed to Royce was never recorded and the record indicates he died in 1979. However, the appellant recorded her deed and bill of sale on June 16, 1980.

In the meantime, Grace Cleveland filed a probate action to have herself appointed guardian of her mother, Mary Alice Nichols, and was so appointed on April 21, 1980. On May 5, 1980, appellant filed a petition, in probate Case No. P79-345, in which she sought to set aside the order appointing her sister, Grace Cleveland, as guardian of their mother. The appellant became unhappy with Chancellor Chesnutt and petitioned for his recusal. He obliged and on April 5, 1980, Chief Justice Fogleman appointed Chancellor Gayle Ford to hear the probate case and all ancillary matters arising out of said proceedings.

Appellant and her attorney strenuously objected before Chancellor Ford to the hearing of the chancery case on January 26, 1981, insisting that the probate case must necessarily be decided first. They argued that if Mary Alice Nichols was declared not to be incompetent at that time then Grace Cleveland would have no standing to bring the chancery court proceeding in which she sought to declare the deed and bill of sale to the appellant invalid.

There was an order prepared by Chancellor Chesnutt disqualifying himself from Case No. 80-684 on January 21, 1981, and requesting Chancellor Ford to hear it for him. Chancellor Ford accepted the assignment on January 26, 1981, which was the date the chancery case was commenced. There was no order from the Arkansas Judicial Department or the Chief Justice appointing Chancellor Ford to hear the chancery case. Arguments for a continuance were heard and overruled before the trial commenced. The trial court did acknowledge pendency of the probate case and stated it was at least going to hear the chancery matter on that date and if

it could be shown that the probate case could be decided first it would go ahead and do that but the same testimony could not be used for both trials. The court stated there was no reason not to go ahead and take testimony in the chancery matter and it would consider the request to hear the other case. The court agreed to reserve the question of the guardian's standing. This issue was never ruled upon by the court nor has the probate case been tried at the present time.

The pleadings were never amended to conform to the proof. In fact, Grace Cleveland testified that her mother was competent on April 6, 1976, when she executed a deed to Royce Nichols. The notary public who acknowledged the signature on the deed to Royce testified that Mary Alice Nichols was all right at the time she executed the deed. The notary public who witnessed the signature on the deed to the appellant was deceased but his daughter positively testified that the signature of her father was real. Grace Cleveland testified that her mother was incompetent at the time she signed the deed to appellant. However, she either accompanied or sent her mother to the office of attorney Julian Glover on March 20, 1980, where Mary Alice Nichols revoked a previous power of attorney in favor of the appellant. The revocation was prepared by attorney Glover and filed of record with the Garland County Circuit Clerk. On August 5, 1979, Mary Alice Nichols executed a notice to quit against the appellant and caused the sheriff to serve it on October 22, 1979. Witness Harold Lavender testified that Mary Alice Nichols seemed rational enough at the time she signed the deed to Royce. Witness Robert H. Scott testified he was acquainted with all of the parties and that in 1976 Mary Alice Nichols seemed normal with no incapacity. He thought she understood her actions.

There is evidence that the appellant was in possession of the house and did a considerable amount of repairs. Various papers indicate that she assumed some indebtedness against the property and paid her mother additional sums.

Larry Bryan, Vice President and Trust Officer of the First National Bank, testified that the signature on the deed to the appellant did not appear to be that of Mary Alice

Nichols. He did not claim to be an expert, and the court stated, "There is no doubt he is not an examiner of questioned documents."

Doctor Driver Rowland testified that Mary Alice Nichols was last seen by him on December 20, 1976. He had talked to her over the telephone but had not seen her since that time. He was treating her for heart trouble at that time. He stated that her ailments probably contributed to her mental ability or deficiency and that he felt that she was senile and unable to care for her own needs. He stated, "I did not see her and this was just noted in passing." He further stated that he had recommended in 1972 that a guardian be appointed because of her mental and physical ailments. He admitted that people could improve from conditions similar to hers but he would not expect her symptoms to entirely disappear. He stated, "I certainly wouldn't say it was not possible that there were times in 1976 when she was competent to make decisions for herself." No other witnesses testified in this case.

The complaint in chancery alleged the deed was a forgery and that the grantor was incompetent. Apparently, these are alternate pleadings. The count of forgery was actionable in chancery but the matter of competency was a probate subject. If the probate case had been heard first, it is possible the appellee would not have had standing to file suit in her mother's behalf. In any event, the guardianship order was not entered until April 21, 1980, which was almost four years after the alleged execution of the deed here in question. The probate order is not a part of the record and therefore there is no evidence, other than that previously stated, that Mary Alice Nichols was incompetent at the time the deed in question was executed. In fact, it does not seem there was any evidence that on the date the deed was executed Mary Alice Nichols was, indeed, incompetent.

In view of the fact that the trial court made no findings relating to the alleged forgery or as to the competency of the grantor it does not seem the case was fully tried. The matter of standing is still pending so far as the record indicates. The trial court has recused itself from any further proceedings in

the chancery case. Therefore, it appears the only manner in which this case can properly be disposed is to remand it for a hearing on the probate matter and a retrial on the chancery case.

Reversed and remanded.

HICKMAN, J., would affirm under Rule 9 (d), Supreme Court Rules.

ARKANSAS SAVINGS AND LOAN ASSOCIATION *et al v.* Frances HAYES

82-137 637 S.W.2d 592

Supreme Court of Arkansas
Opinion delivered July 19, 1982
[Rehearing denied September 13, 1982.]

Tom Tanner, for appellants.

Warner & Smith, by: *James M. Dunn,* for appellee.

ROBERT H. DUDLEY, Justice. The principal issue in this complex case is whether there was a claim of the debtor's homestead exemption which would allow title to real estate to be conveyed free of a judgment lien. In January, 1978, Patricia Stanley filed suit for divorce against Harvey Stanley. They agreed to sell their home in Pulaski County, which they owned as tenants by the entirety, and the proceeds of the sale were to be paid into the registry of the court for division. On January 29, 1979, Harvey Stanley vacated the home and since then has not occupied it. On February 12, 1979, appellee Frances Hayes obtained a judgment in Pulaski County against only Harvey Stanley in the amount of $12,755.95. Judgment was entered the same day and Harvey Stanley did not appeal. Thus a judgment lien was created. Harvey Stanley has never claimed the judgment debtor's homestead exemption from the judgment lien.

Meanwhile, Patricia Stanley and the two minor children occupied the home. On February 21, 1979, the Stanleys executed a contract for the sale of their home and agreed to withhold $10,000 from the proceeds of the sale for the court to divide. The remainder of the net proceeds were to be divided equally. On March 20, 1979, the court in an interlocutory decree approved the agreement and, on the same day, the Stanleys conveyed the property by warranty

deed to appellants James R. and Jeanette Morrison. Patricia Stanley in the warranty deed released her homestead rights in the lands.

On April 4, 1979, appellee Frances Hayes filed a writ of garnishment on the court clerk, who was withholding $10,000 from the sale of the property. Subsequently half of the money was paid to Patricia Stanley and the other half was paid to appellee Frances Hayes, the judgment creditor.

Next, appellants James R. and Jeanette Morrison conveyed the property by warranty deed to appellants Robert A. and Marsha Elliott who mortgaged the property to appellant Arkansas Savings and Loan Association who, in turn, assigned the mortgage to appellant Worthen Bank and Trust Company. Appellee Frances Hayes, the judgment creditor, then commenced this action by seeking to foreclose her judgment lien against the property for the balance of the judgment. Appellants Robert A. and Marsha Elliott wanted to sell the property but found the litigation to be a severe obstacle. They did not want to wait on a final decree and so they impleaded $10,000 and in their petition stated:

> Petitioners herewith submit $10,000.00 to be paid into the Register of the Court and be substituted for the property of the defendants against which the lien is claimed. All rights and claims, all defenses and encumbrances which any party to the litigation may have against the real estate be transferred and in the same manner be impressed upon the fund placed in the Register of the Court. That the Court order and direct the property herein before described, the property of the litigation, be released and the lien discharged as to this real estate.

The parties subsequently agreed to an order which provides that the $10,000 is substituted for the real estate and is to be treated in the same manner as if it were real estate.

Appellants, who are subsequent purchasers and mortgagees argue they are entitled to assert the homestead exemption of the Stanleys. The trial court denied the

homestead exemption and held that the judgment lien was a valid first lien on the $10,000.00. We reverse.

The sale of a homestead can convey title free of a judgment lien in existence at the time of the sale, *Stanley et al* v. *Snyder et al,* 43 Ark. 429 (1884), and it is well established that as to a homestead there are no creditors. *White* v. *Turner,* 203 Ark. 95, 155 S.W.2d 714 (1941). Once the property is occupied as a homestead nothing more need be done to give the debtor the right to claim the personal privilege against a judgment creditor's sale. *Snider et al* v. *Martin,* 55 Ark. 139, 17 S.W. 712 (1891). At one time, in order to claim the homestead exemption, the judgment debtor was compelled to file a schedule of the property claimed and have the clerk issue a supersedeas staying the sale under execution. *Norris et al* v. *Kidd,* 28 Ark. 485 (1873). Today the judgment debtor does not lose the right to claim the exemption by the failure to claim the homestead before sale, but instead may wait until suit is brought before asserting his exemption. Ark. Stat. Ann. § 30-210 (Repl. 1979); *Davis* v. *Day,* 56 Ark. 156, 19 S.W.2d 502 (1892). However, once putting the debtor's homestead right at issue, the burden of proof is on the one claiming the right to the exemption. *Chastain* v. *Arkansas Bank & Trust Co.,* 157 Ark. 423, 249 S.W. 1 (1923). For an excellent comment on the subject see Pryor, *Establishment of the Homestead Exemption in Arkansas,* 9 Ark. L. Rev. 37 (1954).

Harvey Stanley did not, and does not now, seek to exercise his right against execution. Thus his right to the exemption has now been forfeited. *Snider et al* v. *Martin,* supra. The appellants, who are subsequent purchasers and mortgagees, cannot claim the judgment debtors' right to the exemption because it is a personal right which must be exercised by the party who seeks its benefits, *Jones* v. *Thompson,* 204 Ark. 1085, 166 S.W. 1036 (1942). However, appellants correctly contend that Patricia Stanley has claimed the right of exemption. She was entitled to the exemption for when a husband refuses or neglects to claim the homestead as exempt, the wife may do so. Section 30-210, supra; *Hollis* v. *State,* 59 Ark. 211, 27 S.W. 73 (1894). It is not disputed that the home was her homestead and that she

claimed it as such. Therefore, the sale of the homestead conveyed title free of the judgment lien which existed at the time of the sale. *Stanley et al* v. *Snyder et al,* supra. The trial court erred by allowing foreclosure of the exempted homestead.

Reversed.

Jean S. ROY and Eugene ROY *v.*
Roger D. ATKINS and THE DARRAGH COMPANY

82-121 637 S.W.2d 598

Supreme Court of Arkansas
Opinion delivered July 19, 1982

James D. Sprott, for appellants.

Mel Sayes and *Tom Forest Lovett, P.A.,* by: *Mel Sayes,* for appellees.

STEELE HAYS, Justice. Appellants, husband and wife, filed suit to recover for Ms. Jean Roy's personal injuries and Mr. Eugene Roy's property damage, sustained as the result of an automobile collision. The appellees admitted liability and the jury rendered a verdict in the amount of $2,500.00 for the injuries of Ms. Roy and $2,000.00 for Mr. Roy. The single issue on appeal is whether the trial court erred in instructing the jury to disregard Mr. Roy's testimony regarding a list of medical expenses totaling $2,977.74 because it was not supported by sufficient evidence. We cannot say the evidence was admissible as a matter of law and, accordingly, we sustain the trial court.

At trial the appellants offered no medical testimony nor did they introduce any medical bills, drug bills, receipts or cancelled checks. The only medical evidence was from the appellees. Dr. William Blankenship testified that he found no objective evidence that Mrs. Roy sustained any permanent impairment as a result of the accident. (T. 85) Mr. Roy testified that he and his attorney had compiled a list of expenses incurred by Mrs. Roy using receipts and cancelled checks; however, neither he nor his attorney produced them at the trial. On cross-examination Mr. Roy admitted that this list included expenses for drugs for his entire family, not just for his wife. (T. 57) The list was not introduced into evidence nor was it itemized by Mr. Roy's testimony. He simply stated his wife's medical expenses attributable to the accident totaled $2,977.74. Upon appellees' motion to strike, the trial court directed the jury:

> Ladies and gentlemen, you are instructed by the Court, that you are to disregard the testimony of the last

> witness, with regard to the incurrence of medical bills and expenses, in the amount of two thousand nine hundred seventy seven dollars and seventy four cents ($2,977.74).

Appellants correctly state that the reasonableness and necessity of medical expenses are questions of fact to be decided by a jury. *Blissett* v. *Frisby,* 249 Ark. 235, 458 S.W.2d 735 (1970). Appellants contend the trial court improperly withheld from the jury the question of the reasonableness and necessity of medical expenses. The fallacy of the argument is that the trial court's action here did not withhold from the jury all evidence of medical expenses but instructed the jury to disregard only Mr. Roy's testimony concerning medical expenses because a sufficient foundation had not been laid. In *Blissett, supra,* Justice Fogleman stated at 247:

> We also believe that the trial judge has some discretion in deciding whether there is sufficient foundation for the admission of testimony giving the amount of certain expenditures. . . .

We recognize that expert testimony by a physician is not necessary in every case to prove the reasonableness and necessity of medical expenses of an injured plaintiff. *McCullough* v. *Ogan,* 268 Ark. 881, 596 S.W.2d 356 (1980). Appellants interpret the ruling of the trial court as a breach of that rule, but we disagree. Mr. Roy failed to itemize the expenses by physician, or as to medication, or type of service, he simply presented a total amount of $2,977.74. He was unable to verify the figure and he acknowledged that it included expenses not properly recoverable from the appellees. We think the trial court found, correctly, that Mr. Roy's testimony failed to provide a sufficient foundation in support of his wife's medical expenses. It is within the trial court's discretion to determine if the witness's foundation is sufficient to support his testimony. *Blissett* v. *Frisby, supra.*

Appellants argue that the trial court denied the jury the right to consider any medical expenses. But we disagree. The appellants failed to proffer an instruction which included

medical expenses as an element of her damage, even though they had presented evidence by Ms. Roy that her expenses were between 2,000 and 3,000 dollars, which would have warranted such an instruction. Had an instruction covering medical expenses been proffered by the appellants it would have been reversible error to deny it. However, it was appellants' duty to tender such an instruction to the trial court before claiming error. *Christensen* v. *Dady,* 238 Ark. 577, 383 S.W.2d 283 (1964).

The judgment is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I am shocked by the majority opinion in this case. I have never found any jurisdiction, including Arkansas, which prohibited a person from giving oral testimony about medical expenses incurred as a result of a personal injury. In order to reverse a case it is my understanding that we must stick with the abstract and arguments presented by opposing sides. I have adhered to this standard in this dissent. Mr. Eugene Roy testified that the medical expenses alone totaled $2,977.74 and that the above amount represented bills to doctors and hospitals that his spouse had testified about earlier. He stated also that he expended the sum of $150 to hire a wrecker to return the car to his residence. Additionally, he said they had traveled 3,200 miles during this time as a direct result of the consequences of the accident and figuring the operation of his vehicle at 15 cents a mile this amounted to $480. He stated that the vehicle involved in the accident was worth $1,900 immediately before the accident and it had no value at all after it was demolished in the collision. On cross-examination the appellees' attorney asked:

> Question: You have testified to a list of damages there, medical expense and what not, totaling some $2900, and also some transportation expenses. Do you have any statements from any of the doctors to document these amounts?
>
> Answer: My lawyer has.

> Question: Could I see them, please?
>
> Answer: Haven't you got the statements?
>
> * * *
>
> Question: Do you have any cancelled checks, where you paid those charges?
>
> Answer: No, sir, I have them at home.
>
> Question: Not here today?
>
> Answer: Not here today.

There is absolutely no question in my mind but that this was proper testimony and it was for the jury to determine the credibility and value of the testimony. Following Eugene Roy's testimony the court made the following statement:

> Ladies and gentlemen, you are instructed by the court, that you are to disregard the testimony of the last witness, with regard to incurrence of medical bills and expenses, in the amount of $2,977.74.

I think the reason for the scarcity of cases on this subject is that practically no court in the United States would consider excluding such testimony. The defense certainly had the opportunity to present evidence showing the reasonableness of the various items mentioned in the testimony of Mr. Roy. We stated in the case of *Lynch* v. *East Arkansas Builders' Supply Co.*, 193 Ark. 1004, 104 S.W.2d 205 (1937):

> . . . the testimony of a party interested in the suit is not to be considered as undisputed, but the question must be submitted to the jury.

We have also held in the case of *Blissett* v. *Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970), that:

> A defendant who conceives that expenses incurred for

> medical treatment are unreasonable certainly may, and probably should, offer evidence to support his view . . . [and] the reasonableness and necessity of any expenditure for medical treatment is a question of fact for the jury (or a judge sitting as trier of the facts).

I know of no rule of law or statute which requires a plaintiff to introduce the actual medical bills and statements into the record and to prove the reaonableness of same. Testimony is left to the wisdom of a jury to determine its properness, credibility and whether it was necessary in the circumstances of the case.

I would reverse and remand for a new trial.

Evelyn R. GREEN et al *v.* Mac CARDER, Administrator of the Arkansas Alcoholic Beverage Control Division et al

82-77 637 S.W.2d 594

Supreme Court of Arkansas
Opinion delivered July 19, 1982

Jack T. Lassiter, for appellants.

Friday, Eldredge & Clark, by: *Joe D. Bell,* for appellee Edward Stewart Allen.

Donald R. Bennett, for appellee ABC Division.

CLINT HUEY, Special Justice. The Alcoholic Beverage Control Board granted a license to the Heights Liquor Store located at 5008 Kavanaugh Boulevard in Little Rock, Arkansas, on March 20, 1980. Appellants immediately filed a petition for review in Pulaski County Circuit Court wherein they challenged the decision of the ABC Board. Appellants relied upon Ark. Stat. Ann. § 5-713 (Supp. 1980) as well as Ark. Stat. Ann. § 48-311 (E) (Repl. 1977) in their appeal to the circuit court. The trial court required them to elect which statute they would use as their remedy. They chose Ark. Stat. Ann. § 48-311 (E). Some months thereafter the Supreme Court of Arkansas declared the *de novo* portion of this statute unconstitutional. Appellants then sought to transfer their cause to Ark. Stat. Ann. § 5-713. The court denied the request holding their election of remedies to be irrevocable and dismissed the petition.

On appeal the single point relied upon is that the court

erred in granting the appellees' motion to dismiss because they had elected a remedy which was subsequently abolished.

At the time the appellants filed their complaint they had two avenues of approach in order to obtain a review and possible reversal of the ABC Board decision. Upon motion of the ABC Board the court required appellants to elect which remedy they would follow, and they elected Ark. Stat. Ann. § 48-311 (E). Under this statute they thought they would have been allowed a complete *de novo* hearing in circuit court rather than a review of the ABC Board's decision. Under Ark. Stat. Ann. § 5-713 the decision of the board is reviewed by the court and a decision is rendered based upon the record made before the board. This court subsequently ruled unconstitutional that portion of Ark. Stat. Ann. § 48-311 (E) which granted a *de novo* trial insofar as it disregarded the findings of the board.

We must decide whether the appellants were entitled to proceed under either remedy or whether their right to appeal under Ark. Stat. Ann. § 48-311 (E) was abolished by the ruling in *Goodall* v. *Williams,* 271 Ark. 354, 609 S.W.2d 25 (1980). Neither side has been able to locate a case from any jurisdiction precisely on point. Therefore, we must decide this issue for the first time in this case. The appellants have cited cases which hold that when a plaintiff mistakenly selects a remedy that does not exist he has not made an election. *Williams* v. *Westinghouse Credit Corp.,* 250 Ark. 1065, 468 S.W.2d 761 (1971). To the same effect see *Sharpp* v. *Stodghill,* 191 Ark. 500, 86 S.W.2d 934 (1935). Appellants also cited cases from other jurisdictions which hold that the election of a remedy which did not exist was no election at all.

"We have generally held that when a statute is declared unconstitutional it must be treated as if it had never been passed." *Huffman* v. *Dawkins,* 273 Ark. 520 at p. 527, 622 S.W.2d 159 (1981), citing *Morgan* v. *Cook,* 211 Ark. 755, 202 S.W.2d 355 (1947); *State* v. *Williams-Echols Dry Goods Co.,* 176 Ark. 324, 3 S.W.2d 340 (1928); and *Cochran* v. *Cobb,* 43 Ark. 180 (1884).

We have consistently held that "an essential element to an election of remedies is that both remedies are available." *Williams* v. *Westinghouse Credit Corporation,* 250 Ark. 1065, 468 S.W.2d 761 (1971), quoting *Eastburn* v. *Gaylen,* 229 Ark. 70, 313 S.W.2d 794 (1958). We have also stated that the pursuit of a remedy which does not exist is not an election but only a mistake as to an available remedy. The mistake may be one of fact or of law. *Williams* v. *Westinghouse, supra,* citing *Sharpp* v. *Stodghill, supra. See* also, Restatement, Judgments, § 62, and Restatement, Contracts, § 383, to the effect that the remedy relied on as a bar must have been available to the elector.

We hold that the remedy sought was declared unconstitutional and we must treat the litigants as though that statute had never been passed. The elected remedy was not available to appellants and, therefore, there was only a mistake, not an irrevocable election of remedies.

The exception concerning a mistake of law or fact was clearly recognized in *Dudley E. Jones Co.* v. *Daniel,* 67 Ark. 206, 53 S.W. 890 (1899), where the court stated:

> But to this rule there is the exception, based on reason and justice, that an election made without fault, and in ignorance of material facts, is not binding, when no other person's rights have been affected thereby.

Therefore, the proper remedy is to reinstate the petition of the appellants and allow the court to continue from that point.

Reversed and remanded.

HOLT, J., not participating.

HAYS, J., not participating.

TROY HENRY, Special Justice, joins in the opinion.

Melvin Glenn HANEY *v.* STATE of Arkansas

637 S.W.2d 596

Supreme Court of Arkansas
Opinion delivered July 19, 1982

Harold W. Madden, for appellant.

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

PER CURIAM. Appellant, Melvin Glenn Haney, by his attorney, has again filed for a rule on the clerk. In a Per Curiam opinion issued June 28, 1982, we denied a similar motion.

His attorney, Harold W. Madden, has attached an affidavit admitting 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 dated February 5, 1969, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

James SURRIDGE *v.* STATE of Arkansas

637 S.W.2d 597

Supreme Court of Arkansas
Opinion delivered July 19, 1982

John Belew, for appellant.

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

PER CURIAM. James Surridge was convicted in the Circuit Court of Desha County of first degree murder. He was sentenced to a term of 50 years imprisonment in the Arkansas Department of Correction. Retained trial counsel, John Belew, filed a timely notice of appeal on July 24, 1981, and secured Surridge's release from custody on bail. Surridge was subsequently arrested for bank robbery and his bail was revoked.

Belew filed a motion with us on March 22, 1982, to be relieved as counsel and tendered a partial record. The clerk refused to accept it as untimely, and we denied the motion to be relieved. We said that if Belew would concede in a subsequent motion that it was his fault the record was not timely filed we would grant the motion. Although nearly three months have passed, Mr. Belew has not filed a second motion for rule on the clerk.

When it appears that the attorney is at fault, but he has not conceded as much, it is the practice of this Court to deny a motion for rule on the clerk. See our Per Curiam opinion dated February 5, 1969, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964. It is made clear, however, that a subsequent motion will be granted if the attorney admits his error or gives other good cause for granting the motion.

Rule 36.26 of the Arkansas Rules of Criminal Procedure provides:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

The method for taking the appeal is set out in Rule 36.9. In the case at bar, the attorney Belew was not relieved as counsel by the trial court before he filed the notice of appeal. Once the notice of appeal was filed, he was obligated to obtain

permission from this Court to withdraw in accordance with Supreme Court Rule 11 (h). *Ellis* v. *State,* 276 Ark. 560 (July 12, 1982). Rule 11 (h) in pertinent part states:

> Any motion by counsel for a defendant in a criminal case for permission to withdraw made after the notice of appeal has been given shall be addressed to this Court, shall contain a statement of the reason for the requests, and shall be served upon the defendant appealing.

Counsel, whether retained or appointed, cannot file the notice of appeal and sit idle. When a person convicted of a crime desires an appeal, his constitutional right to effective assistance of counsel is denied where counsel fails to pursue the appeal. See *Finnie* v. *State,* 265 Ark. 941, 582 S.W.2d 19 (1979); *Harkness* v. *State,* 264 Ark. 561, 572 S.W.2d 835 (1978). It is imperative that counsel abide by the rules of procedure, and it is incumbent upon this Court and the trial courts to see that the rules are consistently followed. To do otherwise leads to selective enforcement of the rules and confusion as to what constitutes proper appellate procedure.

In light of his failure to follow the procedure prescribed for withdrawal from a case, Belew remains attorney of record. He is therefore responsible for the duties imposed on him by the rules, statutes and opinions of the Court. Since the appellant has furnished this Court with an affidavit attesting to his indigency and is eligible to have counsel appointed, we will grant Belew's motion to be relieved as retained counsel and appoint him counsel on appeal. A writ of certiorari shall be issued to prepare the record.

A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]