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Bill WRIGHT, Mayor of the City of Conway et al
v. Ronald L. BURTON, Municipal Judge et al

82-264 648 S.W.2d 794

Supreme Court of Arkansas
Opinion delivered March 28, 1983

Jesse W. Thompson, for appellants.

James L. Sloan, for appellees.

GEORGE ROSE SMITH, Justice. In 1981 the appellee Ronald L. Burton, the municipal judge of the city of Conway, held in a criminal case in his court that two ordinances adopted earlier that year by the Conway city council were unconstitutional. That decision threatened to result in substantial losses of revenue to the city. The mayor and the members of the city council brought this action against Judge Burton, his court clerk, and the chief of police, for a declaratory judgment upholding the ordinances. This appeal by the mayor and council is from a declaratory judgment holding the ordinances to be partly valid and partly invalid. For reversal the appellants insist that the ordinances are valid in their entirety. Our jurisdiction is under Rule 29 (1) (c).

The first ordinance, No. 81-26, fixed minimum fines and minimum appearance bonds for 53 enumerated mis-

demeanors. We list a few of the specified offenses and minimum fines:

Theft of property	$100.00
Reckless driving	100.00
Class A misdemeanor offense	150.00
Class B misdemeanor offense	100.00
Class C misdemeanor offense	50.00

The second ordinance, No. 81-36, provided that when a person charged with an offense under the first ordinance deposits a sum of money as a fine and costs in lieu of any court appearance, "said sum shall be equal to the minimum fine for such offense," plus costs. Judge Burton held that the ordinances unconstitutionally encroached upon the municipal court's exclusive authority to fix bail bonds for the release of accused persons. The circuit judge agreed with that point of view, but he upheld Ordinance 81-26 to the extent that it fixes minimum fines for Class A, B, and C misdemeanors, because the Criminal Code fixes no minimum fines for those offenses. Ark. Stat. Ann. § 41-1101 (Repl. 1977).

We hold both ordinances invalid, on the ground that they exceed the city's statutory authority to fix the penalty for offenses defined and punishable by state law. A city has express authority to prohibit and punish any act which the state laws make a misdemeanor, Ark. Stat. Ann. § 19-2410 (Repl. 1980), but that section declares that a city cannot prescribe penalties exceeding those prescribed for similar offenses against the state laws. The next section, § 19-2411, makes it unlawful for a city to prescribe less penalties than those prescribed by state laws for similar offenses. Thus the penalties fixed by the city must fall within the state minimums and maximums.

The ordinances in question do not observe the permissible limits. For example, all the offenses mentioned earlier in this opinion subject the offender not merely to a fine but also to possible imprisonment: Theft of property, as a Class A misdemeanor, § 41-2203; reckless driving, § 75-1003 (Repl. 1979); and classified misdemeanors A, B, and C,

§ 41-901. The effect of the two ordinances, taken together, is to permit anyone who commits such offenses to avoid any possibility of imprisonment merely by paying the minimum fine fixed by the city, plus costs. The ordinances unquestionably prescribe a minimum penalty substantially less than that fixed by state law. On the other hand, we do not question the city's authority to provide for the forfeiture of cash deposits in lieu of court appearances in minor cases, such as traffic tickets. *Thompson* v. *City of Little Rock,* 264 Ark. 213, 570 S.W.2d 262 (1978).

This opinion will serve as a declaratory judgment holding the ordinances to be invalid. The appellees, it is true, have not cross-appealed from that part of the circuit court's judgment upholding the validity of some of the minimum fines, but in a case of public interest we think it desirable to point out fatal defects in the ordinances that could be raised by any defendant in any prosecution under those enactments.

Modified and affirmed.

Ivan H. SMITH et al *v.* The CITY OF LITTLE ROCK, Arkansas et al

82-266 648 S.W.2d 454

Supreme Court of Arkansas
Opinion delivered March 28, 1983

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Appellant, *pro se.*

R. Jack Magruder, III, City Atty., for appellee, City of Little Rock.

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *Sam Hilburn,* for appellees Jeannie Hoover, Edna Jones and John L. Burnett.

FRANK HOLT, Justice. The Little Rock City Board of Directors voted unanimously to change the zoning classification of property located at 4908-4932 West Markham, between Monroe and Jackson Streets, from a single family and quiet office classification to "C-3", a general commercial classification as requested by the property owners. A Wendy's restaurant is to be constructed on that site if rezoned. The appellants, who are property owners in that vicinity, filed suit in chancery court to have the rezoning set aside. The chancellor held there is a presumption the Board had acted in a reasonable manner and the appellants had failed to meet their burden of proof which requires them to demonstrate the arbitrariness of its action, so he denied the petition. We affirm.

The appellants first contend: (1) The Court erred in not holding that the City of Little Rock was arbitrary and capricious in acting contrary to Arkansas law as stated in

City of Little Rock v. *Faith Evangelical Lutheran Church,* 241 Ark. 187, 406 S.W.2d 875 (1966); (2) The Court erred in not finding the City of Little Rock to be arbitrary and capricious in creating a commercial zone in the middle of a residential block; (3) The Court erred in not finding that the zoning ordinance Number 14 196 was unrelated to the public health, safety, moral and general welfare of the city and that the power of the city board in passing the ordinance was, therefore, arbitrary and capricious; and (4) The Court erred in not finding the City of Little Rock to be arbitrary and capricious in failing to consider the rights of the residents who have relied upon the existing residential zoning. We will discuss these points together since they relate to whether the rezoning by the city was arbitrary and capricious.

The standard of review applicable here is well settled. The decision of the chancellor will be affirmed unless it is clearly erroneous (clearly against the preponderance of the evidence). ARCP, Rule 52 (a); *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W.2d 664 (1981). There we also said there is a presumption that the City Board acted in a fair, just, and reasonable manner when it rezones or refuses to rezone property and the burden is on the persons attacking the rezoning or refusal to show otherwise. The courts do not have the authority to review zoning legislation *de novo. City of Conway* v. *Conway Housing Authority,* 266 Ark. 404, 584 S.W.2d 10 (1979). There we said:

> [W]hen a municipality, pursuant to authority granted by the General Assembly, takes action in zoning classifications, it is exercising a legislative function and is not subject to review by the courts of its wisdom in so doing . . . . The judiciary has no right or authority to substitute its judgment for that of the legislative branch of government. In zoning matters the General Assembly has delegated legislative power to the cities in matters relating to zoning property. The role of the courts is, therefore, simply to determine whether or not the action of the municipality is arbitrary. Arbitrary has been defined as 'arising from unrestrained exercise of will, caprice, or personal

> preference, based on random or convenient choice, rather than on reason or nature.' Courts are not super zoning commissions and have no authority to classify property according to zones.

To the same effect are *City of Batesville* v. *Grace,* 259 Ark. 493, 534 S.W.2d 224 (1976); and *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S.W.2d 921 (1966).

The appellants argue, *inter alia,* that the rezoning here is inconsistent with The Heights/Hillcrest Plan, a guide for land use decisions adopted in an ordinance on March 17, 1981. This plan, of course, serves only as an advisory or guide and is not binding. *Taylor* v. *City of LR,* 266 Ark. 384, 583 S.W.2d 72 (1979). Here, eight property owners in the area testified that the rezoning to allow a Wendy's restaurant to be built would have detrimental effects on the largely residential neighborhood; e.g., there would be increased traffic problems and hazards, noise, litter, unpleasant odors, vandalism, lights shining into windows at night, and rodents. One was of the view it would be spot zoning. Most of the witnesses were longtime residents in the area. None of the property owners testified they had relied upon the recent Heights/Hillcrest Plan, but some did testify they had chosen to live in the area because of the type of neighborhood it was.

The property in question is, as indicated, located between Monroe and Jackson Streets on the north side of the Markham Street corridor. On the south side of Markham are located the State Hospital, the University of Arkansas Medical Center, War Memorial Park (directly across from the subject property), the State Health Department, and War Memorial Stadium. Jerry Speece, Zoning Administrator for the City of Little Rock, testified in detail with respect to the character of the area on the north side of Markham Street. To the east on the same block are located a single family home and an establishment which sells and rents scuba diving equipment. On the six blocks east of Monroe are located a savings and loan, a branch bank, Peck's Drive-In, a liquor store, a drug store, and other businesses. In the three blocks west of the rezoned property are situated a McDonald's restaurant, an Exxon station, the Black Angus restaurant, a

Kentucky Fried Chicken restaurant, Rob's restaurant, and a motel. Speece also testified that the volume of traffic on Markham is 6,000 to 8,000 vehicles per day below its capacity. He said the Heights/Hillcrest Plan is merely a general guide for city planning and, furthermore, the rezoning in this case is not inconsistent with that plan. He stated the rezoning did not constitute spot zoning, because spot zoning involves zoning one lot in a manner entirely different from the surrounding area, which was not done here. A building permit mandates certain lighting requirements to prevent reflection of lights on adjacent property. The zoning ordinance requires the construction of a four foot opaque fence between commercial and residential property. Access to the rezoned property is limited to Markham Street. In his opinion, as a professional planner, the rezoning from single family and quiet business to commercial use is a reasonable classification.

We cannot say that the decision of the chancellor holding that the rezoning by the City Board of Directors was not arbitrary and capricious is clearly erroneous.

Neither is the decision of the chancellor contrary to our holding in *City of Little Rock* v. *Faith Evangelical Lutheran Church, supra.* There we held the refusal of the City of Little Rock to rezone these properties to "F" commercial was not an arbitrary and capricious decision. We did not hold that it would have been arbitrary and capricious for the city to so rezone the property. We did say, as appellants argue, the proper zoning classification for the property would be "E-1" Quiet Business, but that dictum was merely a comment on the evidence presented in that case and not a decision of this court imposing on the City an unalterable zoning classification for this location.

Appellants next contend that the City Board acted arbitrarily and capriciously in limiting residents to ten minutes in which to present their objections. However, the City Planning Commission had held two public hearings at which the residents were allowed to state their objections. These objections were transcribed and furnished to the City Board before the meeting at which the rezoning decision was

made. Hence, this case is unlike *Wenderoth* v. *Freeze, Mayor,* 248 Ark. 469, 452 S.W.2d 328 (1980), upon which appellants rely, where we held that property owners were arbitrarily denied their right to present their objections to a reclassification to the Planning Commission.

Next appellants assert that the court erred in excluding from the evidence the answers to interrogatories given by the members of the City Board. The appellants sought to introduce the interrogatories and answers during the cross-examination of Speece. Although the interrogatories were placed in the record, they are not abstracted. The answers were neither placed in the record nor abstracted. The burden is upon the appellant to bring up a record sufficient to demonstrate that the trial court committed reversible error. *King* v. *Younts,* 278 Ark. 91, 643 S.W.2d 542 (1982); *SD Leasing* v. *RNF Corp.,* 278 Ark. 530, 647 S.W.2d 447 (1983). Appellants failed to meet their burden on this issue.

Finally appellants contend that the chancellor abused his discretion in refusing to grant them a continuance in order to subpoena the members of the City Board of Directors, after the chancellor refused to admit the interrogatories into evidence. Eight witnesses had testified at the time the appellants moved for a continuance. It is apparent from the record that they had ample opportunity to subpoena whomever they wished before the hearing. Pursuant to ARCP, Rule 40, the granting or denial of a continuance is a matter within the sound discretion of the court, and such a ruling will not be disturbed unless the trial court abused that discretion by acting arbitrarily and capriciously. *Bolden* v. *Carter,* 269 Ark. 391, 602 S.W.2d 640 (1980). Here, the chancellor did not abuse his discretion.

Affirmed.

HICKMAN, SMITH and PURTLE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The majority has taken a rather passive role in this case and decided to uphold a decision by the Little Rock City Board of Directors which rezones five residential lots to a high commercial use,

thereby permitting the construction of a fast-food outlet, Wendy's, in the middle of a residential area. The only justification for the city's action can be that the lots are located not far from a commercial area on West Markham Street, which includes a McDonald's restaurant, an Exxon station and several other similar types of commercial enterprises. In my judgment this case represents a retreat to the city development approach approved in *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S.W. 883 (1925).

In my opinion the city's action was arbitrary for two reasons: First, this is clearly a case of spot zoning and therefore arbitrary; second, it is a flagrant breach of faith with the history of the area, the city's plan, and a decision this court made regarding this very property in 1966. *City of Little Rock* v. *Faith Evangelical Lutheran Church,* 241 Ark. 187, 406 S.W.2d 875 (1966). Furthermore, the only justification I can find for permitting the fast-food restaurant to be built is that the landowners want to make money and the enterprise will benefit the city economically by jobs. Neither is a legal justification for rezoning these lots.

> Spot zoning has been said to be invalid when it is primarily for the private interest of the owner of the property affected, and not related to the general plan for the community as a whole. 1 E. Yokley, ZONING LAW AND PRACTICE § 8-3 (1965).

See Lindsey v. *City of Fayetteville,* 256 Ark. 352, 507 S.W.2d 101 (1974); *Tate* v. *City of Malvern,* 246 Ark. 316, 438 S.W.2d 52 (1969).

There is a serious disagreement about the facts and their relative value in this case. But more important than that, and even this case itself, is the purpose of city planning, and our role, which is to keep the city honest. By and large the city of Little Rock has had good plans for the entire city. When the city has defended those plans against commercial assaults, we have, by and large, upheld them as we should have. *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W.2d 664 (1981); *Kirk* v. *City of Little Rock,* 275 Ark. 128, 628 S.W.2d 21 (1982). Just recently in two cases concerning the same area

of the city as this case, Hillcrest/Pulaski Heights, the city refused to retreat one iota from its plan. The request was to allow a small private school to be located in a residential area. *McMinn* v. *City of Little Rock,* 275 Ark. 458, 631 S.W.2d 288 (1982); *City of Little Rock* v. *Infant-Toddler Montessori School,* 270 Ark. 697, 606 S.W.2d 743 (1980). We had exactly the same situation in those cases that we have here: Nearby commercial enterprises which had been there for years, but no changes in recent years; and an existing comprehensive plan to protect a quiet residential area. Twice the city refused to rezone property to permit the school, although the evidence showed that it would not be a great disruptive factor to residents who wanted the peace and quiet of such a neighborhood. Now we have the same City Board of Directors deciding to place a fast-food restaurant in the middle of a residential area in violation of its own plan. While there are nearby commercial enterprises, not a single one has been added since our decision in *City of Little Rock* v. *Faith Evangelical Lutheran Church, supra,* made in 1966 regarding this very property. The McDonald's restaurant referred to was built on a lot already zoned for such a use. In *Faith Evangelical Lutheran Church,* we upheld the city's decision to protect this part of Markham Street used primarily as a residential area, and we upheld the city's refusal to allow any more commercial intrusions into this neighborhood. Actually the area allows a use for quiet business purposes but there was no objection voiced by any of the landowners of such a use; it was the prospect of a fast-food restaurant that raised their ire, as it should have. Who would want such a place next to their home? At best, they are intolerable; at worst, they are noisy, unsanitary, unsightly, bright at night, odorous, and attract large amounts of traffic. Such an enterprise is totally incompatible with single family residences. Such places do not close down at 5:00 p.m.; in fact, that is when they begin to reach one of their busiest periods, just when the next-door neighbors will arrive home to their haven from the noise, hustle and bustle of city life.

The majority does not address the question of whether this was spot zoning. It simply says Jerry Speece, Zoning Administrator for the city of Little Rock, testified that in his

opinion this was not spot zoning and not an incompatible use. He was wrong in both instances. (He conceded he did not participate in preparing the Hillcrest/Pulaski Heights Plan.) It is undisputed that the five lots are surrounded on three sides by residences. On the other side is Markham Street. It is a busy street, one of the avenues to funnel traffic to and from downtown Little Rock. But that alone cannot be a factor justifying rezoning. *See Lindsey* v. *City of Fayetteville, supra.* More importantly, West Markham is the southern boundary of Pulaski Heights/Hillcrest area, a residential area of uncommon beauty and serenity. There have been no changes in the area since 1966. It is an old residential area, improving in quality, not declining. In the *City of Little Rock* v. *Infant-Toddler Montessori School, supra,* we described this area as:

> . . . being a strong residential one where values are up instead of down and the property is well maintained. The area was described as one of the prime residential neighborhoods in the city which has been established for some 50 years and successfully sustained.

This part of Markham Street is a boundary that has to remain inviolate if the integrity of the Pulaski Heights/ Hillcrest area is to be maintained. Several residents testified they had improved their residences next to this property, after our decision in 1966, relying on that decision that the area would not go commercial, but would remain primarily residential.

It is incredible that the zoning administrator said this was not spot zoning:

> Spot zoning amendments are those which by their terms single out a particular lot or parcel of land, usually small in relative size, and place it in an area, the land use pattern of which is inconsistent with the small lot or parcel so placed, thus projecting an inharmonious land use pattern. 1 E. Yokley, *supra,* § 8-3
>
> Spot Zoning . . . singles out a small parcel of land for use in a manner inconsistent with the other predom-

> inant land uses in the area. R. Wright, *Zoning Law in Arkansas: A Comparative Analysis,* 3 UALR L.J. 421, 442 (1980).

These are perfect descriptions of what happened in this case. Why do cities spot zone property? "Such amendments are usually triggered by efforts to secure special benefits for particular property owners, without proper regard for the rights of adjacent owners." 1 E. Yokley, § 8-3. And that is what happened in this case. It is universally agreed that spot zoning is arbitrary. D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, § 93 (1975); 1 N. Williams, AMERICAN LAND PLANNING LAW, § 27 (1974); R. Wright, *supra,* at 442. In *Riddell* v. *City of Brinkley,* 272 Ark. 84, 612 S.W.2d 116 (1981), we said:

> Spot zoning, by definition, is invalid because it amounts to an arbitrary, capricious and unreasonable treatment of a limited area within a particular district. As such, it departs from the comprehensive treatment or privileges not in harmony with the other use classifications in the area and without any apparent circumstances which call for different treatment. Spot zoning almost invariably involves a single parcel or at least a limited area. R. Wright and S. Webber, *Land Use* (1978).

I would not hold the city's action arbitrary simply because the protestants were only allowed ten minutes to speak, but it is certainly an indication that the board had made up its mind. The majority says the board had been furnished with the record of two public hearings before the Planning Commission. I do not know that they had full knowledge of all the facts. All we know is the "minutes" of those hearings were furnished.

The staff of the city Planning Commission opposed this rezoning effort, as they should have, because it was contrary to a plan they had just adopted, the Heights/Hillcrest Plan, adopted in 1981. That plan was adopted by the city just months before the decision was made to rezone this property. In two meetings the Planning Commission could not agree

on the rezoning request and it was referred to the board to make the decision. It was approved unanimously after allowing the residents ten minutes to speak.

I do not suggest we substitute our judgment for that of a city in a rezoning matter. In the distant past we have done so with regularity. M. Gitelman, *Judicial Review of Zoning in Arkansas,* 23 ARK. L. REV. 22 (1969). In the recent past we have, in my judgment, rather consistently applied the principle of appellate review that we should have, and that is only to determine if the decision by the city was arbitrary. *McMinn* v. *City of Little Rock, supra; Riddell* v. *City of Brinkley, supra; City of Little Rock* v. *Infant-Toddler Montessori School, supra.* We have even abandoned the *Pfeifer* rule. *City of Little Rock* v. *Breeding, supra; City of Conway* v. *Conway Housing Authority,* 266 Ark. 404, 584 S.W.2d 10 (1979). But that does not mean we should go to the other extreme and meekly accept whatever the city does as right in zoning cases, because there is always strong pressure on city boards to make exceptions. There is money to be made and such motives have no social conscience. When a city makes an exception it ought to be clearly justified. The most important goal of a city in planning should be the quality of life it affords its residents. Commercial and residential interests can both be served and flourish, but only through good planning and sticking to it. In this case, Wendy's can be built somewhere else in an authorized commercial zone, and no damage will be done to commercial or residential interests.

I hope the board's decision in this case is a mere aberration; just as I hope the majority's decision is not a step backwards toward *Pfeifer.* But neither hope will change the fact that a breach has been made in the wall that has protected this neighborhood and that breach can only result in the destruction of the use of the adjoining property for single family residences. It will not be fit for such a purpose anymore.

GEORGE ROSE SMITH and PURTLE, JJ., join in this dissent.

Michael W. McMILLEN et al *v.* WINONA NATIONAL & SAVINGS BANK

82-270 648 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered March 28, 1983

Hoover, Jacobs & Storey, by: *O. H. Storey, III* and *Victor A. Fleming,* for appellants.

Wright, Lindsey & Jennings, for appellee.

DARRELL HICKMAN, Justice. This is a conflict of laws case and both parties on appeal agree that the facts more than the law dictate our decision. The circuit court, sitting without a jury, decided that the law of Minnesota applied to a sales contract and its accompanying financial documents, and, therefore, the appellee, Winona National and Savings Bank of Winona, Minnesota, was entitled to judgment against an Arkansas partnership consisting of Michael W. McMillen, John A. Teeter, and David Newbern. The parties agree that if Arkansas law had been applied, the usury provision in the Arkansas Constitution would have voided

the partnership's obligation to Winona. We cannot say the trial court was clearly wrong in its decision and affirm the judgment.

J. C. Brooks, a Little Rock businessman, wanted to open a tire retreading business and contacted Tom Underdahl, who sold such equipment in Minnesota. Underdahl agreed to meet Brooks at the airport in Little Rock when he arrived there on other business. Brooks, his lawyer, Robert McHenry, and perhaps a potential investor, met Underdahl and they discussed generally Brooks' plans. Afterwards Brooks began to try to find investors through his lawyer, McHenry. In the summer of 1977, Brooks and McHenry went to Minnesota. Upon returning to Arkansas, Brooks continued his search for investors and found Michael McMillen, Dr. David Newbern, and Dr. John Teeter, who decided to invest in the venture. They formed the ATC Partnership for that purpose. The Auto Tread Corporation was formed to operate the business; Brooks was general manager, but not a stockholder. Financing in Arkansas could not be obtained and Brooks notified the general manager of the supplier that financing had to be obtained somewhere besides Arkansas. Brooks told the seller that the seller would have to arrange financing.

In September of 1977, Brooks contacted Underdahl's company and asked them to send a sales representative to Arkansas, that investors had been found. Underdahl's sales representative traveled to Little Rock and negotiated some of the terms of financing; retreading equipment was ordered from the representative on that trip. Both the ATC Partnership and Brooks' lawyer, McHenry, signed the order. In October Brooks and McHenry made another trip to Winona, Minnesota. The seller contacted Winona National and Savings Bank about financing and supplied it with the names of the three partners. The bank approved them.

Brooks testified that McHenry called him to his office and told him he had some financing documents for Brooks to take around and get signed. Brooks got them signed by the three partners and gave them back to McHenry. They were signed by Underdahl when they were returned to Minnesota

and Underdahl's company assigned them to Winona National and Savings Bank. The equipment was shipped to Arkansas and installed by the seller's men but a fire in December of 1980 destroyed the plant.

This suit resulted from a dispute over the insurance proceeds. The partners sought to prevent Winona from collecting on the notes claiming the notes were usurious.

The trial court held that Minnesota law should apply and we agree. The principal significant contracts were in Minnesota. *Standard Leasing Corp.* v. *Schmidt Aviation, Inc.*, 264 Ark. 851, 576 S.W.2d 181 (1979). More important, Brooks, the central figure and moving force in this whole transaction, initiated the entire arrangement. He contacted the Minnesota seller, told them financing would have to be arranged through them, and it was entirely at his behest that the matter had any contact at all with Arkansas. This makes the situation different from one where an out-of-state seller initiates contacts in Arkansas. *See Tri-State Equipment Co.* v. *Tedder,* 272 Ark. 408, 614 S.W.2d 938 (1981); *Standard Leasing Corp.* v. *Schmidt Aviation, Inc., supra; Lyles* v. *Union Planters National Bank,* 239 Ark. 738, 393 S.W.2d 867 (1965). The documents, reciting that Minnesota law would govern, were mailed to Brooks' lawyer in Arkansas, signed in Arkansas by the buyers, and then signed in Minnesota by the seller.

What contact did the Winona bank have with Arkansas? None at all. Did a Minnesota company initiate a sale to an Arkansan? No. Did the parties intend for Arkansas law to apply? Certainly there is no evidence of it, except those facts recited and Brooks' testimony that that was his intent. Brooks, of course, was the key to the matter and he sought to buy equipment financed by an out-of-state bank.[1] The fact the contract was actually signed in Arkansas, and the investors never went to Minnesota cannot overcome the opposite facts: That Winona did not seek out the investors, and neither did it ever come to Arkansas; and that the contract expressly provided Minnesota law would govern.

[1]McHenry, Teeter and McMillen did not testify.

Ark. Stat. Ann. § 85-1-105 (Add. 1961); *Snow* v. *C.I.T. Corp. of the South, Inc.,* 278 Ark. 554, 647 S.W.2d 465 (1983).

Although the trial court's finding in such cases is not always critical, it has to be given some weight because a fact question did exist and the trial court found the facts to be in favor of Winona. We will not reverse that finding unless it is clearly contrary to the preponderance of the evidence. *Tri-State Equipment Co.* v. *Tedder, supra.* Here, the trial court correctly considered the factors we have found cotnrolling in determining the validity of multi-state contracts. *See Standard Leasing Corp.* v. *Schmidt Aviation, Inc., supra; Cooper* v. *Cherokee Village Development Co.,* 236 Ark. 37, 364 S.W.2d 158 (1963).

Affirmed.

David Richard POTOCKI and Vicki Karen POTOCKI, Husband and Wife, and Eugene SICKLES and Kay SICKLES *v.* The CITY OF FORT SMITH, Arkansas, and Joe EDWARDS

82-245 648 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered March 28, 1983

William M. Cromwell, for appellants.

Daily, West, Core, Coffman & Canfield, and *Douglas Parker,* for appellees.

JOHN I. PURTLE, Justice. The Board of Directors of the City of Fort Smith overruled its planning commission and enacted an ordinance rezoning certain property within the city. Appellants appealed to the Sebastian County Chancery Court which affirmed the action of the Fort Smith Board of Directors. The appellants argue that both the board and chancellor erred in not giving a proper interpretation to a previously adopted zoning ordinance. We agree with appellants and reverse and remand.

Prior to commencement of any activities involved in this proceeding the City of Fort Smith, Arkansas enacted ordinance no. 3421 which prohibited resubmission of zoning petitions within one year following denial. On October 14, 1980, appellee made application to the planning commission to rezone lots 112-116 in the Fairfax subdivision from residential to commercial. The planning commission recommended denial of the petition to rezone and the board of directors followed the recommendation on November 5, 1980. Appellee submitted another petition for rezoning on January 13, 1981, which requested that only lots 112 and 113 be rezoned. The planning commission rejected the second application. On February 3, 1981 the board of directors

overruled its planning commission and rezoned the two lots. The chancery court sustained the board of directors in an order entered on April 7, 1982.

The question presented on appeal is whether the chancellor erred in failing to rule that ordinance no. 3421 prohibited the board from approving rezoning of these two lots within a year from the time of rejection of the first petition to rezone which included the same two lots. We are of the opinion that ordinance no. 3421 prohibits consideration of the same property for rezoning within a year of prior rejection and find that it was error to not apply the ordinance to the facts in question. Cities possess only the powers granted to them. They have no inherent powers and must act only with powers delegated by the Arkansas Constitution or statutes. *City of Little Rock* v. *Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967). Zoning powers exercised by the city of Fort Smith during the proceedings involved herein are derived from Act 186 of 1957, codified in Ark. Stat. Ann. §§ 19-2825 et seq. (Repl. 1980). Act 186 of 1957 requires the planning commission to review a petition for rezoning prior to the legislative body of the city considering the matter. Ark. Stat. Ann. § 19-2827 (f) states in part:

> After adoption and filing as hereinafter provided, of a plan or plans, no public way, ground, or open space . . . shall be acquired, constructed, or authorized, unless such a project, proposal or development has been submitted to the planning commission for review, recommendation and approval as to its conformity with the plan or plans . . .

The pertinent part of ordinance no. 3421 states:

> (3) (iv) In the event that the appeal to the governing body of the city of the planning commission decision is rejected by the governing body, the proponent of such change or alteration shall not be permitted for a period of one calendar year from the date of action by the governing body of the city to file with the planning commission a petition requesting an identical or substantially identical change or alteration in the

zoning of the subject real property or any portion thereof.

It is obvious the second application for rezoning was made within a year from the date the board denied the prior application. Likewise, the description of the property in the second petition reveals that it is a portion of the property described in the first request for rezoning. Therefore, the rezoning was repugnant to the existing zoning ordinance. A failure to substantially comply with the procedural requirements of enabling legislation renders a subsequent ordinance invalid. *City of Searcy* v. *Roberson,* 224 Ark. 344, 273 S.W.2d 26 (1954). A city simply cannot pass procedural ordinances they expect to be followed by their residents and then conveniently ignore them themselves. A legislative body must substantially comply with its own procedural policies. *Maxwell* v. *Southside School Dist.,* 273 Ark. 89, 618 S.W.2d 148 (1981). In the recent case of *Taggart & Taggart Seed Company, Inc.* v. *The City of Augusta,* 278 Ark. 570, 647 S.W.2d 458 (1983), we held that a city government is bound by its own prior ordinances in adopting a zoning plan. We reverse and remand the case to the lower court to proceed in a manner which will accord with our opinion.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority suggests that the Board of Directors of Fort Smith violated a state statute by allowing appellee Edwards to rezone certain property. This is simply not the case. Instead, the Board merely made an exception to its own rules of procedure.

There is no reason why the Board cannot make such an exception when there is no violation of any person's constitutional rights and no violation of any state statute.

I would affirm the chancellor.

Bobby Joe DOWNING and Bob J. DOWNING *v.*
Mike DeCLERK d/b/a DeCLERK DIESEL SERVICE

82-273 648 S.W.2d 449

Supreme Court of Arkansas
Opinion delivered March 28, 1983
[Rehearing denied May 2, 1983.]

Lambert & Brown, for appellants.

Wilson, Grider & Castleman, by: *Murrey L. Grider,* for appellee.

ROBERT H. DUDLEY, Justice. We affirm the trial court under Rule 9 (e) (2). The pleadings include a complaint, an attachment, an answer, a bond for retention of possession of property after attachment, a complaint to proceed against the bond after judgment, a second answer, a motion for summary judgment by the plaintiff and a motion for summary judgment by the defendant. None are abstracted.

The proceedings include a trial and a later proceeding on the opposing motions for summary judgment. None of the testimony, documentary evidence or stipulations, if any, are abstracted, nor is the manner of proceeding explained.

The complete abstract of record consists of a three sentence abstract of the original judgment along with a five sentence abstract of the subsequent summary judgment on the bond. From these eight sentences it is impossible for us to understand the pleadings, proceedings, evidence and issues which were before the trial court. Thus, we cannot reach the

merits of the appeal and we must affirm for noncompliance with Rule 9 (d).

Affirmed.

Jerry ARMSTRONG and Linda ARMSTRONG, His Wife *v.* Frankie HARRELL et al, Directors of the Mayflower School District

82-277 648 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered March 28, 1983

Guy Jones, Jr., P.A., for appellants.

Brazil & Clawson, for appellees.

ROBERT H. DUDLEY, Justice. Appellants filed a petition in county court alleging that they have no reasonable means of access to their land. They asked that a road be established across appellee's property pursuant to Ark. Stat. Ann. § 76-110 (Repl. 1981). The statute requires a petitioner to make a deposit sufficient to pay all costs and expenses and the county judge to appoint road viewers to examine the route proposed or any other route they deem proper. If the road viewers determine that a road is necessary, they are then required to lay out the road, make an estimate of the damages to the landowner and make a report of all of the above to the county court. The appellants did not make the deposit and the road viewers were not appointed. Appellee, a school district, filed a general denial in county court and, in addition, pleaded that the proposed taking was improper because appellants had other access to their property and the proposed road across school property would unnecessarily endanger school children. The county court denied the petition and appellants appealed to the circuit court. At the circuit court trial the appellee orally raised the issue of the appellants' failure to comply with the statute. Appellants objected, claiming surprise and that the issue could not be raised for the first time on appeal. The court allowed the amendment to the pleadings but did not dismiss the appeal and, instead, heard the case on its merits. The trial court then denied any relief to appellants. We affirm. Jurisdiction is vested in this Court pursuant to Rule 29 (1) (c).

Appellants first contend that the trial court erred in allowing appellee to orally amend its pleadings at the commencement of the trial. There is no reversible error for two reasons. First, the circuit court, after a trial in county court, may permit amendments and new issues to be raised, excepting set off and a new cause of action. *Crockett Motor Co.* v. *Thompson,* 177 Ark. 495, 6 S.W.2d 834 (1928), citing *Texas & St. Louis Ry.* v. *Hall,* 44 Ark. 375 (1884); Ark. Stat. Ann. § 27-2007 (Repl. 1979). Second, even if our law did not permit amendment on appeal to circuit court, there was no prejudice because the circuit court allowed the case to proceed to trial on the merits although the appellants never made a deposit for costs and road viewers were not appointed. Thus, appellants suffered no harm by the ruling.

Appellants' second point is that the trial court applied a higher standard of proof than is proper. The correct standard was well stated in *Pippin* v. *May,* 78 Ark. 18, 21, 93 S.W. 64, 65 (1906):

> In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not.

The trial court considered all of the factors and declined to exercise the right of eminent domain for a public road across appellee's land. *See Dowling* v. *Erickson,* 278 Ark. 142, 644 S.W.2d 264 (1983). Even if the trial judge announced the wrong reason, we will sustain the judgment if it is right, *Reeves* v. *Ark. La. Gas Co.,* 239 Ark. 646, 391 S.W.2d 13 (1965), and we consider the evidence most favorably to appellee and affirm unless the decision of the trial court is clearly erroneous. ARCP Rule 52; *Orsby* v. *McGee,* 271 Ark. 268, 608 S.W.2d 22 (1980). Here, the evidence established that appellants have a means of access across their land but that construction of this alternate route

would be expensive. The proposed road, although less costly, would inconvenience the appellee school district because it would intersect a school parking lot and endanger the school children on the property. In addition, although a public road, the proposed road would benefit only appellants. From a review of the record we cannot say that the trial judge was clearly erroneous in determining that the road across appellee's land was not necessary within the meaning of the statute.

Affirmed.

HICKMAN, J., concurs. See *Dowling* v. *Erickson,* 278 Ark. 142, 644 S.W.2d 264 (1983).

Jerry SIMPSON *v.* Cyril BAILEY

82-278 648 S.W.2d 464

Supreme Court of Arkansas
Opinion delivered March 28, 1983

Pearson, Woodruff & Evans, by: *Ronald G. Woodruff,* for appellant.

Jones & Segers, for appellee.

STEELE HAYS, Justice. The trial court dismissed this personal injury suit by summary judgment upon a finding that the cause of action was barred by the three year statute of limitations. On appeal, appellant urges that the statute was tolled by the timely filing of the complaint and by an order extending the time for obtaining service of summons. The argument is not sustained and we affirm the trial court.

Appellant's injuries were incurred on September 20, 1977 and suit was filed on September 11, 1980. Summons was issued and returned "non-est" on September 18 with a notation that the defendant (appellee) had moved to Rt. 5, Box 501, Springdale, Arkansas. After another unsuccessful attempt was made to serve the appellee under the long arm statute, a new summons was issued and served at the Springdale address on July 20, 1981. Also on July 20, appellant filed a motion to extend the time for obtaining service, which the trial court granted upon a finding that a reasonable effort had been made to obtain service of summons, and that good cause existed to extend the time for obtaining service.

The trial court overruled a motion to dismiss the complaint and subsequently the case was transferred to another division, where appellee moved for summary judg-

ment on the grounds the pleadings showed on their face that the cause of action was barred. The motion was granted and we are asked to reverse the trial court.

The only question to be decided is whether appellant's cause of action "commenced" within three years from the date his injuries were sustained, as required by Ark. Stat. Ann. § 37-206. It is agreed the collision occurred on September 20, 1977, that suit was filed on September 11, 1980, some nine days prior to the running of the statute and that summons was immediately issued. However, Rule 3 of the Arkansas Rules of Civil Procedure (Commencement of Action) provides that an action shall *not* be deemed to have commenced:

> "[A]s to any defendant not served with process . . . within sixty (60) days of the filing of the complaint, unless *within that time* the person filing the complaint has made an effort . . . to obtain service by a different method provided for in Rule 4. In no event shall the time for obtaining service be extended beyond ninety (90) days without leave of court and for good cause shown." (our italics)

Rule 4 provides several alternative methods of service, but appellant availed himself of none of these within the sixty days permitted by Rule 3, nor was any order of extension for good cause made by the trial court within the ninety days permitted by the rule. After the initial summons was returned "non-est" nothing else happened in the case for nearly seven months, when on April 10, 1981, appellant made an attempt to serve the appellee under the long arm statute. This fails to meet the plain wording of Rule 3 and the trial court was correct in finding that suit was not "commenced" within the time provided by Rule 3.

Appellant argues that the trial court has discretion on a showing of good cause to enlarge the period of time provided for in Rule 3, pointing out that the July 20, 1981 order found that a reasonable effort had been made to serve the appellee and that good cause existed to enlarge the time allowed by Rule 3. But the order was not entered until nine

months after the statute of limitations had run, and seven months after the period allowed in Rule 3. The trial court found, correctly, that the discretion arising under Rule 3 must be exercised within the time period allowed under the rule.

Appellant also cites ARCP Rule 6 (b) (2) which permits a trial court to enlarge the time within which an act is to be performed even after the time has expired upon a finding that the failure to act was the result of unavoidable casualty or excusable neglect. But we decline to reach that issue, as there is nothing in this record to indicate a factual basis for holding the long delay was attributable to unavoidable casualty or excusable neglect. The fact is that appellant was served on July 20, 1981, at the same Springdale address as was shown on the copy of the Sheriff's "non-est" return filed with the Clerk on September 18, 1980.

The judgment is affirmed.

FIRST STATE BANK OF SPRINGDALE,
Arkansas *v.* Charles W. SHAVER and Darlena SHAVER,
Husband and Wife

82-303 648 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered March 28, 1983

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

No response for appellees.

PER CURIAM. The appellees have moved to dismiss this appeal on the ground that the notice of appeal was not filed within the time allowed by ARCP Rule 4. We decline to dismiss the appeal. Jurisdiction is in this Court pursuant to Rule 29 (1) (c).

The final decree was entered on September 2, 1982. On September 13, 1982, a motion to amend the decree was filed pursuant to ARCP Rules 59 (a) (6) and (8). On October 7, 1982, the trial court denied the motion to amend. Notice of appeal was given on November 4, 1982. Appellees contend that the appeal should be dismissed because the notice of appeal was not given within 30 days of the entry of judgment, ARAP Rule 4 (a), nor was it given within 10 days from the entry of the order denying the motion to amend. ARAP Rule 4 (d). The motion would be well taken if the appellant is attempting to appeal from any holding in the original judgment. However, the notice of appeal provides that the appellant seeks to appeal only from the order denying the motion to amend, which may have decided new questions. Since the motion to dismiss, to which there has been no response, does not make it clear that the notice of appeal was necessarily too late, the motion must be denied.

Elgie SANDERS *v.* STATE of Arkansas

CR 81-51 648 S.W.2d 451

Supreme Court of Arkansas
Opinion delivered March 28, 1983

Petitioner, *pro se.*

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

PER CURIAM. Petitioner Elgie Sanders was convicted by a jury of aggravated robbery and first degree battery and sentenced to prison terms of 40 years and 20 years consecutively. The terms were ordered served consecutively. We affirmed. *Sanders* v. *State,* 274 Ark. 525, 626 S.W.2d 366 (1982). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37.

Three men, Shells, Thompson, and the petitioner Sanders were jointly charged with the aggravated robbery of three undercover police officers, and with first degree battery in the shooting of two of the officers in the course of the robbery. Testimony at trial indicated that the three officers negotiated a marihuana purchase from Shells and Thompson, who left to get the marihuana. When they returned, petitioner was with them. Both he and Shells had guns. Petitioner pointed his weapon at the officers and shots were immediately exchanged, with petitioner and two of the officers being struck.

Petitioner's sole ground for postconviction relief is that his being sentenced for both aggravated robbery by force and battery is a violation of the constitutional prohibition against double jeopardy and Ark. Stat. Ann. § 41-105 (1) (a) and (2) (a) (Repl. 1977). He contends that Criminal Procedure Rule 37.1 (a) requires this Court to grant relief from the conviction and sentence for first degree battery since it was imposed in violation of the constitution and laws of this State. We agree for two reasons. First, both convictions grew out of a single act; and secondly, under the felony information in this case the proof required to prove one of the offenses necessarily included proof of the other.

In *Akins* v. *State,* 278 Ark. 180, 644 S.W.2d 273 (1983), wherein the appellant was also charged with aggravated robbery and first degree battery, we held that Ark. Stat. Ann. § 41-105 (Repl. 1977) prohibits multiple sentences when the same act results in more than one offense. We also noted that when a criminal offense cannot be committed without the commission of an underlying offense, a conviction cannot be had for both offenses under § 41-105. *Akins, supra,* citing *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982); *Rowe* v. *State,* 275 Ark. 37, 627 S.W.2d 16 (1982); *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). In *Akins,* a case similar to petitioner's in which the victim of an armed robbery attempted to use his own pistol to prevent the robbery and was shot by the robber, we set aside the conviction and sentence for battery. We must afford petitioner the same relief. Count I of the felony information on which he was tried charged that he committed aggravated robbery by force.

Count II charged that "in the course of and in furtherance of the felony [i.e. the aggravated robbery by force], he . . . caused serious physical injury. . . . " As in *Akins,* the proof required to prove one offense necessarily included proof of the other. Therefore, in accordance with A.R.Cr.P. Rule 37.1 (a) the conviction and sentence for the lesser offense, battery in the first degree, must be set aside since it was imposed in violation of Ark. Stat. Ann. § 41-105 (Repl. 1977). The conviction and sentence for aggravated robbery are not disturbed. See also *Wilson* v. *State,* 277 Ark. 219, 640 S.W.2d 440 (1982).

Petition granted.

HICKMAN, J., concurs.

ADKISSON, C.J., not participating.

DARRELL HICKMAN, Justice, concurring. I agree with the result in this case. We decided in *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981), that under the capital murder statute a person could be charged with the commission of capital murder and the underlying felony but could not be convicted of both. That same principle was applied in the case of *Rowe* v. *State,* 275 Ark. 37, 627 S.W.2d 16 (1982), when the charge was attempted capital felony murder. Necessarily, that principle has been applied when one is charged with committing a first degree battery under paragraph (d) of Ark. Stat. Ann. § 41-1601 (Repl. 1977), because such a battery is committed in the course of a felony. This does not necessarily preclude a person from being charged and convicted of aggravated robbery and first degree battery; and if indeed there are two separate acts involved, the prosecuting attorney should not charge a defendant with first degree battery in violation of § 41-1601 (d) but with one of the other three possible charges for first degree battery.

Millard WRIGHT *v.* Billy Don WRIGHT et ux

82-274 648 S.W.2d 473

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Wayland A. Parker, for appellant.

Gean, Gean & Gean, by: *Lawrence W. Fitting,* for appellees.

RICHARD B. ADKISSON, Chief Justice. In 1972 appellees, Billy Don and Dorothy Wright, agreed to purchase approximately 173 acres of land in Crawford County from Dr. M. J. Graham for $100,000 with $20,000 down and the remainder to be paid in installments. On August 20, 1975,

appellant, Millard Wright (Billy Don's father), handed over a $10,000 check to appellees. The check was made to the order of Dr. M. J. Graham "For Payment on land." Billy Don Wright signed his name just below his father's signature and handed the check over to Dr. Graham.

Apparently, sometime between 1975 and 1979 appellant demanded that appellees repay the $10,000 because on October 4, 1979, appellees wrote appellant a letter:

> October 4, 1979
>
> Mr. Millard Wright.
>
> Concerning the 10,000. We can't get it from Mr. M. J. Graham because he is 6 ft. under the ground.
>
> You have a monthly income if you can't live on it then we think you should go to a rest home and live. They will take care of you for the income you receive.
>
> /s/ Billy Don Wright
> /s/ Dorothy Wright

On April 30, 1981, appellant filed this lawsuit to collect the money. Appellees defended, contending that the money was either a gift or that the cause of action was barred by the three year statute of limitations for oral contracts. At trial, appellant testified that the money was a loan and that his son asked him to loan him the $10,000 because he was "in a tight." Appellant further testified that the land was to stand good for the $10,000 and that his son was to pay it back whenever he needed money.

The chancellor held that Ark. Stat. Ann. § 37-206 (Repl. 1962) barred the action. This statute provides:

> The following actions shall be commenced within three (3) years after the passage of this act, or, when the cause of action shall not have accrued at the taking effect of this act, within three (3) years after the cause of action shall accrue: First, all actions (of debt) founded

> upon any contract, obligation, or liability, (not under seal [and not in writing]), . . .

Appellant contends that this statute is inapplicable to this case because the debt, although initially barred by the statute of limitations, was revived by the October 4 letter. In *McHenry* v. *Littleton,* 237 Ark. 483, 374 S.W.2d 171 (1964) we held that a debt otherwise barred by the statute of limitations could be revived by a letter in which the debtor unequivocally recognizes the indebtedness as a subsisting obligation and makes no statement repelling the presumption that he intends to pay. Here, however, appellees' October 4 letter does not recognize the indebtedness as a subsisting obligation and, therefore, falls short of providing a revival by acknowledgment as contemplated by *McHenry, supra.*

Appellant argues that the fraud of appellees tolled the statute of limitations and also alleges that a constructive trust should be imposed upon the land in his favor. However, appellant failed to plead or prove fraud. Nor was there sufficient evidence to satisfy the degree of proof required to establish a constructive trust. The rule is that constructive trusts must be established by clear and convincing evidence — something more than a preponderance. *Neill* v. *Neill,* 221 Ark. 893, 257 S.W.2d 26 (1953). We cannot state that the chancellor was clearly erroneous in her findings.

Affirmed.

James H. SMITH *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND

82-297 648 S.W.2d 475

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Rieves, Shelton & Mayton, for appellant.

William Palma Rainey, for appellee.

RICHARD B. ADKISSON, Chief Justice. The Crittenden County Chancery Court held that appellant, James Smith, had no interest in property which had been executed upon by appellee, Fidelity & Deposit Company of Maryland. On appeal we affirm.

Fidelity had an unsatisfied judgment against James Browder for $24,303.11. James Browder was the owner of the

Jewelry Nook at 500 East Broadway in West Memphis. On September 10, 1981, appellant allegedly bought $5,000 worth of used jewelry from the Jewelry Nook. Appellant obtained a receipt from James Browder which indicated that appellant had paid cash dollars for "79 Rec. dia, wed. & men rings," and "12 Gold necklaces." Appellant did not take possession of the merchandise at the time of sale. And, even though he testified that the jewelry was tagged by a Jewelry Nook employee and that a list of the jewelry was made at that time, appellant was unable to produce this list at trial.

Appellant testified that around the first of November he took possession of the jewelry he had bought and began doing business at Browder's Jewelry Store at 526 East Broadway in West Memphis. Appellant stated that at the time the store opened, his wife wrote out a three page inventory list of the jewelry which was introduced into evidence at trial. Appellant further testified that he sold $2,000 worth of this jewelry, which he replaced with additional jewelry he purchased from James Browder around the latter part of December. No receipt for the additional jewelry was introduced at trial, although appellant testified that he kept track of the jewelry by adding it on to the end of his inventory list.

Appellant allegedly went into business with James Browder's brother, Larry, but testimony at trial revealed that Larry had a full time job as a bus driver and that James Browder actually ran Browder's Jewelry store. The building lease was in James Browder's name, he signed all the checks for the store, and one witness testified that he observed things being moved from the Jewelry Nook to Browder's Jewelry Store in October. There was also testimony to the effect that James Browder made various business arrangements for the store, including one with Delta Auction to auction off the jewelry when it became obvious that Browder's Jewelry Store was not profitable. However, before the auction was held, Fidelity executed on its judgment against Browder, directing the sheriff to take possession of the real and personal property located at Browder's Jewelry Store. On February 9, 1982, the sheriff took possession of all

the merchandise at that location, including the jewelry which appellant alleges belonged to him, and inventoried it.

The chancellor held that all the merchandise in Browder's Jewelry Store was subject to execution, finding that it was not possible to identify appellant's property from the evidence introduced at trial. We cannot say that this finding is clearly erroneous. The list of the jewelry that was allegedly made at the time of purchase was not introduced at trial. The $5,000 receipt which James Browder gave appellant indicates that appellant purchased 12 necklaces, yet no necklaces were listed on appellant's inventory sheet. Nor is there any way to reconcile appellant's inventory sheet with the inventory list prepared by the sheriff when he executed on the property. For example, rings marked "here" on appellant's inventory sheet were apparently not there when the sheriff inventoried the property.

There was sufficient evidence from which the trial judge could have found that the purported sale of jewelry by James Browder to appellant was a subterfuge and an attempt by James Browder to avoid paying his just debts.

Affirmed.

Barry BRAZIL *v.* ARKANSAS STATE BOARD OF DENTAL EXAMINERS

82-302 648 S.W.2d 476

Supreme Court of Arkansas
Opinion delivered April 4, 1983
[Rehearing denied May 9, 1983.]

Ronald J. Bruno and Associates, for appellant.

Howell, Price & Trice, P.A., by: *William E. Trice, III,* for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal by Barry Brazil from an order finding him to be in contempt of court and fixing the punishment at a $1,000 fine and a three-day jail sentence, the latter being stayed during the appeal.

In 1979 the Board of Dental Examiners brought suit to enjoin Brazil and his wife, who are not licensed dentists, from practicing dentistry. The final decree found that the defendants, doing business as American Denture Center, had (1) made dentures without a work authorization from a licensed dentist, (2) had offered their services to the public through media advertising, and (3) had offered to sell, repair, or alter dentures, all in violation of Ark. Stat. Ann.

§§ 72-540 and -545 (Repl. 1979). The decree enjoined the defendants "from selling or delivering or offering to sell or deliver to the general public the construction, repair, reproduction, duplication, alteration, adjustment, cleaning, polishing, refinishing, or in any other manner processing of any artificial or prosthetic tooth or teeth, bridge, crown, denture, restoration, appliance, device, structure, or material or orthodonic appliance or material to be worn or used in the mouth."

In 1982 the Board filed a motion asking that Barry Brazil be held in contempt for having violated the court's order by treating Mary Ross on January 16 and 23, 1982. After a hearing the chancellor found that Brazil had violated the order by treating Mary Ross. This appeal from that order was transferred to us by the Court of Appeals.

The facts are not seriously in dispute. After the injunction was issued, the Brazils conducted their business by taking Dr. Burnett, a licensed dentist, with them as they traveled over the state in a mobile dental van. On January 9, 1982, Mary Ross went to the mobile unit in Dardanelle and saw Dr. Burnett, who took the initial impressions of her mouth. She returned a week later and was treated only by Barry Brazil, who took wax "bite rim" impressions of her mouth. She again returned on January 23 and obtained her dentures from Barry Brazil, who delivered her dentures (which did not fit) and gave her some glue to use on the dentures for two weeks. She was not attended by Dr. Burnett on that visit. She went back again on February 6, but the results were unsatisfactory.

Brazil's own testimony is hard to follow, as he was to some extent evasive, but his attorney abstracts part of it in these words:

> On the 23 of January, I saw her and gave her some glue and told her to come back in two weeks for another fitting. I don't remember from visit to visit if Dr. Burnett treated her directly or not. He treats a lot of patients. I did it for him sometimes. I gave her the dentures by Dr. Burnett's instructions. On January 23, I

> don't know if Dr. Burnett or anyone else examined Ms. Ross. I personally handed her the dentures. I don't remember the visit on February 6. I remember repairing, shortening and modifying her dentures. I painted white impression paste on the inside of the denture. It shows the areas of pressure on the gum. Then I gave the dentures back to her to put in her mouth. I didn't just modify them without checking that they were placed correctly. I could tell by the bite relationship of the teeth, and I modified the dentures that day. I don't remember if Dr. Burnett saw her that day.

The appellant's brief misses the point, for he argues essentially that the original decree required *only* that he obtain written work orders from a licensed dentist, which he has done. The decree, however, also enjoined Brazil from delivering dentures to the general public and from altering or adjusting them, all of which he has admittedly done. Appellant's argument is that the statute was changed after 1980 by an amendment of § 72-543 (Supp. 1981), that he was not charged with a violation of the new statute, and that the injunctive order was therefore void and may be collaterally attacked. We are not convinced that the language of the order went beyond the statute, but even if it did the appellant should have sought a modification of the order rather than violating it. As we said in *Stewart* v. *State,* 221 Ark. 496, 254 S.W.2d 55 (1953): "That the petitioners thought the order too comprehensive is of course immaterial, since it was their duty to obey even an erroneous decree as long as it continues in force. *Carnes* v. *Butt, Chancellor,* 215 Ark. 549, 221 S.W.2d 416 [1949]." We may sum up by saying that apparently Brazil thought he could continue to treat patients himself as long has he had a written work order based upon a licensed dentist's initial examination of the patient. That view, however, was contrary to the language of the injunctive order and cannot serve as a defense to the citation for contempt of court.

Affirmed.

Ronald E. STOKES et al *v.* Charlene STOKES

82-300 648 S.W.2d 478

Supreme Court of Arkansas
Opinion delivered April 4, 1983
[Rehearing denied May 2, 1983.]

Richard L. Peel, for appellants.

Jonathan P. Shermer, Jr., for appellee.

DARRELL HICKMAN, Justice. Carl J. Stokes died testate in 1979. His will, made in 1975, shortly before his marriage to Charlene Stokes, left most of his estate to his adult children by a prior marriage, Ronald E. Stokes and his sister, Nancy Stokes Cornwell, the appellants in this case. The appellee, Charlene Stokes, Carl Stokes' widow, elected to take against his will but we held in *Stokes* v. *Stokes,* 271 Ark.

300, 613 S.W.2d 372 (1980), that several of our gender-based statutes were unconstitutional and she was denied the election.

This particular litigation between the parties arose as an aftermath to our decision in *Stokes* v. *Stokes, supra.* The appellants filed suit against Charlene Stokes in probate court for an accounting of certain rental income she had received during the probation of Carl Stokes' estate. The probate judge dismissed the case without prejudice and we affirmed. *Stokes* v. *Stokes,* 275 Ark. 110, 628 S.W.2d 6 (1982). The case was refiled in chancery court and the trial court essentially held in favor of Charlene Stokes and from that decision the appellants bring this appeal alleging several errors. Actually the question to us is one purely of fact and equity, and we affirm the chancellor.

Carl Stokes had a construction company which he owned with his two children. The company built apartments and the projects were customarily financed by People's Bank and Trust Company. Carl and Charlene purchased a four-unit apartment house from the company that had been financed by People's. After the purchase they were notified by People's that the construction company was heavily in debt and that the company was going to have to provide more money on its various loans. Seven days after the Stokeses purchased the apartment house, they mortgaged it to People's in exchange for an $80,000 loan. Charlene and Carl both signed the note.

Carl had a "rental account" at People's where he deposited the rents from his various apartment complexes and the payments on two notes that he held. This was the Stokeses' primary source of income. At the time Carl mortgaged the four-unit apartment house, he orally directed the bank to automatically take the monthly payments out of the rental account for that mortgage. People's did so for a year before Carl's death and for a year afterwards. It is not disputed that "income" from the apartments, which were ultimately determined to be the property of Carl's estate and not Charlene's, was deposited into the account.

When Carl died, Charlene owned eighteen apartments in her own right or by right of survivorship. Among these was the four-unit apartment house. A few days after Carl's death, Ronald Stokes, the executor of the estate, and his attorney went to Charlene and told her to live as she had been and continue to manage Carl's rental account. Ronald testified that he told her to keep a separate account for the rents from property she owned by herself. She said there was no discussion of separate accounts.

This case arose because the bank continued after Carl's death to draw the payments for the mortgage of the four-unit complex from Carl's rental account. Ronald claimed that Charlene should have made payments on the note from income on her own property since Carl and Charlene mortgaged the property in order to pay the purchase price and since the property was now Charlene's. He also alleged that Charlene was principally liable on the note as a co-maker, and not secondarily liable as an accommodation party.

The chancellor found that Charlene was an accommodation party on the mortgage note, and, therefore, Charlene was right in allowing the note to be paid from income that was the property of Carl's estate. Apparently the chancellor found that the property was mortgaged to meet the debts of Carl Stokes' company and we cannot say that he was clearly wrong. ARCP, Rule 52. Carl died in January and Ronald did not file this action until ten months later. Ronald consented to Charlene's continued use of the rental account and he knew, or should have known, that the mortgage was being paid from that account and made no effort to stop it. Neither Charlene nor People's was directed to stop drawing the payments from the rental account. No doubt the chancellor resolved the dispute between the parties in favor of the appellee, finding the facts and equities of the matter to be in her favor. We can only overrule that judgment if we find it clearly wrong, which we cannot do.

The chancellor did find that the appellee drew $761.00 from the account for insurance on her own property and that sum was ordered returned.

Affirmed.

AREA AGENCY ON AGING OF WEST CENTRAL ARKANSAS, INC. *v.* William F. EVERETT, Director of the Department of Labor of the State of Arkansas; and Kenneth L. COON, Administrator of the Employment Security Division of the Department of Labor of the State of Arkansas

82-265 648 S.W.2d 467

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Laser, Sharp, Haley, Young & Huckabay, P.A., by: *Alvin Laser,* for appellant.

Bruce H. Bokony, for appellees.

JOHN I. PURTLE, Justice. The Garland County Chancery Court dismissed appellant's petition for an injunction to prevent an illegal exaction and to quash a notice of assessment of contribution against appellant by the Employment Security Division of the Arkansas Department of Labor. Appellant argues the court erred in denying jurisdiction and by holding that appellant had been given notice and an opportunity for a hearing. We hold the court did have jurisdiction of the subject matter and that appellant did not have notice and an opportunity for a hearing. The case is reversed and remanded.

On October 2, 1981, Kenneth L. Coon, Administrator of the Employment Security Division, Arkansas Department of Labor, certified to William F. "Bill" Everett, Commissioner, Arkansas Department of Labor, a notice of assessment of contributions against the Area Agency on Aging of West Central Arkansas, Inc. The notice and assessment were purportedly given pursuant to Act 162 of 1953, creating a lien upon appellant's property. Appellant filed a petition to remove the lien as a cloud on the title to its property and to enjoin an illegal exaction. Appellee moved to dismiss the petition because it did not state facts upon which relief could be granted and further contending that chancery had no jurisdiction over the subject matter. The appellee relied upon Ark. Stat. Ann. § 81-1114 (b) (2) (Supp. 1981) as authority to levy the assessment against appellant. The chancellor held that appellant had not been denied notice and an opportunity to be heard under Ark. Stat. Ann. § 81-1114(b)(2) and that the court did not have jurisdiction to

determine appellant's status as an employer under Ark. Stat. Ann. §§ 81-1101, et seq. (Repl. 1976). The court further stated appellant's proper remedy concerning coverage liability was a hearing in accordance with § 81-1114 (b) (2). The court also stated appellant had failed to state facts showing appellees' actions contravened Art. XVI, Sec. 13 of the Constitution of the State of Arkansas.

Ark. Stat. Ann. § 81-1114 (b) (2) provides in part as follows:

> The Director may, upon his own motion, or upon application of an employing unit, and after notice and opportunity for hearing, make findings of fact and on the basis thereof, determinations with respect to whether an employing unit constitutes an employer and whether services performed for, or in connection with the business of an employing unit constitute employment for such employing unit. . . . an appeal may be taken from a determination made by the Director to the Board of Review on all matters with respect to coverage determined by the Director within fifteen (15) days after . . . delivery of such notice.

In the present case the director was acting upon his own motion, therefore, appellant had the right to appeal to the board of review within fifteen (15) days from the notice of assessment. Before the fifteen (15) days expired the appellant petitioned the chancery court for other relief. The record disclosed that no notice of the assessment had been given to the appellant and no administrative hearing had been had for the purpose of determining appellant's objections to the assessment. The provisions of § 81-1114 (b) (2) pertaining to a hearing were ignored and the assessment was made in reliance upon a former ruling of the board of review which had been affirmed, without written opinion, by the Court of Appeals.

Almost the same factual situation was presented in the case of *McCain, Commissioner of Labor* v. *Hammock, Chancellor,* 204 Ark. 163, 161 S.W.2d 192 (1942), where we held chancery court had jurisdiction pursuant to Art. XVI,

Sec. 13, Constitution of the State of Arkansas. In the case of *Thornbrough, Commissioner of Labor* v. *Barnhart,* 232 Ark. 862, 340 S.W.2d 569 (1960) we faced the question of whether the chancery court could quash an assessment by the Commissioner of Labor and held that it could. The chancellor had ordered the assessment expunged from the records because of failure to give notice and an opportunity for a hearing. The commissioner reissued the assessment, after a hearing, and the employer argued the first ruling was *res judicata.* The board of review held with the employer. We reversed and remanded with instructions to proceed with the case finding that *res judicata* did not apply. The same statute was involved in *Palmer* v. *Cline, Director,* 254 Ark. 393, 494 S.W.2d 112 (1973). Palmer filed a petition in the Chancery Court of Pulaski County seeking review of a commissioners' assessment against him for taxes under the Employment Security Act. The dispute was primarily whether chancery or circuit court had jurisdiction to hear the matter. We upheld the chancellor's ruling that chancery did not have jurisdiction to determine an employer-employee relationship pursuant to Ark. Stat. Ann. § 81-1114 (b) (2). We agreed that such disputes were properly brought in circuit court. However, in *Palmer,* the constitutional issue of illegal exaction was not involved as it was in *McCain* and *Thornbrough* as well as the case here under consideration.

The chancery court's jurisdiction on the matter of illegal exaction gives it authority to consider the petition. After obtaining jurisdiction on one subject the court had jurisdiction to consider the entire petition in the absence of a motion to transfer the matter to law court. The facts were fully developed as to matters which the petitioner desired to have adjudicated. It is obvious from the facts that appellant was not afforded the notice and opportunity for hearing as required by Ark. Stat. Ann. § 81-1114 (b) (2). The chancery court having properly obtained jurisdiction under the constitutional claim of illegal exaction and to remove a cloud upon title to real property, the chancellor should have considered the matter of notice and opportunity for a hearing. Therefore, the case is remanded to the Garland County Chancery Court with directions to remand the case to the Commis-

sioner of Labor and E.S.D. with directions to them to give appellant an opportunity to contest the decision that appellant is an employer under the terms of the act. Also, any assessment creating a lien against appellant arising from these same facts should be expunged from the record until appellant has been given notice and an opportunity for a hearing.

Reversed and remanded.

Jerry RHODES *v.* OAKLAWN BANK

82-275 648 S.W.2d 470

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Nelson V. Shaw,* for appellant.

Wheeler, Graham, Gooding & Morriss, by: *Josh R. Morriss, III,* for appellee.

JOHN I. PURTLE, Justice. Appellant executed a promissory note to appellee which was secured by some items of restaurant equipment and a prefabricated aluminum building. The appellant had operated a fast food restaurant from this building and used the equipment in the business. Appellant defaulted in his payment schedule and appellee repossessed the building and equipment. Some months later, appellee sold the collateral. Appellant was never sent written notice of the sale. Appellee brought suit for failure to make payments under the terms of the note. The trial court granted judgment against appellant in the sum of $21,516.32. Appellant argues on appeal that the trial court erred in failing to find: (1) the sale was not commercially reasonable, (2) the appellee unjustifiably impaired the collateral, and, (3) that appellant should be allowed an offset of an amount equal to the proceeds of the sale. We hold that the appellee failed to give notice as required by the Uniform Commercial Code, and do not reach the other arguments presented on appeal. The case is reversed and dismissed.

In 1975, appellant and his brother purchased a portable building and the necessary equipment to operate a fast food

establishment. The building and air conditioning unit were purchased for $26,700. The other equipment, almost all stainless steel, increased the total capital investment to $41,864.74. The appellant's brother died in 1976 and on January 18, 1978, appellant renegotiated a loan with appellee in the sum of $20,592.02. In September, 1978, the appellee called the balance due on the note because appellant defaulted on the monthly note payment.

Appellee repossessed the building and equipment in November, 1978, and tried to sell the property without success. On December 6, 1978, the property was listed for sale with a real estate firm. The list price was $10,000 but no buyer was found. A "for sale" sign was placed upon the property, which was only a few hundred feet from appellant's other business where he worked daily. The equipment was stored on the back of a trailer in an open lot. The equipment was subsequently exposed to the elements and depreciated in value. In July of 1979 appellee sold the collateral for $1,400. Specific notice of the sale, or a date after which the sale would be made, was not given to appellant.

Appellee brought suit for $21,516.32 plus costs, interest and attorney's fees. Appellant defended on the grounds that the sale was not "commercially reasonable" and that the appellee unjustifiably impaired the collateral. The trial court granted judgment in the amount of $21,516.32 without making specific findings of fact and conclusions of law.

The pertinent part of Ark. Stat. Ann. § 85-9-504 (3) (Supp. 1981) reads:

> Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be *sent* by

> the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. (Emphasis supplied).

In the case of *Barker* v. *Horn,* 245 Ark. 315, 432 S.W.2d 21 (1968), we held that the debtor was entitled to notice of the time and place of a public sale or reasonable notice of the time after which a private sale would be made. In *Barker,* the creditor told the debtor on the day after repossession, that he would sell the car to the highest bidder. He did not, however, mention the time or place of the sale. Evidence was introduced to the effect that notice had been mailed. The debtor denied receipt of the letter. We construed this same statute to require notice and since it was not proven we reversed and dismissed the deficiency judgment obtained by the creditor. In *Wheeless* v. *Eudora Bank,* 256 Ark. 644, 509 S.W.2d 532 (1974), the creditor repossessed an automobile and sold it at public sale a few weeks later without giving notice to the debtor as to the time of the sale. At trial on the deficiency claim it was argued that notice was given and received by the debtor when he surrendered the keys at the time of repossession and when he promised to pay the deficiency judgment after being notified of such. The trial court directed a judgment in favor of the creditor. We reversed and remanded, holding that there was a valid jury question and that the trial court should not have directed a verdict. As to the law in question, we held that the provisions of Ark. Stat. Ann. § 85-9-504 (Supp. 1973) required more than knowledge of repossession or that the collateral would eventually be sold. We also held that after default and prior to a sale of collateral in its possession, a creditor must give notice to the debtor of the time and place of a public sale or the time after which a private sale would be conducted.

When a creditor repossesses chattels and resells them in a manner not consistent with the code it is his responsibility to prove the sale was commercially reasonable before he is entitled to a deficiency judgment *Harper* v. *Wheatley,* 278 Ark. 27, 643 S.W.2d 537 (1982). *See also Universal C.I.T.* v. *Rone,* 248 Ark. 665, 453 S.W.2d 37 (1970). We remanded *Harper* to the trial court for a determination of commercial

reasonableness because such proof was disallowed at trial. The matter of lack of notice was not decided in *Harper*.

When a creditor repossesses chattels and sells them without sending the debtor notice as to the time and date of sale, or as to a date after which the collateral will be sold, he is not entitled to a deficiency judgment, unless the debtor has specifically waived his rights to such notice. In the case before us no notice was sent as defined by Ark. Stat. Ann. § 85-1-201 (38) (Supp. 1981), and no waiver by the debtor was proven. Under the circumstances the creditor is not entitled to a deficiency judgment. The decision of the trial court is reversed and the case is dismissed.

Stanley WELLS *v.* STATE of Arkansas

CR 82-156 648 S.W.2d 466

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Claude S. Hawkins, Jr., for appellant.

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

JOHN I. PURTLE, Justice. Appellant's motion pursuant to A.R.Cr.P. Rule 37 was denied by the Circuit Court of Howard County without a hearing. On appeal it is contended that the trial court erred in failing to vacate or modify the sentence. We agree with the lower court's decision.

On September 18, 1981, the appellant entered a plea of guilty to burglary and theft of property and second degree escape. He received a sentence of seven years on burglary and theft of property plus a two year sentence for second degree escape; the sentences to run consecutively. His timely motion pursuant to Rule 37 was denied at the trial level without a hearing.

After commencing his sentence the appellant learned that he was subject to the provisions of Act 93 of 1977, codified in Ark. Stat. Ann. §§ 43-2828 et seq. (Repl. 1977), which required him to serve two-thirds of his sentence because he had had two prior convictions.

Appellant's Rule 37 petition was a claim of ineffective assistance of counsel due to the fact that he was not informed, prior to his plea, that he would be subject to the provisions of Act 93 in serving his sentence. A careful review of the record indicates that the acceptance of appellant's

guilty plea by the trial court was genuinely fair and complete in all details. There was no showing by the court or anyone else that appellant would be subject to the provisions of Act 93 while serving his sentence in the Arkansas Department of Correction. Judge Castleman thoroughly explained the minimum and maximum sentence, the right to a trial by a jury, and every other matter necessary prior to accepting a guilty plea. We held in *Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979), that it was prejudicial error for the trial judge to comment to the jury concerning the power of the governor to pardon. We faced almost exactly this same question in the case of *Houff* v. *State,* 268 Ark. 19, 593 S.W.2d 39 (1980). In fact, the trial court in *Houff* was aware that Act 93 of 1977 had become effective but was not sure how it would affect the time to be served on the sentence. We affirmed the trial court's denial of Houff's Rule 37 petition. The problem of how much time an inmate must serve before becoming eligible for parole was considered in the case of *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1982). We held that the manner in which a sentence is being executed is not a proper matter to be considered in a petition for postconviction relief and that the department of correction was the proper authority for determining parole eligibility. We have also held that the trial court has no authority to determine the manner in which the board of pardons and paroles exercises its prerogative for parole eligibility. *Jones* v. *State,* 270 Ark. 328, 605 S.W.2d 7 (1980). In *Stevens* v. *State,* 262 Ark. 216, 555 S.W.2d 229 (1977), we considered a Rule 37 petition for relief when the trial court had denied the petition without a hearing. At the sentencing phase the appellant was told he was sentenced to eleven years and that the court did not know what effect parole policy might have upon the length of time to be served. We affirmed the action by the trial court.

The appellant received the sentence he bargained for. There was no duty upon the court or anyone else to inform the appellant that his sentence might be affected by the provisions of Act 93 of 1977. Any attempt by the court or the defense counsel or the state's attorney to inform the defendant of his exact parole eligibility date could have resulted in error of a prejudicial nature. Certainly the defense counsel

should inform his client about the possibility of parole if he has knowledge of such. However, to require the court or its officers to explain parole eligibility to a defendant would be to encourage the judiciary to encroach upon the executive department of government. Therefore, we find that the court did not err in denying appellant's motion pursuant to Rule 37 without a hearing.

Affirmed.

Francine B. CARTER *v.* Thomas L. WILSON

82-286 648 S.W.2d 472

Supreme Court of Arkansas
Opinion delivered April 4, 1983

Cole & Orintas, for appellant.

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

STEELE HAYS, Justice. Appellant filed this suit in Pulaski County, Arkansas, where she resides, for personal injuries sustained in a motor vehicle collision which occurred in Pickens County, Alabama on September 13, 1980. The defendant (appellee) is a resident of Alabama and was served with summons in Alabama. The complaint asserts that jurisdiction is based on Ark. Stat. Ann. § 27-610.1 (Repl. 1979). The defendant (appellee) moved to dismiss the suit pursuant to ARCP Rule 21 alleging the court had no jurisdiction over the defendant and the subject matter of the law suit. The trial judge granted the motion and appellant has appealed. We affirm.

Appellant cites Ark. Stat. Ann. § 27-2502, which lists a number of activities that will render a person answerable to suit in Arkansas, including a provision that a court of this State may exercise jurisdiction "on any other basis authorized by law." Appellant points to Ark. Stat. Ann. § 27-610.1 as such "other basis." It reads:

> Actions for damages for personal injury or death by wrongful act, where the accident which caused the injury or death occurred outside this State, shall be brought in the county in this State where the person injured or killed resided at the time of injury or in any county in which the defendant, or one [1] of several defendants, resides or is summoned.

But the argument has a fatal defect — § 27-610.1 is a *venue* statute and is not to be regarded as an attempt to give Arkansas courts jurisdiction over a non-resident motorist involved in an out-of-state collision. Section 27-610.1 assumes that jurisdiction exists over the defendant, and where that is so, the statute gives the plaintiff a choice of

forums. See 15 Ark. L. Rev. 436: "Venue Where Out-of-State Accident Gives Rise to Personal Injury or Wrongful Death Action."

Here the appellee resides in Alabama, the accident occurred in Alabama and for the purposes of this case, we may assume the appellee has never been in Arkansas. It is thoroughly settled that under the due process clause of the Fourteenth Amendment, where a resident of another state has no contacts with Arkansas, engages in no activities that would establish a "presence" here to render him amenable to suit, he is not subject to the in personam jurisdiction of this State. *Pennoyer* v. *Neff,* 95 U.S. 714 (1877). *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). See Leflar, American Conflicts Law, 3rd Edition, Section 19.

If appellant could achieve her objective here, it would mean that a resident of California could motor to Maine, become involved in a collision, return to California and bring suit, thus forcing upon the Maine resident, not to mention the witnesses, the burden of defending a suit tried at the opposite end of the country.

> Those restrictions [the due process clause] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the several states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had "minimal contacts" with that State that are a prerequisite to its exercise of power over him. *Hanson* v. *Denckla,* 357 U.S. 235 (1958) at 251.

The case was properly dismissed and the judgment is affirmed.

Samuel ROBINSON *v.* STATE of Arkansas

CR 82-138 648 S.W.2d 446

Supreme Court of Arkansas
Opinion delivered April 4, 1983

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

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

PER CURIAM. Samuel Robinson filed a petition for A.R.Cr.P., Rule 37, relief because he was convicted of aggravated robbery and first degree battery and sentenced in violation of Ark. Stat. Ann. § 41-105 (2) (a) (lesser included offense). We affirmed Robinson's conviction and his sentence of twenty-five years imprisonment for aggravated robbery and twelve years for first degree battery, finding that the issue argued to us was not properly raised.

Robinson was charged with first degree battery in violation of Ark. Stat. Ann. § 41-1601 (d) in that he committed the battery during the course of a felony, that felony being aggravated robbery. The jury was instructed accordingly, AMCI 1601(A). In accordance with our decisions in *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981), *Rowe* v. *State,* 275 Ark. 37, 627 S.W.2d 16 (1982), and *Sanders* v. *State,* 279 Ark. 32, 648 S.W.2d 451 (1983), the conviction

and sentence for first degree battery are set aside as being imposed in violation of Ark. Stat. Ann. § 41-105 (Repl. 1977). The conviction and sentence for aggravated robbery are not disturbed. *See Wilson* v. *State,* 277 Ark. 219, 640 S.W.2d 440 (1982).

Bonnie Sue PIERCE *v.* Bobby Joe PIERCE et al

83-24 648 S.W.2d 487

Supreme Court of Arkansas
Opinion delivered April 11, 1983

Richard W. Byrd, for appellant.

Phillip H. Shirron, for appellees.

RICHARD B. ADKISSON, Chief Justice. The Saline County Probate Court refused to allow appellant, Bonnie Sue Pierce, to revoke her consent to the adoption of her child by appellees, Bobby Joe Pierce and Phyllis Kay Pierce. On appeal we affirm.

The facts are not in dispute. The child was born on September 8, 1978. On May 11, 1981, appellant signed a

"consent to adoption and relinquishment of parent and child relationship" and on that same day appellees, who are the brother and sister-in-law of appellant, took custody of the child. On June 19, 1981, the probate court approved appellees' petition to adopt and entered an interlocutory order to that effect. On September 17, 1981, appellant filed a motion to revoke her consent, alleging that the adoption was not final under Ark. Stat. Ann. § 56-213 (Supp. 1981) because the child had not lived in the adoptive home for six months. On January 22, 1982, the probate court denied appellant's attempted revocation of consent to adoption.

We considered the question of whether a natural mother can withdraw her consent to the adoption of her child after an interlocutory decree had been entered but before a final decree has been entered in the recent case of *McCluskey* v. *Kerlen,* 278 Ark. 338, 645 S.W.2d 948 (1983). Under *McCluskey,* it is settled that consent to adoption can be withdrawn after an interlocutory order only upon a proper showing of fraud, duress, or intimidation. Here the only reason appellant gave in her motion for wanting to revoke her consent was that the adoption was not final. Appellant neither pled nor proffered any evidence of fraud, duress, or intimidation at the hearing. Under these circumstances the probate court did not err in denying appellant's motion to revoke her consent.

Affirmed.

Donald Lewis CURTIS *v.* STATE of Arkansas

CR 82-153 648 S.W.2d 487

Supreme Court of Arkansas
Opinion delivered April 11, 1983

Thomas G. Montgomery, Crittenden County Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant was charged with the aggravated robbery of two jewelry store employees in West Memphis, with the rape of one of the

employees by forcibly engaging in deviate sexual activity with her, and with being an habitual criminal. The jury found the appellant guilty of aggravated robbery and imposed a sentence of life imprisonment. The jury also found the appellant not guilty of rape but guilty of the lesser included offense of sexual abuse in the first degree (described as sexual misconduct on the verdict form) and imposed a six-year sentence. For reversal the appellant complains first of the trial judge's refusal to call the jury back from its deliberations to consider additional evidence and, second, of the error in one of the verdict forms. Our jurisdiction is under Rule 29 (1) (b).

The robbery occurred at about 9:45 a.m. on May 13, 1982. The appellant was arrested eleven days later. He did not testify at the trial, but he called as alibi witnesses his sister, with whom he was living at the time of the robbery, and three other residents of Shearerville, which is a few miles from the scene of the robbery. These witnesses each testified that they saw the appellant for a few minutes in the neighborhood at the time of the robbery. Two other witnesses from Forrest City testified that they saw him there later in the day.

Several of these witnesses had given statements to the police, but none of them had been able to pinpoint May 13 as the day of the robbery. At trial, however, most of them, in saying they had seen the accused on May 13, fixed that date because Jesse Mathis, the boyfriend of another sister of the appellant, had driven his mother to Cleveland, Ohio, on the night of May 13 to attend the funeral of Jesse's uncle on May 14. They professed to remember that the robbery was on the 13th because the funeral was the next day.

After the jury had retired defense counsel produced a bulletin from the church in Cleveland, announcing that the funeral was to be on May 14. Counsel stated that he had not known about the bulletin until a defense witness handed it to him just before the jury retired. The trial judge denied counsel's request that the jury be recalled so that the bulletin might be introduced in evidence.

No prejudicial error appears. The appellant concedes that the recalling of the jury for additional evidence is discretionary with the trial judge. *Powell* v. *State,* 270 Ark. 236, 605 S.W.2d 2 (1980). Here there was clearly no abuse of discretion. To begin with, the date of the funeral was hardly relevant, because the witnesses, some of whom saw the appellant every day, gave no particular reason for associating their supposed brief encounter with the appellant on May 13 with the funeral the next day. They might equally well have selected some other contemporary occurrence and associated it with the day of the robbery. Second, the date of the funeral had already been fixed by several witnesses and was undisputed; so the bulletin would have been merely cumulative and hence not a basis for reopening the case. *Walker* v. *State,* 240 Ark. 441, 399 S.W.2d 672 (1966); and see *Smith* v. *State,* 162 Ark. 458, 258 S.W. 349 (1942), a case quite similar to this one. Indeed, to have recalled the jury would have over-emphasized the importance of the church bulletin. Third, there is no showing of diligence; for if counsel thought the date of the funeral to be important, conclusive evidence of the date could easily have been obtained before the trial, perhaps by stipulation.

On the second point, the court correctly instructed the jury that the charge of rape included the lesser offense of sexual abuse in the first degree, which was then defined; but the verdict form for the included offense referred to it as sexual misconduct. In returning the verdict of guilty, the foreman signed that form. In the second stage of the bifurcated trial the verdict form correctly referred to the offense as sexual abuse in the first degree, and the foreman signed that form.

We think it beyond question that the jury was not misled. Sexual misconduct is an offense newly created by the Criminal Code and not one familiar to the average juror. Ark. Stat. Ann. § 41-1807 (Repl. 1977). It involves sexual intercourse with a person less than sixteen years old — facts not pertinent to this case in any way. More important, the reference to sexual misconduct was read aloud by the trial judge in submitting the first verdict form, but counsel made no objection. We have stated in two fairly recent cases that an

error in the verdict form cannot be raised on appeal if the point was not presented to the trial court. *Ply* v. *State,* 270 Ark. 554, 560, 606 S.W.2d 556 (1980); *Goodwin* v. *State,* 263 Ark. 856, 861, 568 S.W.2d 3 (1978). Too, we do not reverse for a minor irregularity that could have been easily remedied upon proper objection. *Ark. State Highway Commn.* v. *Newton,* 253 Ark. 903, 489 S.W.2d 804 (1973).

We find no error in any of the other objections brought to our attention.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I do not understand by what process or under what authority the majority upgrades the jury verdict from a class B misdemeanor to a class D felony. The jury was provided with three forms for their verdict. The three forms related to aggravated robbery, rape, and sexual misconduct. The jury acquitted appellant on the charge of rape but found him guilty of aggravated robbery and sexual misconduct. It was not the appellant who submitted the wrong form to the jury. The jury had no right to sentence him for a crime for which he was not convicted. The sentence is of no importance in this case because the appellant was sentenced to life on the aggravated robbery conviction. However, the precedent established is of great potential harm. I think we should reduce the second penalty to the one appropriate for the crime for which he was convicted.

Lawrence SMITH *v.* STATE of Arkansas

CR 82-145 648 S.W.2d 490

Supreme Court of Arkansas
Opinion delivered April 11, 1983

Williamson, Ball & Bird, by: *Michael W. Lonsberry,* for appellant.

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

FRANK HOLT, Justice. The appellant was convicted of capital murder. Ark. Stat. Ann. § 41-1501 (Repl. 1977). The jury fixed his punishment at life imprisonment without parole. We reverse.

Vera Rhoden was brutally murdered in her home on June 6, 1980, during the course of an apparent burglary and robbery. She died from repeated blows to the head with a claw hammer. In April 1981 Freddie Lee Hendrix was arrested on an unrelated charge of aggravated assault. While he was incarcerated in the county jail and before he had obtained counsel, he signed an unsworn statement implicating the appellant, as well as himself, in the murder of Mrs. Rhoden. Nine days before appellant's trial, Hendrix bargained a guilty plea, receiving a sentence of life imprisonment. Thus, he was no longer a co-defendant at the appellant's trial. In substance, his unsworn, written statement to the sheriff and his deputy was that he received ten dollars from the appellant for acting as a lookout while the appellant broke into the Rhoden home and killed and robbed her. At trial, Hendrix repudiated his statement, denying that he was present at the murder scene. He stated that he had signed the written statement under duress, and he had lied to the sentencing judge when he pled guilty on his plea bargain. He testified that his only knowledge about the crime was what he had learned from a person named Garland Woodberry, who was killed prior to trial in an unrelated incident. Woodberry had related to him, Hendrix, that appellant had committed the crime while Woodberry acted as a lookout.

When Hendrix recanted on the witness stand, the prosecution sought to introduce into evidence the written statement previously given to the sheriff and his deputy. Initially, the trial court sustained the objection of defense counsel on the ground that the written statement was hearsay. However, the prosecution later was permitted to read the statement to the jury over the objection of the defense. On appeal the state argues *Chisum* v. *State,* 273 Ark. 1, 616 S.W.2d 728 (1981), permits the admission into evidence of the written statement for purposes of impeachment. We do not think *Chisum* is controlling here, because it is manifest from the record that Hendrix's written statement was read to the jury, not for purposes of impeachment, but as substantive evidence to prove the truth of the matters asserted in it. When the defense moved for a directed verdict at the close of the state's case, it appears that

both attorneys treated the written statement as substantive evidence in argument to the trial court. Furthermore, the jury was instructed that Hendrix was an accomplice whose testimony required corroboration to sustain a verdict of guilty. This instruction presupposes the written statement was substantive evidence and invites the jury to so consider it. It appears that the prosecutor, in his argument to the jury, treated the written statement as substantive evidence of appellant's guilt. We are convinced that the written statement made to the sheriff and his deputy was used as substantive evidence to prove the truth of the matters asserted in it. It was not given under oath and subject to the penalty of perjury at a trial, hearing, other proceeding, or deposition, so far as the record before us reflects. Therefore, it was hearsay. Ark. Stat. Ann. § 28-1001, Rule 801 (Repl. 1979); *Patterson* v. *State,* 267 Ark. 436, 591 S.W.2d 356 (1979); and *Brown* v. *State,* 262 Ark. 298, 556 S.W.2d 418 (1977). This statement does not come within any exception to the hearsay rule. As we said in *Chisum* v. *State, supra*:

> It was formerly our rule that inconsistent statements were admissible only for impeachment and not as substantive evidence. . . . That limitation has now been abolished entirely in civil cases and has been similarly abolished in criminal cases when the prior statement was given under oath and subject to the penalty of perjury. Uniform Evidence Rule 801 (d) (1). The common law rule was not otherwise changed by the Uniform Rules and still prevails in criminal cases when the prior statement was not under oath . . . .

Accordingly, the trial court erred by allowing the statement to be read to the jury.

The appellant also argues the trial court erred by admitting into evidence certain photographs of the victim as she was found by the investigating officers. The trial court excluded numerous other photographs including some taken after the victim was moved from the scene of the crime. The appellant argues the prejudicial effect of the photographs, which were admitted into evidence, substantially outweighed their probative value, since the appellant was

willing to stipulate to the cause of death, so they should have been excluded from evidence. Ark. Stat. Ann. § 28-1001, Rule 403 (Repl. 1979). The decision to admit photographs into evidence 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; and a photograph is not inadmissible because it is cumulative or unnecessary due to admitted or otherwise proven facts. *Cotton* v. *State,* 276 Ark. 282, 634 S.W.2d 127 (1982). Here, these photographs were relevant and helpful to the jury in understanding the testimony of the witnesses. We cannot agree with the appellant that their probative value is outweighed by any prejudicial effect they might have had. No abuse of discretion is demonstrated.

Appellant insists that he was entitled to a mistrial due to certain remarks made by the prosecuting attorney which were designed to focus the jury's attention on appellant's failure to testify. We consider it unnecessary to discuss this contention since it is unlikely to occur upon a retrial.

We have reviewed the transcript for rulings adverse to appellant and find no other error prejudicial to his rights. Supreme Court Rule 11 (f), Ark. Stat. Ann. Vol. 3A (Repl. 1977).

Reversed and remanded.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. This case should be compared to the case of *Roberts* v. *State,* 278 Ark. 550, 648 S.W.2d 44 (1983); a case which is inexplicably ignored by the majority. Here there is no question that the statement was admitted as substantive evidence and not for purposes of impeachment. Therefore, the fact the statement was read to the jury is irrelevant. If it had been used to impeach, it could have been read. Ark. Stat. Ann. § 28-1001, Rule 613.

GOVERNMENT EMPLOYEES INSURANCE COMPANY *v.* Verlin AKERS et ux

83-61 648 S.W.2d 492

Supreme Court of Arkansas
Opinion delivered April 11, 1983
[Rehearing denied May 9, 1983.]

William R. Wilson, Jr., P.A., by: *William R. Wilson, Jr.*, for appellant.

Gardner & Gardner, by: *Richard E. Gardner, Jr.*, for appellees.

DARRELL HICKMAN, Justice. The question is a procedural one: Whether the trial court erred in finding that an affirmative defense had not been pleaded. Government Employees Insurance Company brings this appeal from the trial court's decision denying Government Employees from defending a claim by a homeowner for fire damage by presenting evidence of arson — that one of the Akerses caused the house to be burned. The trial court found that the appellant had not pleaded arson or willful burning of the residence by the homeowners, Verlin Akers and his wife, the appellees, as an affirmative defense. On appeal we cannot say the trial court abused its discretion and that is actually the question to be answered. It was conceded that Government Employees had an insurance policy in effect on the dwelling; that the house did, in fact, burn, and that there

was a loss of a specified sum of money. When the appellees filed their lawsuit against Government Employees on the basis of the policy, Government Employees filed a general denial. After several pleadings were filed, Government Employees filed an amendment to its answer stating that the loss alleged by the plaintiffs was not "within the coverage, terms, and conditions of the policy of insurance." The appellees filed a motion to require the appellant to make a more definite and certain answer, and the court ordered the appellant to do so within fifteen days. The appellant responded stating that:

> . . . [T]he loss suffered by the Plaintiffs was not covered under this policy. The policy explains in detail the perils insured against and the exceptions thereto. The loss sustained by the Plaintiffs was not such a loss as insured by the Defendant.

So the appellant never affirmatively pleaded arson — or set out the policy provision it was relying on. But the appellant argues this is only technically true, that the trial court could have decided otherwise and indeed changed its mind just before trial.

The case was set for trial in March of 1981, and before trial the appellees filed a motion in limine to prevent Government Employees from using the defense of arson since it had not been specifically pleaded even though there was no written order. The court apparently refusd to grant the motion. The case was continued and just before it was to be tried in November of 1981, the appellees filed the same motion in limine. Upon reconsideration, the court decided that Government Employees had not specifically pleaded the defense of arson or any specific provision of the policy that would preclude recovery and granted the motion.

On appeal Government Employees is represented by another attorney and it is argued that the appellees were not surprised since the motion in limine mentioned arson, and therefore, there was no justifiable basis for the trial court's

decision. But, as the court pointed out, there are rules of procedure and the appellant did not plead an affirmative defense as it should have. It is argued that the motion in limine placed in issue the question of arson and a liberal construction of the Rules of Civil Procedure should have allowed Government Employees to proceed with its defense. There is no doubt that arson was mentioned in these pleadings but a party is entitled to know precisely what affirmative defense will be relied upon and none was pleaded in this case.

The answer filed by Government Employees in this case put no specific provision of the policy in issue. A general denial by an insurance company defending a policy merely puts the plaintiff to his proof. An affirmative defense such as an exception in the policy must be specifically pleaded. *Universal Life Insurance Company* v. *Howlett,* 240 Ark. 458, 400 S.W.2d 294 (1966). It is true the trial judge did change his mind but ultimately made the right decision. And the fact that he changed his mind is not necessarily reversible error. *Nance* v. *Flaugh,* 221 Ark. 352, 253 S.W.2d 207 (1952). It was purely a discretionary decision by the trial court which we cannot find manifestly wrong.

Affirmed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I could readily side with the majority in this case if there had been any surprise or prejudice, or some disadvantage resulting from the appellant's failure to specifically plead the defense of arson. But there was none, as the trial court noted. The appellee knew the appellant's defense was a claim of arson and for the trial court to grant a motion in limine on the morning of trial, the same motion it had earlier denied, defeats the spirit of ARCP Rule 8 (f), that pleadings are to be "liberally construed so as to achieve substantial justice."

I concede the trial court's discretion in these matters, but where that discretion is exercised restrictively so as to deprive a litigant of any opportunity to prove what might

have been a meritorious defense, that discretion ought to be reviewed carefully on appeal, and any doubts resolved against one litigant being denied its "day in court", as we like to term it, a right regarded as fundamental under our system.

The indiscriminate, and growing, use of motions in limine aimed at striking an entire defense is thoughtfully addressed by the Supreme Court of Iowa in *Lewis* v. *Buena Vista Mutual Insurance Association,* 183 N.W.2d 198 (Iowa 1971). It makes good reading for judge and practitioner alike. The case is strikingly similar to the one before us, the only material difference is in the outcome. There, the trial court granted a motion in limine on the morning of trial so as to prevent an insurer from proving arson in defense of a fire loss. Noting that the plaintiff was not surprised by the claim of arson because pretrial discovery included references to arson and fire marshal reports, the Supreme Court of Iowa reversed and remanded the case for trial, as we should do.

COUNTRY PRIDE FOODS LIMITED *v.*
MEDINA & MEDINA

83-27 648 S.W.2d 485

Supreme Court of Arkansas
Opinion delivered April 11, 1983

Vickery & Jones, P.A., for appellant.

Compton, Prewett, Thomas & Hickey, by: *Robert C. Compton*, for appellee.

JOHN I. PURTLE, Justice. The trial court dismissed appellant's complaint for a declaratory judgment *sua sponte* on the grounds: 1) that there was another action pending, and 2) pursuant to Ark. Stat. Ann. § 27-2502 E. (Repl. 1979), inconvenient forum. We agree with the appellant's argument that the court should not have dismissed the complaint without giving appellant an opportunity to present evidence as to the proper forum.

Appellee was a broker in Puerto Rico operating on behalf of the appellant. The relationship was terminated by appellant for what it felt was just cause. Appellee disagreed and filed suit in federal district court in Puerto Rico. Subsequently the appellant filed suit in Union County Circuit Court for a declaratory judgment. The appellee filed a motion to dismiss because there was another action pending, contending the Arkansas trial court lacked jurisdiction. A hearing was held on the motion to dismiss. The court found there were sufficient activities on the part of appellee in Arkansas to give rise to jurisdiction but stated that in the interest of substantial justice the complaint should be dismissed pursuant to Ark. Stat. Ann. § 27-2502 E. There had been no motion by appellee to dismiss because of an inconvenient forum.

The question presented on appeal is whether the court should have *sua sponte* dismissed the complaint. We hold that it was error to dismiss the complaint without hearing evidence as to the proper forum. In *Running* v. *Southwest Freight Lines, Inc.,* 227 Ark. 839, 303 S.W.2d 578 (1957) we held that it was the duty of one wishing to avail himself of the doctrine of *forum non conveniens* to produce evidence to sustain the allegations of the motion. In *Running* we held that the pleadings and stipulations alone were insufficient to form a basis upon which the court could decide the issue of inconvenient forum. The trial court's discretion must necessarily be based upon such factors as convenience to the parties in obtaining documents and witnesses, the expense involved in trying the case, questions of foreign law, trial docket and other matters. *Harvey* v. *Eastman Kodak Co.,* 271 Ark. 783, 610 S.W.2d 582 (1981). As stated in *Harvey,* the application of *forum non conveniens* lies within the sound

discretion of the trial court and we will disturb the decision only upon a showing of abuse of discretion. However, the record must show the matters considered by the court in applying the doctrine before we can make a decision. In the case before us we do not know what, if any, facts the court considered when it based its decision upon the interests of substantial justice. There is no reason why a court should not be allowed to raise the doctrine of *forum non conveniens* on its own but its decision must be supported by facts in the record. *Haynes* v. *Carr,* 379 A.2d 1178 (D.C. App. 1977).

Appellant contends the court erred in dismissing the complaint because another action was pending in federal court in Puerto Rico. We agree that the trial court was not compelled to dismiss the action because of the other proceeding in Puerto Rico. We have held that federal district courts and state courts are separate jurisdictions and identical cases between the same parties may be pending in each court at the same time. *Carter* v. *Owens-Illinois, Inc.,* 261 Ark. 728, 551 S.W.2d 209 (1977). In situations where separate causes of action are pending at the same time the first one to judgment is binding on the parties. *Carter* v. *Owens-Illinois, Inc.,* supra.

The case is remanded to the trial court with directions to consider evidence and facts necessary to invoke the doctrine of *forum non conveniens,* if the court or either of the parties desire to rely upon the doctrine.

Conrad Leon SMITH, Jr. *v.* Dale EDWARDS

82-279 648 S.W.2d 482

Supreme Court of Arkansas
Opinion delivered April 11, 1983
[Rehearing denied May 9, 1983.]

Jim O'Hara, for appellant.

Rose Law Firm, P.A., for appellee.

ROBERT H. DUDLEY, Justice. Rebecca Strickland was killed in a Woodruff County vehicle accident on January 20, 1978. On December 22, 1980, her estate filed a lawsuit against: (1) Conrad Leon Smith, the driver of the car in which she was a passenger, the appellant here; (2) the owner of that car; and (3) Dale Edwards, the driver of the other vehicle, the appellee here. The plaintiff obtained valid personal service on all of the defendants with appellee Dale Edwards receiving at his correct address in Missouri a copy of the complaint and warning order. Both appellant Smith and appellee Edwards answered the plaintiff's complaint.

The basis of this appeal, however, is a cross-complaint filed by appellant Smith against appellee Edwards. Appellant filed the cross-complaint against appellee on January 19, 1981, one day before the action was barred by the statute of limitations. Appellant caused a summons to be directed to the sheriff of Clay County who promptly reported to appellant's counsel that appellee had moved out of the state. The attorney representing appellant on his cross-complaint then filed an affidavit for a warning order alleging that, after diligent inquiry, he was unable to locate the cross-defendant. Appellant then attempted to obtain constructive service under ARCP Rule 4 (f). Eight months later, when appellee first learned of the cross-complaint, he immediately filed a

motion to dismiss. He alleged that as a result of lack of proper service a cause of action on the cross-complaint was not commenced within the period of limitations. The trial court dismissed the cross-complaint. We affirm. This case was certified to the Supreme Court by the Court of Appeals pursuant to Rule 29 (1) (c) since it requires an interpretation of part of the rules on summons and service, ARCP Rules 3 and 4.

Appellant's cross-complaint was filed within the period of limitations by one day but was not properly commenced within this period. ARCP Rule 3 is the rule which governs the issue of whether the action was commenced within the period of limitations. It provides:

> COMMENCEMENT OF ACTION — A civil action is commenced by filing a complaint with the clerk of the proper court who shall note thereon the precise date and time of filing; provided, that an action shall not be deemed to have been commenced as to any defendant not served with process in accordance with these rules within sixty (60) days of the filing of the complaint, unless within that time the person filing the complaint has made an effort, that is noted of record in the clerk's office, to obtain service by a different method provided for in Rule 4. In no event shall the time for obtaining service be extended beyond ninety (90) days without leave of court and for good cause shown.

No leave of court was obtained extending the time of service beyond 90 days. Therefore, in order to commence his cross-complaint within the period of limitations the appellant had a maximum of 90 days from the filing of the complaint in which to complete service of process. The appellee, who was the cross-defendant, resided outside this state at all material times and service by actual notice was not had upon him by any one of the authorized methods. *See* ARCP Rule 4 (e) (1), (2), (3), (4) and (5). Instead, appellant sought to have service by constructive notice. ARCP Rule 4 (f), the rule governing constructive service, provides:

> Service Upon Defendant Whose Identity or Whereabouts Is Unknown: Where it appears by the

> affidavit of a party or his attorney that after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for four (4) consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address by any form of mail requiring a signed receipt.

This rule permits constructive service by warning order only if the whereabouts of the defendant is unknown "after diligent inquiry." The affidavit signed by appellant's attorney recites the standard phrase that the location of appellant was unknown "after a diligent and reasonable inquiry." A mere recitation, however, is not enough. As Comment 12 to Rule 4 states:

> The burden is on the party attempting service by publication to attempt to locate the missing or unknown defendant. Such party or his attorney is required to demonstrate to the court, by affidavit or otherwise, that after diligent inquiry, the defendant's identity or whereabouts remains unknown.

The trial court's finding that appellant did not make a diligent search is supported by the evidence and is not clearly erroneous. ARCP Rule 52; *Alley* v. *Rodgers,* 269 Ark. 262, 599 S.W.2d 739 (1980). The proof below was that the attorney ad litem on the original complaint located appellee merely by telephoning one of the original plaintiff's attorneys. Appellant did not contact the same attorney. The report of the attorney ad litem on the original complaint filed on March 9, 1981 contained appellee's correct address in Missouri. Appellant did not utilize the information in order to locate appellee and give him actual notice. The accident report, which appellant's attorneys possessed, recited appellee's Missouri driver's license number. His Missouri address was written on his driver's license, which was on file with the Missouri Department of Revenue. No effort was made to obtain the appellee's address through the revenue department. The accident report contained the name and location

of appellee's employer. No inquiry of appellee's address was made of the employer. Moreover, appellant's attorney received a copy of appellee's answer to the plaintiff's original complaint on March 16, 1981, which was well within the 90 days allowed Smith for commencing his action on the cross-complaint under Rule 3. At that time, appellant could have located appellee by simply inquiring of appellee's attorney of record. The proof does not reflect such an inquiry. We affirm the trial court's holding that appellant did not make a diligent inquiry to locate the appellee and cause him to be served in a manner giving actual notice. Since service with actual notice was not completed within 90 days from the date of filing, no extension of time for that type of service was obtained, and no diligent effort was made to locate appellee in order to give him actual notice, the action was not commenced within the period of time allowed by the statute of limitations. Rules 3, 4 (e) and 4 (f).

Appellant next contends that his cross-complaint should not have been dismissed because appellee in fact knew about the filing of the cross-complaint. We find no merit in the argument. It has long been the law in Arkansas that a cross-claim constitutes a separate and distinct cause of action. In order to give the court personal jurisdiction over the cross-defendant it is essential to have service of process on the cross-defendant even when, as here, the cross-defendant is also an original defendant. *Moore* v. *Owens,* 268 Ark. 324, 597 S.W.2d 65 (1980); *Miller* v. *Mattison,* 105 Ark. 201, 150 S.W. 710 (1912) citing *Pillow* v. *Sentelle,* 49 Ark. 430, 5 S.W. 783 (1887); *Ringo* v. *Woodruff,* 43 Ark. 469 (1884). Service of process or a waiver of that service is necessary in order to comply with the Due Process requirements of the United States Constitution. *Davis* v. *Schimmel,* 252 Ark. 1201, 482 S.W.2d 785 (1972).

Finally, appellant argues that since the allegations of plaintiff's complaint are essentially the same as the allegations contained in the cross-complaint, appellee's answer to the complaint should be deemed an answer to appellant's cross-complaint. Appellant relies on *Firestone Tire & Rubber Co.* v. *Little,* 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980) and *Southland Mobile Home Corp.* v. *Winders,* 262

Ark. 693, 561 S.W.2d 281 (1978). In both cases, a co-defendant was granted relief from a default judgment on the theory that the answer of a co-defendant will inure to the benefit of the non-answering co-defendant if tha answer states a defense that is common to both defendants. These cases are based on the Common Defense Doctrine which originated in England around 1600. *See Firestone Tire & Rubber Co.* v. *Little: Overextension of the Common Defense Doctrine,* 35 Ark. L. Rev. 328 (1982). The rationale of these cases is not applicable to a situation where the defendant fails to answer a cross-complaint filed against him. Unlike co-defendants defending against a common claim, the original plaintiff and the cross-complainant are separate parties stating separate and distinct causes of action. The cross-complainant and the cross-defendant are adverse parties rather than defendants with common interests. Therefore, the answer filed by appellant on the plaintiff's complaint did not constitute a general appearance by appellee on appellant's cross-complaint.

Affirmed.

In Re: The Matter of Interest on Lawyers' Trust Accounts

82-276 648 S.W.2d 480

Supreme Court of Arkansas
Opinion delivered April 11, 1983

PER CURIAM. The Arkansas Bar Association, through its Interest on Lawyers' Trust Accounts Committee, petitioned this court to permit the collection and disbursement of interest derived from lawyers' trust accounts, which are nominal in amount and of short duration. The recipient of the funds would be a nonprofit organization to be created to dispense the funds primarily to provide legal aid to the poor in civil matters, and secondarily, for other specified legal projects. On January 10, 1982, in response to the petition we issued a *per curiam* opinion inviting *amicus curiae* and other writing on this proposal. The principal responses have been from the Bar Committee that originally petitioned this court, the Arkansas Justice Foundation, Inc., a nonprofit, tax exempt entity which assists and supports free legal services for the poor, and some legal aid offices.

According to the briefs from the Bar Association and the Justice Foundation, the pilot program of the nature proposed here is, in essence, the Florida program. In seven states the highest court or the legislature has authorized a similar plan. Proposals have been disapproved in three states. Similar proposals are under study in the vast majority of the

other states. The Florida program was first proposed there in 1971 and authorized in 1978 by the Supreme Court of Florida in *In Re: Interest on Trust Accounts,* 356 So.2d 799 (Fla. 1978). Alterations were found to be necessary which were made in the following opinions: *Matter of Interest on Trust Accounts,* 372 So.2d 67 (Fla. 1979); *Matter of Interest on Trust Accounts,* 396 So.2d 719 (Fla. 1981); and *Matter of Interest on Trust Accounts,* 402 So.2d 389 (Fla. 1981). See also *In the Matter of the Petition of the Minnesota Bar Association, No. A-8* (Minn., December 8, 1982); and *Petition of New Hampshire Bar Association* (New Hamp., November 24, 1982).

The Florida program, like the present proposal, is voluntary in the sense that attorneys are free to participate or refuse to participate as they see fit. This is acceptable. However, that court's most recent pronouncement, which gives us great concern, amended the rules to provide that clients need not be notified that their funds are being so used nor can they decline to allow their escrow funds to be used in the program. This change was deemed necessary because the Internal Revenue Service ruled that the interest generated from the trust accounts would be taxable to the clients whose funds were used unless the decision whether to participate in the program was removed from the clients. Rev. Rul. 81-209, 26 CFR 1.61-7, provides that interest earned in a plan where the client has no control over the decision to participate would be treated as reportable income only by the receiving entity, not the attorney nor his clients, so long as the funds to be commingled were nominal in amount and held for a short duration. The Florida program and the plan submitted to this court by the petitioner committee provide that once the attorney decides to participate consent by his clients is not required. This eliminates any control the client may have had over the earnings. The petitioner justifies this procedure, as did the Florida court, by the argument that the clients do not currently receive any income from this type of account, so that there is no "taking" of "property" that would trigger the protection of the due process clause of the Constitution; and that for a single client's funds, nominal in amount, placed in the lawyer's trust account for a short duration, it is impractical to compute and pay interest to

that individual client. In summary, the proposal involves only funds and accounts that presently do not earn interest, and, therefore, the clients lose nothing by the implementation of this program.

While we support the basic concept of allowing this type of trust funds to be placed in interest bearing accounts, we are of the opinion that participation in the program must be conditioned upon notice to and approval from the clients whose funds are so used. The public confidence in their attorneys and the legal profession in general is not likely to be enhanced by the knowledge that lawyers are authorized to use their clients' funds to generate income in support of projects that the clients may disapprove and certainly cannot control. As American Bar Association President Morris Harrell recently stated in a speech in Seattle, "Our legal system rests so precariously on public confidence that the rule of law itself is threatened by a lack of real understanding by the public." With respect to the use of client funds to generate income for a worthy legal project, such as here, we think these considerations require that the proponents seek a change in the Internal Revenue Code or the interpretation to enable the plan to be administered in a manner that unquestionably promotes rather than potentially undermines public confidence in the legal profession. Full disclosure of every use of client funds is essential to that much needed confidence. Further, the fact that a person is not currently using his resource to generate income does not give license to others to use that resource to generate income for a purpose, no matter how worthy, without the owner's consent.

We reiterate that we support the concept of allowing lawyers' trust funds to be placed in interest bearing accounts to generate income for legal services to the poor and the other purposes proposed in the submitted plan. The Arkansas Justice Foundation, Inc., the Arkansas Bar Association and other proponents are to be commended. Efforts should be made to bring about a change in the federal tax laws or their interpretation in order to permit us to authorize a plan that avoids the difficulties about which we have expressed our concern.

Petition denied.

HAYS, J., would grant.

STEELE HAYS, Justice, dissenting. I would grant the petition. It has obvious advantages: it is for the public good; it produces earnings from a source that has heretofore produced nothing; it has the support of the bar and several bar related organizations; it has the opposition of no one.

The argument that the client must approve the plan is not without substance, but the objection is more theoretical than real, and I expect it would resolve itself in practice. Clients traditionally have neither received nor expected interest earnings on these short-term funds, which are in relatively small amounts or, if not, are rarely held for more than a few days. Nor has this problem prevented several other states from adopting similar plans.

If, as the majority suggests, the legal profession and its systems are losing the public's confidence, I think it is not so much the result of our willingness to venture new methods, as an unwillingness to try them.

Benjamin BRADLEY *v.* STATE of Arkansas

648 S.W.2d 796

Supreme Court of Arkansas
Opinion delivered April 11, 1983

Atchley, Russell, Waldrop & Hlavinka, by: *Alan Harrel,* for appellant.

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

PER CURIAM. The appellant's attorney, Allan Harrel, has filed a motion for a Rule on the Clerk. In the motion he admits that it was his fault that the record was tendered late. The attorney for the appellant miscalculated the date the record was due to be filed.

Pursuant to our per curiam concerning belated appeals in criminal cases, 265 Ark. 964 (1979), the Rule on the Clerk is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

FAYETTEVILLE SCHOOL DISTRICT NO. 1 et al
v. ALCOHOLIC BEVERAGE CONTROL BOARD et al

82-299 648 S.W.2d 804

Supreme Court of Arkansas
Opinion delivered April 18, 1983

Everett & Whitlock, by: *John C. Everett,* for appellants.

Donald R. Bennett, for appellee ABC Board.

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

GEORGE ROSE SMITH, Justice. In 1981 the principal appellee, Kathleen D. Burke, applied to the Alcoholic Beverage Control Board for permission to transfer her retail liquor outlet from its location in a shopping mall in Fayetteville to a new location on North Garland Avenue near the intersection of Highways 16 and 112. The application was opposed by the appellants — a school district and seven individuals — and by others who signed petitions opposing the application but did not otherwise participate in the proceedings. After a hearing the Alcoholic Beverage Control Board approved the transfer. This appeal from the circuit court's affirmance of the Board's decision was transferred to us under Rule 29 (1) (c). We affirm.

The appellants' main argument for reversal is that the Board's decision is not supported by substantial evidence. Ark. Stat. Ann. § 5-713 (h) (5) (Repl. 1976). The applicant's testimony and exhibits show that about 12,000 people live within a one-mile radius of the proposed site; there is no liquor store within that area, which is devoted to both residential and commercial uses; the two nearby highways have a total traffic count of about 20,000 vehicles a day; other liquor stores are closer to public schools than this one will be; and the University of Arkansas permits adult students to have alcoholic beverages in university housing. Twenty-four photographs show more than that many commercial buildings in the neighborhood, including filling stations, grocery stores, fast-food establishments, and various others. The school district's protest was presented by the principal

of a school that is about four tenths of a mile from the proposed site. She objected not so much to a liquor store as such but to any new business in the area, because increased traffic could be dangerous to pupils walking to school. The third witness who testified objected on those grounds and also the the presence of a liquor store a block and a half from his house.

The Board found that the proposed transfer would be to the "public convenience and advantage," statutory language not further defined. Ark. Stat. Ann. § 48-301 (Repl. 1977). The reference to the *public* convenience and advantage evidently means that the interest of the general public is to be considered, not merely that of the applicant. *See Gerst* v. *Cain,* 388 S.W.2d 168 (Tex., 1965). Even so, such general language unquestionably invests the Board with much discretionary leeway in deciding whether to approve an application such as this one. Since the record contains affirmative proof supporting the view of each side, we must defer to the Board's expertise and experience in cases of this kind. In that view there is substantial evidence to support the Board's decision.

The appellants' second argument is that the Board had no power to order a continuance on its own motion when an unforeseen question arose during the hearing. We think it fundamental that the Board's statutory duty to hold a public hearing, Section 48-311 (E), carries with it the implied authority to interrupt the hearing when it is reasonable to do so. "The law necessarily contemplates unavoidable contingencies, illness of parties and witnesses, and similar causes which make it just to grant continuances and unjust to refuse them." *Williams* v. *Buchanan,* 86 Ark. 259, 271, 110 S.W. 1024 (1908). In the absence of any explicit statutory prohibition of a continuance, the Board had the authority to act as it did.

We do not reach the appellants' third argument — that the Board's written decision did not include sufficient findings of fact — for the appellants have not abstracted the Board's decision.

Affirmed.

BANK OF CABOT *v.* Mark RAY

83-25 648 S.W.2d 800

Supreme Court of Arkansas
Opinion delivered April 18, 1983

Joe O'Bryan, for appellant.

Lance L. Hanshaw, for appellee.

GEORGE ROSE SMITH, Justice. Mark Ray, the appellee, brought this action against the Bank of Cabot for the conversion of a 1967 Pontiac car that Mark, then 20 years old, was rebuilding himself. This appeal from a judgment in Mark's favor for compensatory and punitive damages comes to the Supreme Court as a tort action. Rule 29 (1) (o). The judgment must be reversed, because the plaintiff failed to introduce any proof of the fair market value of the car.

Mark testified that in 1978 he had a LeMans car which he had damaged beyond repair in a wreck. He bought the 1967 Pontiac for $200 and paid his cousin $350 to put the Lemans engine in the Pontiac. Mark testified to the cost of various parts he bought and installed, but the car was not yet in a condition to be dirven when the bank converted it. There was no testimony by either side about the fair market value of the partly rebuilt Pontiac, but the trial judge overruled an objection on that score, saying that there was no way to give the jury some idea of the market value except by proof of the state of the repairs. The jury was instructed that the measure of damages would be the fair market value of the car, but in the absence of supporting proof the submission of that issue was error. *Ford Motor Credit Co.* v. *Herring,* 267 Ark. 201, 589 S.W.2d 584 (1979).

There was sufficient evidence to justify the submission of the issue of punitive damages. The bank, as agent for the owners of a house near Cabot, had rented it either to Mark's girlfriend or to her and Mark together. In seeking to recover possession the bank served a notice to vacate on both Mark and the girl. It directed them to deliver possession on or before September 30 and to "remove all property including cars." The bank, however, took possession of the house before September 30 and had the Pontiac hauled away and crushed, thinking it to be an abandoned junk car. When Mark went to the house on September 30 and found the car to be missing, he reported it to the police as a stolen car.

In view of the language in the notice to vacate, the bank's premature repossession, and its precipitate destruction of the car, the evidence was sufficient to support the court's submission of AMI 2217 on punitive damages,

leaving it to the jury to decide whether malice should be inferred. AMI Civil 2d, 2217 (1974). The court, however, should not have used the bracketed reference to the bank's financial condition, for there was no proof about that matter.

A third point for reversal relates to the plaintiff's motion that the bank not be permitted to cross-examine Ray about a conviction for the delivery of a controlled substance. The court did not make a final ruling, and until it does so, weighing the impeachment value of the conviction against its prejudicial effect, we are not in a position to say how the trial court should exercise its discretion. The bank's fourth point is without merit. The trial judge properly refused to give the bank's requested instruction No. 6, which would have told the jury that Mark Ray was not a tenant — a disputed question of fact.

Reversed and remanded for a new trial.

HERITAGE INSURANCE COMPANY of Lincolnwood, Illinois *v.* WHITE COUNTY, Arkansas

83-26 649 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered April 18, 1983
[Rehearing denied May 16, 1983.]

Ronald J. Bruno & Associates, for appellant.

Robert Edwards, Pros. Atty., 17th Judicial District, for appellee.

FRANK HOLT, Justice. On September 29, 1980 Bobby Wayne Glover, representing himself as a limited surety agent for the appellant, executed a $10,000 bail bond on behalf of Charles Burgess. Burgess failed to appear for trial on December 16, 1980, and the bond was then forfeited by a docket entry. The appellee, in a non-jury trial, was awarded a judgment on the bond on March 30, 1982 against Glover and the appellant, jointly and severally. Hence, this appeal.

The appellant first argues the trial court erred in holding that notice to the appellant was not required before forfeiture of the bond. Ark. Stat. Ann. § 43-723 (Repl. 1977) provides:

> If the defendant [fails] to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the fact to be entered on the minutes, *and thereupon* the bail-bond, or the money deposited in lieu of bail, is forfeited. (Italics supplied)

As we said in *Craig & Schaaf* v. *State,* 257 Ark. 112, 514 S.W.2d 383 (1974), "Under section 43-723, when [the defendant] failed to appear on October 8 and the court entered that fact upon its record, the bond was, in the language of the statute, thereupon forfeited." Likewise, in *Tri-State Bonding Co.* v. *State,* 263 Ark. 620, 567 S.W.2d 937 (1978) we said, "The failure of each of the defendants to appear at the time fixed was sufficient basis for forfeiture of the bond, when noted on the record." Plainly, the statute and our cases permit forfeiture merely upon failure of the defendant to appear and the entry of that fact on the record. Notice before forfeiture is not required. Here, the judgment results from a civil action instituted by the appellee to collect on the forfeited bond. The appellant had ample notice and opportunity to defend in this action, which it did.

Neither can we agree with the appellant's argument that the trial court erred in finding that Glover was a limited surety agent for the appellant on September 29, 1980. Suffice it to say the requests for admission and answers thereto by the appellant, which were abstracted by the appellee, clearly indicate the appellant admitted that Glover was its limited surety agent on that date. ARCP Rule 36 (b).

Finally, the appellant argues the trial court erred in finding the bail-bond in question was properly executed and authorized by the appellant's general power of attorney, which was on file at the Arkansas Insurance Department. The argument is that under the general power of attorney filed with the commissioner, Glover only had authority to execute bonds when accompanied by an individual, numbered power of attorney, which was not done here. None of the exhibits presented to the trial court have been abstracted. The exhibits relevant to this point are critical to an understanding of the question presented to us. Therefore, we affirm the trial court on this point pursuant to Rules of the Supreme Court and Court of Appeals, Rule 9 (d) and (e). *Van Marion* v. *Moseley,* 259 Ark. 740, 536 S.W.2d 697 (1976). Also see *Dyke Industries* v. *Johnson Const Co.,* 261 Ark. 790, 551 S.W.2d 217 (1977); *Collier* v. *Hot Springs Savings & Loan Association,* 272 Ark. 162, 612 S.W.2d 730 (1981); and *Bank of Ozark* v. *Issacs,* 263 Ark. 113, 563 S.W.2d 707 (1978).

Affirmed.

Lee TAYLOR *v.* Gayle A. TERRY and Jane TERRY, Individually, ex rel, CHRISTIAN BOOK CENTER, INC.

83-44 649 S.W.2d 392

Supreme Court of Arkansas
Opinion delivered April 18, 1983
[Rehearing denied May 23, 1983.]

Bullock, Hardin & McCormick, for appellant.

Irwin & Kennedy, by: *Robert E. Irwin,* for appellees.

ROBERT H. DUDLEY, Justice. This appeal is from a derivative action by shareholders who asserted a corporate right of action against the president of the corporation. A jury returned a verdict of $35,000 in favor of the corporation. The only point raised on appeal is the sufficiency of the evidence. We affirm. The case was certified to this Court by the Court of Appeals.

In Arkansas, derivative actions by shareholders are provided for by rule, statute, and case law. *See* ARCP Rule 23.1; Ark. Stat. Ann. § 64-223 (Repl. 1980); Parrish, *A Look at the Derivative Suit,* 24 Ark. L. Rev. 89 (1970). The shareholder's suit is one in equity even if the right to be enforced is a legal right of the corporation. *Red Bud Realty Co.* v. *South,* 153 Ark. 380, 241 S.W. 21 (1922); 13 Fletcher Cyclopedia Corporations § 5944 (Perm. Ed. 1980). This derivative action was filed in circuit court and tried before a jury. However, since the issue of subject matter jurisdiction is not before us, we are required to apply the standard of review of actions in law and we affirm if there is any substantial evidence to support the finding of the jury. *Thrifty Rent-A-Car* v. *Jeffrey,* 257 Ark. 904, 520 S.W.2d 304 (1975). In determining the sufficiency of the evidence we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to appellee. *Green* v. *Harrington,* 253 Ark. 496, 487 S.W.2d 612 (1972).

The law imposes a high standard of conduct upon an officer or director of a corporation, predicated upon the fact that he has voluntarily accepted a position of trust and has assumed control of the property of others. *Raines* v. *Toney,* 228 Ark. 1170, 313 S.W.2d 802 (1958). Such a person occupies

a fiduciary relation to the corporation and may not acquire, in opposition to the corporation, property in which the corporation has an interest or which is essential to its existence. Certainly, the president of a corporation owes a duty not to do an unfair or fraudulent act which will result in his private gain at the expense of the corporation. *Raines,* 228 Ark. at 1179. Such an act would be a breach of the fiduciary capacity of the president.

In the case before us there was substantial evidence from which the jury could find that the president breached his position of trust for his own private gain. The appellees, Gayle and Jane Terry, owned fifty percent of the common stock of the Christian Book Center, Inc., a Russellville business. Edjuana Taylor and her husband, appellant Lee Taylor, owned the other half of the stock. From the inception of the corporation in September, 1977, appellant served as president. By March 1978, the two couples were unable to agree on the conduct of the business affairs and, according to the appellees, the appellant president stated that he and his wife would operate the business. The appellees testified that they were told by appellant in April that they, the appellees, were out of the business. The parties discussed selling their common stock to each other. According to appellant, the corporation was not profitable. Shortly thereafter, a promissory note by the corporation to the Peoples Bank and Trust Company of Russellville became due and appellant testified there "was no point in making contact with Mr. Terry [appellee] about extending the note because we were not working together." A bank official and appellant's attorney at that time asked the bank's attorney to file suit and foreclose on the assets of the corporation. The suit was filed on July 28, 1978. No summons was issued and, viewing the facts most favorably to appellees, appellees were not given notice of the action prior to the decree of foreclosure. The corporation answered on July 31, 1978. The foreclosure decree was entered on August 3, 1978. Since July 29, 1978 came on a Saturday and July 30 on Sunday, the foreclosure, from complaint to decree, took just four work days. At the foreclosure sale the appellant, while still president of the corporation, purchased all of the assets of the corporation in his own name. The appellant made the

purchase by simply refinancing with the same bank. No additional security was pledged. No payment was made on the principal. Appellant then continued doing business with the same assets, in the same location, except in his own name.

An accountant reconstructed the financial status of the corporation and challenged the appellant's statement that the corporation was not profitable. He testified that on September 30, 1978, less than thirty days after the foreclosure, the business showed a net profit of $7,300.00 and that by the date of the trial, November 3, 1981, the business had a net worth of $72,614.72.

Thus, there was substantial evidence from which the jury could find that the president of the corporation breached his position of trust in favor of his own private gain.

Affirmed.

Dan PADILLA *v.* STATE of Arkansas

CR 83-46 648 S.W.2d 797

Supreme Court of Arkansas
Opinion delivered April 18, 1983

Donald R. Huffman, Public Defender, for appellant.

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

ROBERT A. DUDLEY, Justice. The issue in this case is whether the Interstate Agreement on Detainers Act, Ark. Stat. Ann. § 43-3201 (Repl. 1977), is applicable to a detainer based on a petition for revocation of probation which does not allege the commission of a subsequent offense. In 1980, appellant entered a plea of guilty to two felonies in Benton County and was placed on three years probation. Two months later a petition for revocation of his probation was filed alleging that appellant had not reported to his probation officer and had absconded. When appellant failed to appear at the hearing, a warrant was issued for his arrest. Subsequently, appellant was convicted on an unrelated charge in California and sentenced to two years in the California Department of Correction. A detainer, based on the outstanding Arkansas warrant, was then placed on

appellant in California. Appellant requested that a final disposition of the alleged probation violation promptly be made under the Interstate Agreement on Detainers Act [hereinafter referred to as Agreement]. The prosecuting attorney refused to honor appellant's request for extradition and trial. Eight months later appellant was returned to Arkansas for a hearing. He moved to dismiss the petition alleging that the Agreement requires the State to dispose of the complaint against him within 180 days of his request for final disposition. The trial court found that appellant had already been tried on the basic charge and that a hearing to revoke probation does not constitute trial of an "untried indictment, information or complaint" within the purview of the Agreement. We affirm. This case was certified to the Supreme Court by the Court of Appeals since it involves the construction of an Arkansas statute. Rule 29 (1) (c).

The Interstate Agreement on Detainers is an interstate compact to which both Arkansas and California are signatories. Article III provides that where a detainer is lodged against a prisoner based upon an untried indictment, information or complaint of another state, the prisoner, upon request, must be brought to trial on the untried charges within 180 days. Ark. Stat. Ann. § 43-3201 Art. III (a). Failure to accord a timely trial may mandate dismissal of the underlying charge. Art. III (d); *but see Young* v. *Mabry,* 471 F. Supp. 553 (E.D. Ark. 1978), aff'd, 596 F.2d 339 (8th Cir.), *cert, denied,* 444 U.S. 853 (1979). The compact is designed to standardize interstate rendition procedures in order to protect the inmate's right to speedy trial and reduce any uncertainties which might obstruct programs of prisoner treatment and rehabilitiation. Ark. Stat. Ann. § 43-3201 Art. I; *United States* v. *Mauro,* 436 U.S. 340 (1978); *Capalongo* v. *Howard,* 453 N.Y.S.2d 45 (N.Y. App. Div. 1982); *Camp* v. *United States,* 587 F.2d 397 (8th Cir. 1978).

Appellant contends that the State's petition to revoke his probation is an untried complaint within the scope and meaning of the Agreement. This is a case of first impression in Arkansas. Although some courts have held otherwise, *see Gaddy* v. *Turner,* 376 So.2d 1225 (Fla. App. 1979), we are persuaded by the reasoning of the courts that have held a

probation revocation proceeding not to involve "untried" matters within the purview of the Interstate Agreement on Detainers Act. *See e.g., Capalongo* v. *Howard, supra; People* v. *Jackson,* 626 P.2d 723 (Colo. Ct. App. 1981).

The Interstate Agreement on Detainers Act, Ark. Stat. Ann. § 43-3201 (Repl. 1977) by its express terms applies only to a detainer based on an untried indictment, information or complaint. Under the principle of *noscitur a sociis,* we interpret the terms "untried" and "complaint" as used in the Agreement as being synonymous with, or at least in the nature of, an untried "indictment" or "information." *Altus Cooperative Winery* v. *Morley,* 218 Ark. 492, 237 S.W.2d 481 (1951). A charge against a defendant does not remain "untried" after a defendant has pleaded guilty. A plea of guilty is itself a conviction; nothing remains but to give judgment and determine punishment. *Boykin* v. *Alabama,* 395 U.S. 238 (1969). As stated by the Tennessee Court of Criminal Appeals:

> The term "untried" refers to matters which can be brought to full trial. In a probation revocation proceeding, the trial has already been held, and the defendant convicted. In such a hearing, the defendant comes before the court in a completely different posture than he does at his trial before conviction.

Blackwell v. *State,* 546 S.W.2d 828 (Tenn. Crim. App. 1976); *see also Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Lockett* v. *State,* 271 Ark. 860, 611 S.W.2d 500 (1981).

The petition to revoke appellant's probation did not charge him with committing a crime prior to completion of his sentence. Since appellant had entered a plea of guilty on the charges underlying the original sentence of probation, there was nothing "untried" within the meaning of the statute. In our opinion, a charge of violation of probation, absent an allegation of the commission of an indictable offense, is not an "untried indictment, information, or complaint" within the scope and meaning of the Interstate Agreement on Detainers Act. The trial court was correct in refusing to dismiss the petition.

Affirmed.

SMITH, J., concurs.

PURTLE, J., dissents.

GEORGE ROSE SMITH, Justice, concurring. I agree with the court's opinion, but I also point out that Padilla's demand for a hearing in Arkansas is plainly a ruse by which he hopes to avoid a detainer that would certainly still exist even if the hearing were held. He is charged with not reporting to his probation officer in Arkansas and with absconding. His present petition itself proves the charge, for it is made from a prison in California after he committed an offense there. The hearing would be a five-minute formality at which Padilla's own petition would alone prove that his probation should be revoked. If Padilla wishes to pay the expenses involved in having an Arkansas police officer go to California, return Padilla to Arkansas for the useless hearing, and then return him to California, he is free to do so. But it would be absurd for this court to distort the plain meaning of the statute merely to enable Padilla to accomplish his scheme of holding the taxpayers of Arkansas for ransom.

JOHN I. PURTLE, Justice, dissenting. The majority opinion presents a very sad picture because in this case of first impression we had the opportunity to construe the statute in its plain and ordinary meaning without the liability of following cases which twist the interpretation. The majority misinterpretation appears to be by design. The concurring opinion would go even further in denying legislated rights to one who makes a legitimate demand for these rights. For the concurrence to state that this valid exercise of statutory rights is a "ruse" and a mere "formality" is to disregard the express intent of the Arkansas General Assembly. If we were to require the appellant to pay the expense of a hearing in Arkansas, we would, in effect, be denying him the right to such a hearing.

Act 705 of 1971 was enacted for the purpose of enabling Arkansas to participate in the "Interstate Agreement on Detainers." The Arkansas General Assembly found that

outstanding charges against prisoners and detainers based upon untried indictments, informations and complaints, as well as difficulties in securing speedy trials of prisoners incarcerated in other jurisdictions, produced uncertainties which obstructed programs of prisoner treatment and rehabilitation. A detainer placed against a prisoner in another state often subjects the prisoner to greater restrictions than the general prison population:

> Most parole boards consider a detainer as an adverse factor, and some will automatically deny parole if a detainer is pending. A detainer generally affects the convict's work assignments, barring him from trustee status, from working outside the prison walls, or even from participating in a prison industrial organization . . . In addition, the uncertainty engendered by such an unresolved charge will usually cause the convict to take a negative attitude toward any rehabilitation program which the correction officials undertake.

"Convicts — The Right to a Speedy Trial and the New Detainer Statutes," 18 Rutgers L. Rev. 828 (1974).

The Arkansas General Assembly further explained their reasoning in Article I (Ark. Stat. Ann. § 43-3201 [Repl. 1977]):

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures.

It is clear from the wording of the act that the General Assembly intended to provide for the orderly disposition of such *"charges and detainers"* with the purpose of helping in treating and rehabilitating prisoners. With these views in mind provisions were made for requiring certain procedures to be followed by the states as well as the prisoners. The appellant in the present case followed proper procedure in requesting a speedy disposition of the charges after a detainer was placed on him in the California prison. The State of Arkansas refused to comply with the request although California offered to return appellant here for disposition of the charges. The purpose of the act being to aid in treatment and rehabilitation, it should be liberally construed in favor of the prisoner. The majority opinion construes the act strictly against the appellant in direct contravention of the express words of the act.

The majority maneuvers around the words "complaint" and "untried" in an attempt to justify its opinion. The acts speaks clearly of charges and detainers based upon indictment, information or complaint. However, it is evident to me that any detainer pending on a prisoner triggers the procedures and binds the states to comply with the agreement. A detainer based upon a complaint or petition to revoke a suspension or probation is just as much a detainer as one based upon an indictment or information. The contention that appellant's alleged probation violation was not "untried" is erroneous. The detainer was based upon an alleged act which was never proven; it was not based upon the original conviction. By ignoring the request of appellant for a speedy disposition of the charges against him the state will effectively let appellant serve his required time in another state under adverse conditions and then have the additional satisfaction of seeing appellant serve the most time possible in Arkansas. I submit that is not how the agreement on detainers was to work. The Florida Court of Appeals squarely addressed the same set of facts as those presented in this case, and applied the same language in the same act and stated in a well reasoned opinion:

> . . . we hold that the Interstate Agreement on Detainers Act which requires a hearing within 180 days of request

applies to detainers based on charges of probation violation.

Gaddy v. *Turner,* 376 So.2d 1225 (Fla. App. 1979).

The majority makes a valiant effort to turn the immense power of the state (and now the various states who have ratified this act) against the clearly expressed rights given specifically to this class of people. To unbalance the scales so, is to do disservice to our fundamental constitutional precepts to which I firmly adhere. A single right abridged chips away and the fundamental rights guaranteed all of us. I cannot be a part of such an erosion.

BANK OF OAK GROVE *v.* WILMOT STATE BANK

83-21 648 S.W.2d 802

Supreme Court of Arkansas
Opinion delivered April 18, 1983

Griffin, Rainwater & Draper, for appellant.

Arnold, Hamilton & Streetman, for appellee.

STEELE HAYS, Justice. This dispute arises from the foreclosure of land subject to three mortgages. It is agreed the property is subject to a first mortgage to First Federal Savings and Loan Association of Pine Bluff (now First South), but the Bank of Oak Grove (appellant) and the Wilmot State Bank (appellee) each claim to have a second mortgage. The Chancellor ruled in favor of the State Bank of Wilmot and the Bank of Oak Grove has appealed. We affirm the Chancellor.

The facts are not in dispute: George and Carolyn Bailey own two residential lots in Wilmot, Arkansas, subject to a first mortgage to First South dated March 19, 1979. On September 14, 1979, the Wilmot State Bank recorded its mortgage from the Baileys securing an indebtedness of $21,249.90. The margin of the record shows this mortgage to have been satisfied in full on January 28, 1980, but a later marginal entry on August 28, 1980, states that the release was entered by mistake and the indebtedness remains outstanding.

A few days after the mortgage to the Wilmot State Bank was mistakenly satisfied, the Baileys sought a loan from the Bank of Oak Grove, Louisiana. After satisfying itself that it would have a second mortgage, the bank agreed to make the loan and used a method familiar to lenders in Louisiana, i.e., taking a note from the Baileys payable to bearer and a mortgage identifying the mortgagee only as "any future holder," Appellant explains that under Louisiana practice this financing device, known as a collateral mortgage, allows the free negotiability of the debt; that the term "any future holder" is not intended to name a specific individual but only whoever may be a future bearer of the note. Appellant submits the Supreme Court of Louisiana has expressly recognized the use of nominal or "straw" mortgagees and, hence, mortgages to "any future holder" are valid in Louisiana. *Commercial Germania Trust and Savings Bank* v. *White,* 81 So. 753, 145 La. 54 (1919).

When the Baileys defaulted in their payments the Wilmot State Bank commenced foreclosure proceedings. Wilmot State Bank concedes First South's status as first mortgagee, but claims to have a prior lien as against "any future holder", which it attempted to serve by warning order. The Bank of Oak Grove intervened and, after a hearing, the Chancellor held that the mortgage to the Oak Grove Bank was void as to the Wilmot State Bank because "any future holder" was not a legal entity capable of holding title to land.

Appellant concedes title to real property is governed by the law of its situs and that Arkansas law requires that in conveyances of real property the grantee must be a legal entity, so that title can vest in either an individual, a partnership or a corporation. This was our holding in *Lael* v. *Crook,* 192 Ark. 1115, 97 S.W.2d 436 (1936), and in *North Little Rock Hunting Club* v. *Toon,* 259 Ark. 784, 536 S.W.2d 709 (1976), on which the Chancellor relied. In *Lael* v. *Crook,* we held that a deed to "Camp Wiley Crook, Sons of Confederate Veterans, and Chapter J. Mart Meroney, Daughters of Confederacy" was invalid, as there was no legal capacity by the grantees to take or hold title to real property. We recently applied the same reasoning to a lease of hunting rights to an unincorporated association of individuals. See *North Little Rock Hunting Club* v. *Toon, supra.* In *Toon,* we were asked to distinguish *Lael* v. *Crook* because that case involved an attempt to convey title in fee, whereas in the *Toon* case only a lease for years was involved. We refused to make that distinction, noting that a lease, like a deed, "is properly a conveyance of a particular estate in lands, whether for life or for years or at will when reversion is left to the grantor. 2 Blackstone Comm. 367; Tiedeman on Real Property, § 772."

Appellant argues that because we are construing a mortgage rather than a deed or a lease, the *Lael* and *Toon* cases should be distinguished; it submits that Arkansas applies a lien theory to mortgages as opposed to a title theory and, hence, we should relax the strict requirements applicable to deeds and leases. The appellant has cited no authority, and we are unwilling to decide the issue on as

broad and undefined a principle as lien versus title theories of mortgages. Our cases do not support the argument that clearly. While recognizing that parties to a mortgage have duality of interest in mortgaged lands, our decisions suggest that a legal title does, indeed, pass from the mortgagor to the mortgagee, the former retaining only an equitable interest, conditioned on payment of the indebtedness. *Harris* v. *Collins,* 202 Ark. 445, 150 S.W.2d 749 (1941); *Morgan Utilities, Inc.* v. *Kansas City Life Insurance Co.,* 183 Ark. 492, 37 S.W.2d 90 (1931); *Fitzgerald* v. *Chicago Mill and Lumber Co.,* 176 Ark. 64, 3 S.W.2d 30 (1928). Dr. Leflar evidently regards mortgages as resulting in a transfer of title:

> "The giving of a mortgage on land is a transfer of a title interest in the land, and the security interest given by a mortgage is a fee simple or lesser estate, usually corresponding to the estate owned by the mortgagor." See Leflar, American Conflicts Law, 3rd Edition, § 171, P. 442.

We must reject, as well, the argument that we should consider the law of Louisiana in determining the effect of the term "any future holder", because of the rule that contracts are interpreted in light of the law where the contract was made. We find no reference in the note to "any future holder". That term appears only in the mortgage. It is clear that we apply the laws of Arkansas to transactions involving lands within our boundaries. *Tate* v. *Dinsmore,* 117 Ark. 412, 175 S.W. 528 (1915); *Crossett Lumber Co.* v. *Files,* 104 Ark. 600, 149 S.W. 908 (1912).

We take the appellee's point of view because any attempt to engraft onto the substantive and procedural law of Arkansas, methods peculiar to another state and wholly different from our own, but affecting lands in Arkansas, would surely spawn problems better avoided. Confronted with that choice, we are compelled to rely on the only laws we can claim familiarity with — our own.

The decree is affirmed.

John R. BEAN and Pauline C. BEAN
v. Jessie C. JOHNSON

83-36 649 S.W.2d 171

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Wilson, McNee & Vaughan, P.A., by: *Keith Vaughan*, for appellants.

Shackleford, Shackleford & Phillips, P.A., for appellee.

RICHARD B. ADKISSON, Chief Justice. This case involves a land dispute regarding an easement of ingress and egress. Appellants, John and Pauline Bean, are the owners of an

easement over land belonging to appellee, Jessie C. Johnson. This easement was established in 1977 by a Calhoun County Chancery Court order which determined the respective rights of the parties:

> . . . that title in and to the lands described in the complaint herein be, and hereby is, quieted and confirmed in the defendants, Jessie C. Johnson and Evie Lou Johnson; that the plaintiffs have a personal easement across the said lands to reach their respective properties, this easement being a personal one, extending only to plaintiffs [John R. and Pauline C. Bean] and their social invitees; and that the plaintiffs are enjoined and restrained from exercising any acts of ownership or dominion over the said lands belonging to the defendants, Jessie Johnson and Evie Lou Johnson.

In 1980 appellants brought suit again, alleging that appellee had interfered with the easement granted in the 1977 order, interfered with appellants' property, interfered with a prospective contract to sell their property, and had trespassed on appellants' easement. Appellants requested damages, an injunction, and that appellee be held in contempt. The trial court refused to grant the relief requested, but elaborated on its former decision by stating:

> The plaintiffs, John R. Bean and Pauline C. Bean, have a personal easement across the lands of the defendant, Jessie C. Johnson, that extends to them and to their social invitees. *However, if social invitees of plaintiffs attempt to use the easement when the plaintiffs are not present, then such social invitees shall first report to the defendant, Jessie C. Johnson, that they are going to use the easement and shall furnish to the defendant written proof that they are, in fact, social invitees of the plaintiffs.* [Emphasis supplied]

It is from this ruling that appellants bring this appeal.

The relevant facts are as follows: Appellants live in Central Arkansas and own a cabin on Champagnolle Creek

in South Arkansas. The easement in question is a road which is the only means of access to appellants' property. It is located on property which appellee lives on and owns. Problems arose over this easement when appellants gave various "social invitees" permission to go on their property but did not accompany them. Testimony at trial indicated that when various "invitees" arrived, appellee told them that they were trespassing and ordered them off the property. Appellee testified he did this because he understood the 1977 order to mean that social invitees could come on the property only if appellants were with them. Appellee testified that he checked on anybody that visited the property even when it was dark. "When they make the turnaround, make the complete turnaround and come out I'd check them. That's my business." Relatives of appellants who were checking on the property for appellants testified that shortly after they drove up to the property, appellee walked over and told them they were trespassing and threatened to have them arrested if they came back. A prospective purchaser of the property testified that appellee told him that his son could use the property only if he [the buyer] were there, which was the main reason he decided not to purchase the property.

Appellants argue that the chancellor's ruling which required appellants' social invitees to first report to appellee and to furnish him with written proof that they were in fact social invitees unduly restricted their right to the use of their easement. We agree. When an easement exists, the rights of both parties are reciprocal, and respective owners must use the easement in a manner that will not interfere with the other's rights to utilization and enjoyment of the property. *Davis* v. *Arkansas Louisiana Gas Co.*, 248 Ark. 881, 454 S.W.2d 331 (1970). RESTATEMENT OF PROPERTY, § 481 (1944) states:

> As the extent of the easement becomes more difficult to discover, the relations between the owner of it and the possessor of the servient tenement become increasingly subject to the governing principle that neither shall unreasonably interfere with the use of the land by the other. ...The determination as to what constitutes an

> unreasonable interference on the part of the possessor of the servient tenement with the use of the land by the owner of the easement depends primarily upon a consideration of the relative advantage to him of his desired use and the disadvantage to the owner of the easement.

Here, the disadvantage caused to appellants by requiring either their presence or their written permission before social invitees can use the easement is greater than any advantage appellee might gain by being allowed to stop and check all unaccompanied social invitees. Therefore, it was error for the chancellor to place such restrictions on appellants' easement. Appellants and their social invitees must be allowed unrestricted use of the easement without interference by appellee.

Appellants also argue that the trial court erred in dismissing their prayer for damages for interference with prospective contract. Testimony at trial revealed that appellants had put the property up for sale and had at least one prospective purchaser who was seriously considering buying the property until he talked with appellee concerning the easement. Although we recognized in *Mason* v. *Funderburk,* 247 Ark. 521, 446 S.W.2d 543 (1969) that damages can be recovered for interference with a prospective contract, appellants failed to prove the necessary elements of damage. The only proof going to the element of damage was that appellants were asking $9,500 for the tract and that the prospective purchaser might have paid $8,000 for it. There was no proof of what appellants had paid for the tract or what its fair market value was, and, as a result, no proof of the loss of a prospective profit. *See* RESTATEMENT OF TORTS, § 774 A (1979). Therefore, the trial court did not err in dismissing the damage portion of appellants' complaint.

Affirmed in part; reversed in part.

Dickson FORREST *v.* Carole Jean FORREST

83-54 649 S.W.2d 173

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Michael W. Lonsberry of *Williamson, Ball & Bird,* for appellant.

Charles S. Gibson of *Charles S. Gibson Law Office,* for appellee.

RICHARD B. ADKISSON, Chief Justice. The Drew County Chancery Court granted appellee, Carole Jean Forrest, a limited divorce from appellant, Dickson Forrest, and

awarded her alimony. On appeal we must decide whether the trial court erred in the amount of alimony awarded and whether the marital property should have been divided at the time of the decree although both parties had agreed that it was not to be divided at that time.

The parties separated on April 8, 1981, and shortly thereafter appellant filed for a divorce. Appellee denied that appellant was entitled to a divorce and counterclaimed for separate maintenance. The trial court dismissed appellant's action for divorce for insufficient evidence and found that appellee should be awarded a limited divorce on her counterclaim. The trial court ordered appellant to pay $522 per month alimony but stated that if he made the house payment of $212 per month he would be credited this amount. At the time of the decree the marital property was not divided, with the court's order stating that "the parties have agreed that it would be inappropriate to cause a division of the parties' properties as a part of this proceeding."

Appellant now argues that the trial court erred in not ordering a property division at the time he granted the limited divorce. Ark. Stat. Ann. § 34-1214 (A) (Supp. 1981) provides:

> Division of property. — (A) At the time a divorce decree is entered:
> (1) all marital property shall be distributed . . .

As the concurring opinion in *Spencer* v. *Spencer,* 275 Ark. 112, 627 S.W.2d 550 (1982) points out, the legislature clearly intended that this statute apply not only to absolute divorce but also to limited divorce. See Compiler's Notes, Ark. Stat. Ann. § 34-1214. However, we see no reason why, if the parties so desire and specifically agree, that the trial court cannot postpone the division of the property until a later date. Here, the record reflects that both parties did agree that no property division was to be made at the time the decree was entered; therefore, not distributing the property at that time was not error.

Appellant argues that the $522 alimony award is excessive since appellee, with appellant's alimony payments, has a monthly income of $1,034 while appellant's monthly income, after these payments, is only $908. However, appellant ignores the fact that $212 of the $522 alimony payment is for the house payment, which operates to his benefit since one-half of the house is his.

Appellant also argues that the court improperly considered the parties' two adult children who lived at home but did not contribute toward their expenses when arriving at the alimony figure. This assertion is not supported by the record. The court specifically disallowed certain expenses which appellee had requested appellant pay because they were expenses because of the two children. The court also stated: "Frankly, the Court's position is that those two boys ought to either get out, or go to work and pay some rent . . ."

We cannot say the chancellor's decision in fixing the amount of alimony is clearly erroneous.

Affirmed.

Jerry BAILEY *v.* Harold Gene MATTHEWS et ux

83-60 649 S.W.2d 175

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Holland & Todd, by: *Michael E. Todd,* for appellant.

Ponder & Jarboe, by: *Dick Jarboe,* for appellees.

FRANK HOLT, Justice. Pursuant to a written contract, appellant built a home for the appellees. The undisputed evidence established that the concrete foundation was poured in water and mud. When the ground dried, the foundation cracked and the house settled, creating numerous other defects in the house. Appellees' house was repaired at a cost of approximately $19,000.

The appellees filed suit, initially on a theory of breach of an implied warranty that the house was to be constructed with sound workmanship and proper construction. Before trial the complaint was amended by alleging a breach of written provision of the contract, which stated that the work

was to be completed in a workmanlike manner according to standard practices. At a nonjury trial, when the appellees rested their case, the appellant moved for a directed verdict on the ground that the appellees had failed to give notice to appellant of the alleged breach of warranty, citing cases involving breaches of warranty in the sale of goods. Ark. Stat. Ann. § 85-2-607 (3) (Add. 1961). The court denied the motion. The appellant rested his case, choosing to stand on his motion for directed verdict. Two days after the court took the case under advisement, the appellees sought to amend their complaint to conform to the proof, alleging negligent construction in that the work was not completed in a workmanlike manner according to standard practices. The court allowed the amendment to conform to the proof and entered judgment for the appellees "[u]pon consideration of the pleadings and amendment to the pleadings to conform to the proof . . . " without specifying whether the judgment was founded on the warranty theory, the negligence theory, or both theories. Appeal was taken to the Court of Appeals, which certified the case to this court because it presents a question in the law of torts. Rules of the Supreme Court and Court of Appeals, Rule 29 (1) (o).

We first discuss appellant's contention that the court abused its discretion in allowing the appellees to amend their pleadings to conform to the proof after both parties had rested and the matter had been submitted to the court for a decision.

ARCP Rule 15 (b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be

> amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

This rule is identical to the corresponding federal rule. According to Wright and Miller, Federal Practice and Procedure: Civil § 1493, "[a] party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the pleadings is in no position to contest a motion to conform. Thus, consent generally is found when evidence is introduced without objection . . . ." Here, the evidence relating to the issue of negligent workmanship, as well as breach of warranty with respect to good workmanship, was testimony that the foundation was poured in water contrary to standard practice and good workmanship. No objection was made to the introduction of this evidence. Unlike *T. H. Epperson & Son, Inc.* v. *Robinson,* 274 Ark. 142, 622 S.W.2d 668 (1981), we cannot say that the appellant was prejudiced by the amendment of the pleadings. There, the amendment to the complaint had the effect of substantially reducing the plaintiff's burden and presenting the defendant with a much more difficult claim to meet than had been pleaded before trial. Here, the elements of the claim pleaded before trial and the claim pleaded in the amendment to conform to the proof were substantially the same. The pretrial pleadings put the appellant on notice that he would be required to meet a claim that the foundation was not completed in a workmanlike manner according to standard practices. The amendment simply restated the same claim attaching a different label to it.

The appellant argues that an amendment may not substantially change the claim or defense and cites in support of this contention *O'Guinn Volkswagen, Inc.* v. *Lawson,* 256 Ark. 23, 505 S.W.2d 213 (1974); and *St. Louis I.M. & Ry. Co.* v. *State,* 59 Ark. 165, 26 S.W. 824 (1894). Suffice it to say that both cases predate the Arkansas Rules of Civil Procedure, which include Rule 15 (b). Nothing in Rule 15 (b) precludes, under the facts of this case, an amendment of the pleadings by adding a theory of negligence to the theory of breach of warranty. See Moore's Federal Practice par. 15.13 [2], which cites many federal cases construing

Rule 15 (b) to allow amendments to conform to the evidence where the cause of action is changed and the opposing party is not prejudiced. No prejudice is demonstrated here. Furthermore, Rule 15 (b) provides that the court may grant a continuance to enable the objecting party to meet evidence relevant to issues not pleaded before trial. The record reveals that the appellees suggested to the trial court, in their memorandum brief in support of their amendment to the pleadings, that if the appellant deemed himself prejudiced, the court allow an additional hearing on the matter. The appellant never availed himself of this opportunity to correct any possible prejudice, responding only that allowing the amendment was an abuse of discretion. In our view the trial court did not abuse its discretion by allowing the appellees to amend their pleadings to conform to the proof.

Consequently, we need not reach appellant's remaining contention that the court erred in denying his motion for a directed verdict on the ground that appellees failed to give notice to the appellant of the alleged breach of warranties.

Affirmed.

Ray FORAN and Bobby WASHBURN *v.* MOLITOR FORD, Mollie NOWLIN and E. P. MOLITOR

83-14 649 S.W.2d 177

Supreme Court of Arkansas
Opinion delivered April 25, 1983

David Solomon, for appellants.

Raymond F. Galloway of *Raff & Galloway,* for appellees.

DARRELL HICKMAN, Justice. This is an appeal from an award of treble damages to a landowner against a tenant and an adjacent landowner for trespassing, which resulted in a $6,000 judgment plus $500 attorney fees. We find that the trial court erred in trebling the damages pursuant to Ark. Stat. Ann. § 50-105 (Repl. 1971), strike the unauthorized attorney fees, dismiss the judgment against the tenant, but affirm a judgment for $2,000 against the adjacent landowner.

The Molitor family, the appellees, owns forty acres of land in Phillips County, Arkansas, which has been leased for years to the Washburn family for farming. Less than half of the forty acres can be cultivated since the remaining portion is under water or wet most of the year. A farm road crosses the land and is, and has been, used by the appellant, Ray Foran, the adjacent property owner, to reach his land. It was stipulated by the parties that Foran has a prescriptive easement over the appellees' forty acres.

There was evidence the road was low and had ditches only one or two feet deep at each side that were narrow enough to step across. The road would wash when it rained and was barely passable in winter. It was used solely for Foran's easement. Foran decided to improve the road and told appellant, Bobby Washburn, the Molitors' tenant, that he planned to clean out the ditches and fill the holes in the road. Washburn told Foran that he did not see what harm it would do as long as it did not interfere with cultivation. Foran never discussed his plans with the appellees. Foran also asked Washburn if he could replace some power lines that had once run through the appellees' land. Washburn said that he did ask appellee E. P. Molitor's mother about the line and she consented.

Foran had the power lines replaced, and put them along the road. He dug the ditches along the road in places up to eight feet deep and five to ten feet wide, according to the Molitors. He took the dirt from the ditches and raised the road in places three feet above the surrounding ground. The appellees' complaint was that the changes seriously affected the topographic structure of their land and inhibited drainage. Washburn and Foran testified that the changes were not so extensive. The only witness who testified regarding the amount of damage done, said that it would cost $2,000 to restore the road to its original condition.

The trial court, sitting without a jury, found that Foran exceeded any authority he had by virtue of his prescriptive easement and had trespassed. He resolved in the Molitors' favor the factual dispute about the effect of the road work and the landowners' right to keep their property as it was.

The judge said in summation: "The defendant, Foran, admits that he had no authority from anyone to go in and do such an expensive construction project. That no one gave him permission to do it, and [he] even said — that he probably should have gotten somebody's permission." There is substantial evidence to support the judge's findings in this regard. Although one has a prescriptive easement, and may maintain that easement, that is not a license to make major alterations in the land. *Craig* v. *O'Bryan,* 227 Ark. 681, 301 S.W.2d 18 (1957).

But there is no evidence at all that would justify treble damages under Ark. Stat. Ann. § 50-105. That statute is penal and generally provides that if any person cuts down, destroys or carries away any trees or growing things, or digs up any stone, turf or fruit from another person's land in which he has no interest or right, that person is guilty of trespassing and shall pay treble damages for anything so damaged, destroyed, or carried away. It is our judgment that the damage done in this case is not covered by this penal statute. Foran had a right to repair the road because it is conceded that he had an easement which is an "interest" in the land according to the statute. The only thing done was that the dirt was moved on the property to build a new road, and while that action amounted to trespass because it was excessive under the circumstances according to the trial court's finding of facts, it was not the sort of trespass envisioned by Ark. Stat. Ann. § 50-105. *See Stoner* v. *Houston,* 265 Ark. 928, 582 S.W.2d 28 (1979). Therefore, the court was wrong in entering a judgment for treble damages. But there was evidence which would support the trial court's finding that the land was damaged from the owners' point of view, and the only evidence of the amount of damage done was the testimony by a contractor that the old road could be restored for $2,000. The judgment in that amount is affirmed against Foran.

The court also found that Bobby Washburn was liable for the trespass because as a tenant he was under an obligation to prevent the trespass or notify the landowner that it was happening, and, instead, Washburn stood by and allowed the trespass. There is not a preponderance of

evidence to support that finding. Washburn never used the road and the testimony was that Foran told Washburn he was only going to clean out the ditches and fill the holes in the road. There was an abundance of testimony that the road had been maintained in such a way for years. A tenant's duty to the landowner is to exercise reasonable care to guard against injury to the property. *Kirkpatrick* v. *Reese,* 219 Ark. 124, 240 S.W.2d 1 (1951). There is no evidence to support a finding that Washburn breached his duty to the Molitors. In fact, it might easily be inferred that had the tenant known such an extensive project was contemplated by Foran, he would have told the Molitors, because he did tell them about the change of the power lines. Therefore, the judgment against Washburn is dismissed.

There is no provision for attorneys' fees in a case such as this and without express statutory authority such fees are not permissible. *American Physicians Insurance Co.* v. *Hruska,* 244 Ark. 1176, 428 S.W.2d 622 (1966). Therefore, the judgment is affirmed as modified.

Affirmed as modified.

Garland TRICE, Jr. *v.* CITY OF PINE BLUFF, Arkansas

82-233 649 S.W.2d 179

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Othello C. Cross, for appellant.

Berlin C. Jones, Asst. City Atty., for appellee.

ROBERT H. DUDLEY, Justice. This is an appeal from convictions for violating a city zoning ordinance. The narrow issue involved is whether the ordinance was too vague to be enforced through criminal law. We hold that the ordinance did not give appellant fair warning in definite language that his acts were prohibited and we reverse the conviction. Jurisdiction is in this Court as the case involves the validity of a municipal ordinance as applied. Rule 29 (1) (c).

The City of Pine Bluff has a comprehensive zoning ordinance. Appellant owns two lots in the city which are designated for residential purposes. The city issued a permit to appellant for a non-conforming use, a garage, on the lot across the street from the tract on which his home is located. The neighbors complained to the city about appellant's use of the lot with the garage. However, appellant did not think he was violating the uses proscribed by the zoning ordinance.

As a result, the city charged appellant in municipal court with five separate counts of "Violation of City Ordinance." He was convicted on all counts and appealed to circuit court. There, at the commencement of the consolidated trials, the circuit judge prophetically inquired of the city attorney as follows:

THE COURT: This is City appeal cases Number 82-137-1, Number 137-A-1, 137-B-1, 137-C-1 and 137-D-1. Now, somebody tell me in just plain language, if it is in plain language, what the man is charged with. I assume, as I said before, that it has something to do with driving a truck in an area of the City that a truck is not supposed to be in.
MR. JONES: (City attorney) No, sir.
THE COURT: That's not it.
MR. JONES: That is 137-D, truck driving —
THE COURT: Well, don't tell me what 137-D is if we are not trying 137-D. The only ones I'm interested in are the ones that we are trying and what the man is charged with so when we take the facts I can understand what he — You know — Try to figure it out whether he violated it or not.
MR. KEOUGH: (City attorney) Violation of Section 9 of City Ordinance 4807, the zoning ordinance of the City of Pine Bluff, uses permitted in an R-3 residential district.

The sufficiency of the charge is not questioned on appeal. One count, 137-D, was dismissed by the circuit court but appellant was found guilty on the other four counts. The convictions were had because on four different days a zoning administrator found the following: (1) "grass that needed cutting and some other items stored . . . and a pile of lumber," (2) "an 18 wheel tractor-trailer on the lot," (3) "a pickup truck," and (4) "another truck, approximately one ton." The specific question before this Court is whether the ordinance gives a person fair warning in definite language that the following are prohibited: (1) allowing grass to grow too high and storing lumber, (2) parking a large truck, (3) parking a small truck, and (4) parking a medium truck.

Zoning ordinances may be judicially enforced by either civil or criminal proceedings. *City of Mountain Home* v. *Ray*, 223 Ark. 553, 267 S.W.2d 503 (1954). Civil enforcement, the most common form, is usually by actions for injunctions or declaratory judgments. In those civil actions, an ambiguous ordinance or one with a double meaning may be construed by the courts so that effect is given to the

legislative intent. The rule for enforcement by criminal action is markedly different because there can be neither constructively created criminal offenses nor criminal offenses established by implication. *International Harvester Co.* v. *State,* 79 Ark. 517, 96 S.W. 119 (1906). Ordinances creating criminal offenses must be clear and unambiguous. In civil law we inquire into what the legislature meant but in criminal law we inquire into only what the statute means. *Lewis* v. *State,* 220 Ark. 259, 263, 247 S.W.2d 195, 197 (1952), citing *Giles* v. *State,* 190 Ark. 218, 78 S.W.2d 70 (1935). It is this difference that makes a criminal proceeding a poor vehicle for resolving a zoning dispute such as the one before us. Instead of seeking a declaratory judgment for the interpretation of the ordinance or an injunction against impliedly proscribed uses, the city sought to resolve this dispute by the process of a criminal action. Therefore, we examine the ordinance for vagueness, the standard for criminal statutes.

The standard by which we determine whether an ordinance is vague is whether the ordinance gives a person of average intelligence a fair warning in definite language of the prohibited act. *Jordan* v. *State,* 274 Ark. 572, 626 S.W.2d 947 (1982). The material section of the ordinance is appended to this opinion. There is no warning in definite language that the ordinance in question created a criminal offense for allowing grass to exceed a certain height, or for storing lumber, or for parking trucks. The city's argument tacitly recognizes that there was no warning in definite language but it contends that the ordinance is an exclusive zoning ordinance and therefore all uses other than proper residential uses are criminally excluded. From this basis the city constructively or by implication would create the four criminal offenses. Although this argument might be valid in a civil action to determine permitted uses, *see Ferguson* v. *City of Mountain Pine,* 278 Ark. 575, 647 S.W.2d 460 (1983). it is irrelevant to the interpretation of criminal laws which are subject to strict guidelines of interpretation. *Lewis* v. *State,* 220 Ark. 259, 263, 247 S.W.2d 195, 197 (1952). Moreover, the following questions demonstrate the fallacy in this interpretation of the ordinance. For example, how tall is grass which is too tall? How much lumber, if any, can

be stored? What, besides lumber, is prohibited from being stored? May an automobile be parked on one's land? If so, why may an automobile be parked when a pickup truck may not? Quite obviously, the ordinance contains no written standard by which the questions can be answered. Logic dictates only one conclusion: that a zoning administrator and a judge decide what constitutes an offense without written standards. In *Davis* v. *Smith,* 266 Ark. 112, 118, 583 S.W.2d 37, 41 (1979), we stated:

> In criminal cases, placing discretion in the hands of the police without prescribing any standards governing its exercise is another instance which renders a statute void for vagueness. *Papachristou* v. *City of Jacksonville,* supra [405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)]. . . . A law which, due to vagueness, leaves basic policy matters in the criminal law field to either policemen or judges on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application, is also impermissible. *Grayned* v. *City of Rockford,* supra [408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)]. A law that is so vague and standardless that it leaves judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case fails to meet due process requirements. *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). See also, *Andrew Jackson, ex parte,* 45 Ark. 158.

If an ordinance can be construed to create a criminal offense, not by its definite language, but merely according to a zoning administrator's interpretation of that ordinance, we become a state governed not by laws but by administrators.

The city seeks to minimize this danger by placing reliance on the argument that appellant knew that in his application for a permit for a non-conforming use, he stated the garage would be used to park an automobile and knew the manner in which the city interpreted its own ordinance. Therefore, the city argues, he had fair warning. However, criminal offenses cannot properly rest upon what an application stated when that application does not form a part of

the charge, or upon what the neighbors thought the ordinance meant or upon what warning an administrator gave based upon his own interpretation of the ordinance. The validity of the criminal provisions of the ordinance is determined by the language of the ordinance. That language is vague and the conviction must be reversed.

Reversed and dismissed.

HICKMAN and HAYS, JJ., dissent.

APPENDIX

SECTION 9
R-3 RESIDENTIAL

A. General Description and Intent of District.

This District is intended for use in residential neighborhoods which meet one or both of the following criteria:

1. Lot sizes are generally smaller than those required in the "R-1" zone in area or dimension.
2. It can be established that the residential character of the neighborhood can best be preserved or improved by allowing a broader mix of uses than allowed in "R-1" areas.

B. Permitted Uses

1. Single Family Dwellings
2. Accessory Uses and Buildings
3. Duplex (with lot area of 7,800 sq. ft. and a lot width of 65 ft.)
4. Home Occupation
5. Any single lot subdivided and recorded as of the effective date of this Ordinance, with a fifty (50) foot width at the building line, and five thousand (5,000) square feet of area, may be used at the discretion of the Zoning Administrator where required R-3 setbacks can be met.

6. Office uses which comply with the following additional regulations and other city regulations.

C. Uses Permitted Upon Review and Approval of the Planning Commission

The Planning Commission may impose special conditions relating to such considerations as the site plan, screening or parking as a condition for approval of the following uses or any other uses it deems appropriate for the protection of the public health, safety and welfare.

1. Parks and Playgrounds
2. Day-Care Family Home
3. Rooming House
4. Cemetery
5. Public & Semi-public Uses
6. Golf Course
7. Tennis Courts
9. Public Elementary Schools and other educational institutions with curriculum equivalent to a Public Elementary School.
10. Churches (See Section 24-(M))
11. Garage Apartments (Occupied by Relatives)
12. Professional Office in a converted functionally obsolete single family residence.
13. Restaurant in a converted functionally obsolete single family residence.
14. Other uses deemed appropriate in the opinion of the Board of Zoning Adjustment which conform to the basic intent of this district and which can be demonstrated to be equal to or less intense than other permitted uses in this district.

D. Parking Requirements

Two (2) off-street parking spaces shall be required for duplexes and single family residences. Other uses shall provide parking in conformance with provisions of Section 23.

E. Height, Area and Structure Regulation

1. *Height Regulations* — No building shall exceed two and one-half stories nor shall it exceed thirty-five (35) feet in height. The height shall be measured from the Finished Floor Level (FFL).

2. *Space Regulations*

a. *Lot Area:* A minimum of seven thousand two hundred (7,200) square feet. A duplex must have a minimum of seven thousand, eight hundred (7,800) square feet.

b. *Lot Width:* A minimum width at the building setback line of sixty (60) feet. A duplex shall have a minimum of sixty-five (65) feet.

c. *Front Yard:* A minimum of twenty-five (25) feet.

d. *Side Yards:* The minimum side yard shall be five (5) feet. The side yard on the street side of each corner lot shall not be less than twenty (20) feet.

e. *Rear Yard:* A minimum of twenty (20) feet.

f. *Accessory Buildings* shall be set back from any property line a minimum of five (5) feet.

g. *Building Coverage:* A maximum of forty-five (45) percent of the lot area.

3. *Structure Regulations*

Only one dwelling unit per lot, regardless of lot size, will be permitted except garage apartments as provided for in this Ordinance.

F. Dimensions

Each structure shall have a minimum total dimension on each side of twenty (20) feet and the entire twenty (20) feet shall be finished on a permanent foundation.

More than one modular unit may be joined and considered one structure providing that joints are completely sealed in such a manner that they are not discernible from the exterior of the structure, and in no way indicates mobility. This section shall not include storage buildings or other minor accessory structures.

DARRELL HICKMAN, Justice, dissenting. Rather than go to the record to reverse this decision, we should only go to the record to affirm the decision. Rather than view the evidence most favorably to the appellant, we must view it most favorably to the appellee. *Hamlin Flying Service, Inc.* v. *Breckenridge,* 275 Ark. 188, 628 S.W.2d 312 (1982). Rather than search for a way to find an ordinance unconstitutional we must first presume it is constitutional and try to give it a construction which would meet constitutional tests if that construction is reasonable. *Board of Adjustment of Fayetteville* v. *Osage Oil & Transportation, Inc.,* 258 Ark. 91, 522 S.W.2d 836 (1975), *cert. denied* 423 U.S. 941 (1975); *Connors* v. *Riley,* 395 F. Supp. 1244 (W.D. Ark. 1975).

The majority opinion decides a case that essentially was not presented to the trial court, nor fairly represented as such on appeal. If our appellate rules are to have any significance, if parties who prevail in trials are to have any security in the judicial process, and if trial judges are to have any confidence in our approach to reviewing cases, this case must be affirmed.

It is not for us to say how tall grass can grow, or what vehicles can be parked in a residential area, and those are not the questions to us. Our role in this case is simply to review two questions presented: Is the ordinance constitutional by any reasonable measure, and was there substantial evidence to support the trial court's decision.

The evidence stated most favorably to the appellee is this: Trice, the appellant, had been a source of irritation to his neighbors for some time because he ran a business from his home which is located in a residential area in Pine Bluff, an area that can be used for no other purpose except residential. Trice bought a vacant lot across the street from his house, which he admitted was purchased as a place to park his business vehicles, or just vehicles, as he insists. He was granted permission to build a garage on it but the permission was limited to using it for parking automobiles. In other words, he was deliberately deceptive.

After several complaints were made of his use of the lot, a city official checked the lot on four separate days: November 16, 17, 18, and December 1, 1981. On those days the official noted what he thought were improper uses. According to his testimony, which was supported by photographs, on one day there was an 18-wheel trailer and a one-ton truck with a fuel tank parked on the property. There were also tall grass, tires, and a pile of lumber on the lot. Over the next two days the trailer was gone but the other things remained. On December 1, 1981, an 18-wheel tractor-trailer was on the lot being cleaned by a steam cleaning service.

Trice admitted he was using the lot for his business and he was charged with an improper use of the property. The circuit judge, sitting without a jury and charged with finding the facts, simply summed up the evidence by saying:

> He's in the trucking business. . . . The garage was built for automobiles, personal use, and that was permitted. Maybe that shouldn't have been permitted. I don't know. But nevertheless, a ton and a half truck, a pickup truck, an automobile and an 18-wheeler with a truck bed and a pile of lumber indicates to me there is something going on there besides sleeping and eating, and I'm not condemning the work as such but if you are going to carry on that kind of operation you are going to have to find another place to do it. You can park your truck as I understand at your residence overnight, but you just simply can't use that vacant lot over there as a place to operate from to unload excess lumber or to unload a torn-up truck bed or to clean up the equipment or repair the equipment. That's a part of your business operation, and it does violate the ordinance.

So all we must decide is whether there is substantial evidence that Trice was improperly using the property for something other than a residential purpose. Indeed it is not even disputed that was what Trice was doing, and there was no objection to the charge. So it is not a question of height of the grass, or notations by a civil servant of violations; it is a question of reviewing the facts found by a trial judge, which

we must honor if substantially supported by the evidence. The majority concedes no objection was made as to the charges, but dwells on them anyway.

The ordinance in question is a routine but comprehensive zoning ordinance that declares what uses property may be put to and necessarily what uses may not be employed. The ordinance is not in the record, only references were made to it at the trial. We cannot take judicial notice of a municipal ordinance. *Orrell* v. *City of Hot Springs,* 265 Ark. 267, 578 S.W.2d 18 (1979). The excerpt reprinted by the majority was furnished by the appellee and did not appear in the record.

We can surmise there was a penal provision allowing a fine for each violation of the ordinance; that is not questioned, but the provision itself is not in the record. We do know there is no question that this neighborhood was exclusively zoned as a residential area. Residential zoned property may not, of course, be used for commercial, industrial, or agricultural uses, which are the other general categories, unless specifically authorized in the ordinance. The appellant specifically attacks one provision of the ordinance as unconstitutional; that provision defines the accessory uses to which an owner may put his property. It obviously controls this case, and is not even mentioned by the majority. The provision, quoted to us by the appellant, defines an accessory use as:

> A use customarily incidental, appropriate and subordinate to the principal use of land on building; and located on the same lot.

The appellant argues in his brief this is an unconstitutional provision because these are broad unspecific terms "which do not lend themselves to ready measurement."

In *Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977), we upheld as constitutional some statutory language defining one kind of first degree battery as causing serious injury "under circumstances manifesting extreme indifference to the value of human life." If the average person can compre-

hend that language, surely one can know what uses are customary, incidental, appropriate and subordinate to residential use. Necessarily it means, when the zoning ordinance is given a reasonable interpretation, that one cannot use such property for commercial, business, industrial or agricultural purposes.

Common sense has to be applied to the interpretation of statutes and ordinances. *Henderson* v. *Russell,* 267 Ark. 140, 589 S.W.2d 565 (1979). Would it satisfy the majority if the ordinance had mentioned all the "Thou shalt nots" instead of succinctly and clearly stating what the property could be used for? That would make much less sense than spelling out, as the ordinance apparently does, only what the property may be used for.

I would not strain to strike down this ordinance, in the dark, so to speak. The appellant essentially says the ordinance is invalid because of the "accessory use" of the provision. And that is the question I would answer.

The ordinary person would not have to speculate to the meaning of this provision. *Jordon* v. *State,* 274 Ark. 572, 626 S.W.2d 947 (1982). An ordinance which " . . . defines boundaries sufficiently distinct for all citizens, policemen, juries and appellate judges is not impermissibly vague." *Davis* v. *Smith,* 266 Ark. 112, 583 S.W.2d 37 (1979). *See Martin* v. *State, supra.*

The provision of the ordinance under attack is part of a zoning code, the primary purpose of which is to define how one may and may not use property. There is a penal sanction for violations.

This is a simple case. The appellant was obviously running a business on a residential lot, and that is what the trial court found. The appellant knew he could not run a trucking business there, yet he proceeded to do so. I would apply our usual rules of appellate procedure and affirm the case. I would make no blanket rule concerning any and all provisions of this ordinance on the chance the parties have

submitted to us all relevant portions. *See Bethea* v. *City of Little Rock,* 272 Ark. 159, 612 S.W.2d 320 (1981).

HAYS, J., joins in this dissent.

Don W. ALLEN et al *v.* Gene TITSWORTH et al

82-293 649 S.W.2d185

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Phillip B. Boudreaux, for appellants.

Orvin W. Foster, for appellees.

ROBERT H. DUDLEY, Justice. In 1980 the City of Mena employed appellant, Don W. Allen, as Chief of Police. He continues to serve in that capacity but, from January 25, 1981 until February 8, 1982, he was not certified as a law enforcement officer. Appellee, Gene Titsworth, filed a class action on behalf of all taxpayers residing in Mena praying that all official acts of appellant as police chief during the period of non-certification be invalidated and that appellant be ordered to refund all compensation paid to him during the period. The chancellor ruled that all actions taken during the period were invalid but that a refund of the compensation received during the period was not required. Both parties appeal. We dismiss on direct appeal and affirm on cross-appeal. Jurisdiction is in this Court as this case involves the interpretation of the statute on certification of law enforcement offices. Rule 29 (1) (c).

Title 42, Chapter 10 of the Arkansas Statutes Annotated provides a system and a program for the training and certification of law enforcement officers within the State. An appointed chief of police is a law enforcement officer, within the statutory definition, because he "is responsible for the prevention and detection of crime and the enforcement of the criminal, traffic or highway laws of this State ...." Ark. Stat. Ann. § 42-1001 (a) (Repl. 1977). Thus, it was necessary for appellant to be certified in order for him to validly act as a law enforcement officer. Appellant failed to obtain certification for the period of time at issue. Ark. Stat. Ann. § 42-1009 (Repl. 1977) provides that one who is not certified "shall not take any official action as a police officer and any action taken shall be held as invalid." Appellant does not contest that part of the trial court's decree which invalidates all actions taken by him as a law enforcement officer during the period of non-certification. Rather, he argues that the certification statutes should not apply to

non-law enforcement administrative acts as distinguished from law enforcement administrative acts. We do not reach the point because the evidence offered below is not sufficient to make the suggested distinction a justiciable issue. We are asked to issue an advisory opinion to decide an academic issue. This is contrary to our practice. *Stafford* v. *City of Hot Springs,* 276 Ark. 466, 637 S.W.2d 553 (1982). Therefore, we dismiss the direct appeal. Similarly, in the court below there was no real controversy concerning any designated act, there was no standing to directly question a specific action and the trial court did not invalidate any particular act. While that part of the trial court's decree invalidating all law enforcement actions is not on appeal, we note that it is in the nature of advice and does not have the force, effect and binding nature of a judicial decision which resolves an actual controversy between parties. *McCuen* v. *Harris,* 271 Ark. 863, 611 S.W.2d 503 (1981).

On cross-appeal Gene Titsworth argues that the trial court erred by not requiring cross-appellee Don Allen to refund all compensation paid to him during the period of non-certification. We find no merit in the contention. Cross-appellee was validly employed, his salary was reasonble and he acted in good faith. Under these circumstances the city should not be given a windfall profit. *Martindale* v. *Honey,* 261 Ark. 708, 551 S.W.2d 203 (1977).

Dismissed on direct appeal and affirmed on cross-appeal.

L. V. BLAKELY *v.* STATE of Arkansas

649 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Appellant, *pro se.*

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

PER CURIAM. On June 2, 1981, petitioner L. V. Blakely pleaded guilty to second degree forgery. The trial court suspended imposition of sentence for five years. On November 8, 1982, a hearing was held on a petition to revoke the suspended sentence filed by the State. The petition was granted. Blakely has now filed a motion seeking permission to file a belated appeal of that action. His attorney at the

revocation hearing, Mike J. Etoch, has submitted an affidavit in response to the motion.

Petitioner alleges that he wrote Mr. Etoch three times asking him to appeal the revocation. Mr. Etoch concedes that petitioner wrote to him and the circuit judge on December 2 and 3, which was within the thirty days for filing a notice of appeal, asking him to appeal. He states, however, that "at about the same time" he received a phone call from an employee of the Department of Corection who said that he would handle the appeal if Etoch would send a letter withdrawing himself as attorney-of-record. Although he sent the letter, Etoch never formally asked the trial court to relieve him as counsel.

Criminal Procedure Rule 36.9 provides that a belated appeal may be granted for good cause even if no notice of appeal was filed. We have consistently held that the failure of counsel to perfect an appeal in a criminal case where the defendant desires to appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Surridge* v. *State,* 276 Ark. 596, 637 S.W.2d 597 (1982). There can be no doubt in this case that petitioner wanted to appeal. If counsel understood that the notice of appeal was to be filed by some other attorney, he was obligated to seek permission from the trial court to withdraw from the case. 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.

Rule 11 (h), Rules of the Supreme Court of Arkansas, places certain duties upon the trial attorney if he intends to withdraw from a case. In *Finnie* v. *State,* 265 Ark. 941, 582 S.W.2d 19 (1979), we held that it was the duty of the trial attorney to obtain permission from the trial court to withdraw from the case and that the petition to withdraw should contain a statement of reasons therefor. Also, we held

that a copy of request for withdrawal, if granted, should be sent to the appellant.

Petitioner's motion for belated appeal is granted. Since Mr. Etoch has never received permission to withdraw from the case, he remains attorney of record on this appeal and must be held responsible for the duties imposed upon him by the rules, statutes and opinions of this Court. *Surridge, supra; Finnie, supra.* Petitioner has furnished us with an affidavit attesting to his indigency. As an indigent, he is entitled to have the record prepared at public expense. A writ of certiorari is issued to prepare the record.

A copy of this opinion shall be forwarded to the Committee on Professional Conduct. See *Ellis* v. *State,* 276 Ark. 560, 637 S.W.2d 588 (1982).

Motion granted.

George LEWIS *v.* STATE of Arkansas

649 S.W.2d 188

Supreme Court of Arkansas
Opinion delivered April 25, 1983

Appellant, *pro se.*

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

PER CURIAM. Petitioner George Lewis was convicted of aggravated robbery on July 15, 1982. No appeal was taken. Petitioner now contends that he wanted to appeal, but his retained counsel Ronald Griggs said it would cost $1,000.00 and did not advise him that he could appeal as an indigent. Mr. Griggs has filed an affidavit in response to petitioner's motion, stating that he told petitioner that an appeal might be successful but expensive. He says that he heard no more from petitioner after telling him that the "costs alone" of an appeal would be about $1,000.00. Petitioner alleges that he did not know that an appeal was available to an indigent person until he talked to other prison inmates after the time for filing a notice of appeal had passed.

Criminal Procedure Rule 36.26 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.

It is apparent from the attorney's affidavit in this case that he neither withdrew from the case in accordance with Rule 36.26 nor took any action to see that his client understood

that an indigent could ask the trial court to appoint an attorney to perfect an appeal at public expense. Since counsel knew that his client wanted to appeal, he was obligated to file a notice of appeal or obtain permission from the trial court to withdraw. To do nothing amounted to a denial of effective assistance of counsel. *Finnie* v. *State,* 265 Ark. 941, 582 S.W.2d 19 (1979). If petitioner could not afford the cost of appeal, a motion for permission to proceed as an indigent should have been filed in the trial court. An attorney cannot abandon a convicted defendant merely because his appeal must be pursued at public expense. An attorney who wishes to withdraw from a case must obtain permission from the trial court to withdraw by means of a petition to withdraw containing a statement of reasons for withdrawing. A copy of the request for withdrawal, if granted, should be sent to appellant. *Osbourne* v. *State,* 276 Ark. 479, 637 S.W.2d 535 (1982); *Green* v. *State,* 276 Ark. 313, 634 S.W.2d 140 (1982); *Finnie, supra.*

Since he has never been relieved as counsel, Mr. Griggs remains attorney of record. Petitioner has provided this Court with an affidavit attesting to his indigency and is eligible to have counsel appointed. Therefore, petitioner's motion for belated appeal is granted and Ronald Griggs is appointed counsel on appeal. A writ of certiorari shall be issued to prepare the record.

Motion granted.

Harvey Lee SMITH *v.* STATE of Arkansas

CR 83-24 649 S.W.2d 400

Supreme Court of Arkansas
Opinion delivered May 2, 1983

William R. Simpson, Public Defender, by: *Jerome Kearney,* Deputy Public Defender, for appellant.

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

GEORGE ROSE SMITH, Justice. On conviction for aggravated robbery and first degree battery the appellant was sentenced to consecutive 25-year and 30-year sentences. His only argument for a new trial is that the trial judge should not have admitted his confession into evidence. We agree with the trial judge.

When the appellant and a companion attempted to hold up a grocery store, the proprietor thwarted the attempt by opening fire with his own gun, hitting Smith three times. After an operation the bullets were still somewhere in Smith's body when the police took his statement three days later. The nurse told them that it was up to Smith to decide whether to make a statement. The officers testified that Smith was sitting in a chair, that he was warned of his rights, that he understood them, that he gave a coherent account of the attempted robbery, and that he did not appear to be under drugs or sedation. Smith did not testify at the Denno hearing.

Counsel rely for reversal on the holding in *Mincey* v. *Arizona,* 437 U.S. 385 (1978). There, however, the court held that the statement was involuntary because the accused was barely conscious, was in intensive care, had a tube in his mouth that kept him from talking, and more than once asked in writing for a lawyer. We find no controlling similarity between that case and this one.

Affirmed.

Charles D. RAGLAND, Comm'r of Revenues, Dept. of Finance & Administration *v.* LYON'S MACHINERY COMPANY, INC.

82-296 649 S.W.2d 401

Supreme Court of Arkansas
Opinion delivered May 2, 1983
[Rehearing denied June 13, 1983.]

Kelly S. Jennings, for appellant.

David L. Hale and *Rogers Cockrill,* for appellee.

DARRELL HICKMAN, Justice. This is an appeal from a decision by the Pulaski County Chancery Court holding that certain equipment sold by Lyon's Machinery Company, the appellee, is exempt from the Gross Receipts Act. The statute exempts from sales tax, equipment sold that is used directly in manufacturing. The chancellor held that the equipment is used in the "manufacture" of concrete and, therefore, is exempt under Ark. Stat. Ann. § 84-1904 (r) (2).

The State argues on appeal that the equipment is not used in the "manufacture" of a product within the meaning of the statute and requests that the judgment be reversed. We find the chancellor was wrong, reverse the decree, and remand the cause for entry of judgment for the State.

Lyon sells ready-mix concrete plants, which are generally called "batch" plants, and according to the undisputed evidence these plants are used to mix cement, sand, gravel and water to produce ready-mix concrete. The batch plants are expensive and modern machinery for mixing cement. While the appellee presented a good deal of testimony that the ready-mix concrete industry has become very sophisticated and technical, using computers to insure quality, it is essentially the same business that it was in 1965. In 1965, we decided the case of *C.J.C. Corp.* v. *Cheney,* 239 Ark. 541, 390 S.W.2d 437 (1965) that ready-mix batch plants were not exempt from taxation as manufacturing equipment. We held that such equipment was simply used to mix and process certain ingredients and was not used in manufacturing. The only difference between the batch plants here and in *C.J.C. Corp.* is that water is added in the batch plants in question and it was not in the *C.J.C. Corp.* case. That is not a significant or controlling factor. The machinery is still just used for mixing materials and does not produce a truly finished product, such as concrete blocks. It is the burden of the taxpayer to prove beyond a reasonable doubt that equipment is exempt from taxation. *C & C Machinery, Inc.* v. *Ragland,* 278 Ark. 629, 648 S.W.2d 61 (1983). We can find no basis for distinguishing this case from our decision in

C.J.C. Corp. v. *Cheney, supra.* Therefore, we reverse the chancellor's decision.

The second issue raised on appeal, whether certain items such as belt conveyors, water heaters, bins, and so forth are used directly in the manufacturing process, becomes moot in view of our decision on the main issue.

Reversed and remanded.

Oneta ALLEN, Fletcher Harold ALLEN & Aleta M. HAMLIN *v.* Jean WALLIS

83-64 650 S.W.2d 225

Supreme Court of Arkansas
Opinion delivered May 2, 1983
[Rehearing denied May 31, 1983.]

Jack M. Lewis, for appellants.

Dan Stripling, for appellee.

DARRELL HICKMAN, Justice. This is an appeal from the Probate Court of Van Buren County, Arkansas, which found the appellants, the three children of Fletcher Haywood Allen, were not Allen's legitimate children, and, therefore, not lawful heirs of Allen's uncle, Wager Kirkwood, who died intestate in 1979. The judge held the appellee, Jean Wallis, to be the only legitimate child of Allen.

The probate judge based his decision on two erroneous premises: The first was that the appellants' claim accrued before the law was changed allowing illegitimtes to inherit; the second error was holding that the appellants had to prove their parents were married by clear, cogent, and convincing evidence. We would uphold his decision even though the wrong reasons were used, if he had reached the right result. But since we find by a preponderance of the evidence that the parents were married and that the appellants were entitled to inherit through their father pursuant to Ark. Stat. Ann. § 61-141 (Supp. 1981), we reverse the judgment.

The appellants' parents had lived together about seventeen years, holding themselves out as husband and wife. There is no doubt about that; but also there is no doubt the appellants could not produce a marriage certificate. They had three children: Oneta Allen, Fletcher Harold Allen, and Dixie Aleta Marie Hamlin.

Allen lived in Texas with the children's mother for a time in 1943, and Texas is a state which recognizes common-law marriages. They lived in Arkansas from 1944-1947, and from 1948 until 1961, when they separated. Fletcher Allen died in 1969.

Apparently it was at Fletcher Allen's death that his daughter, Jean Wallis, a child of a prior marriage, learned that her father had other children. Mr. Allen's uncle died in 1979 and an administrator was appointed. By the law of

descent and distribution one-half of his estate would go to Fletcher Allen's children and one-half to other heirs. It is only the half to go to Fletcher Allen's children that was disputed. The appellee filed a petition for the court to determine heirs and the appellants were served notice. At this time Aleta was twenty-six years old, Fletcher was twenty-one, and Oneta was twenty.

The facts are largely undisputed. Appellant Fletcher Harold Allen said he never knew his parents were not married. The birth certificates of all three children showed Fletcher Allen as the father; two of the certificates had "Mrs. Fletcher Allen" and "Iva Allen" as the mother. The appellants conceded that no certificate of marriage could be produced. Testimony was offered that the Allens lived in Texas in 1947 and held themselves out as husband and wife.

In 1948 Fletcher Allen mailed Iva a postcard in Indiana, a state which recognizes common-law marriages, and addressed it to "Mrs. Fletcher Allen." In Clarksville, Arkansas, a newspaper announcement appeared announcing the birth of Dixie Aleta Marie, daughter of Mr. and Mrs. Fletcher Allen, in 1953.

The probate judge denied the claim on the two premises we have recited, but he found unequivocally that the appellants were indeed the children of Fletcher Allen. However, he held that they could not inherit as illegitimate children pursuant to Ark. Stat. Ann. § 61-141 because their claim was barred by our decision in *Frakes* v. *Hunt,* 266 Ark. 171, 583 S.W.2d 497 (1979), which held that *Trimble* v. *Gordon,* 430 U.S. 762 (1977), which allowed illegitimates to inherit, could not be applied retroactively and Fletcher Allen had died in 1969. This was wrong because the children did not become heirs of their uncle until the uncle's death in 1979, and not at the death of their father in 1969. *Lucas* v. *Handcock,* 266 Ark. 142, 583 S.W.2d 491 (1979). Even so, our disposition of the case rests on the fact that there was a preponderance of the evidence that the Allens had a marriage according to Texas law.

The probate judge found that the appellants had not proved the common-law marriage by clear, cogent and

convincing evidence. That was an incorrect statement of the appellants' burden. The appellants need only show the marriage by a preponderance of the evidence. *See Evatt* v. *Miller,* 114 Ark. 84 (1914). We find that they met their burden.

A marriage by "common-law" is recognized in Texas according to Tex. Code Ann. § 1.91 (a) (2) (b):

> (a) In any judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> (2) they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.
>
> (b) In any proceeding in which a marriage is to be proved under Subsection (a) (2) of this section, the agreement of the parties to marry may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.

Every bit of the evidence supports the contention that the parties agreed to live together as husband and wife and held themselves out as such. Further in *Coogler* v. *Dorn,* 231 Ark. 188, 328 S.W.2d 506 (1959), we said:

> Where there is cohabitation apparently matrimonial, a strong presumption of marriage arises which increases with the passage of time, during which the parties lived together as husband and wife, especially where the legitimacy of a child is involved. This rule was recognized by this Court in *Martin* v. *Martin,* 212 Ark. 204, 205 S.W.2d 189. The burden is on one claiming otherwise to prove there was not such marriage.

Such a finding makes the appellants the legitimate children of Fletcher Allen and, therefore, his lawful descendants, entitled to inherit from his uncle's estate.

Over the objections of the appellants a decree from the Van Buren Chancery Court was introduced and it concerned

a deed Fletcher Allen executed in 1965 after he and Iva separated. Iva claimed that she and Fletcher Allen had been married and that she had a one-half interest in the land deeded. The chancellor, in that case, found that no marriage existed, but that Iva had owned the land with Allen as a tenant-in-common, and awarded her $5,000.

The appellee argued below that the 1970 decree collaterally estopped the appellants' claim their parents were married. Neither res judicata nor collateral estoppel was pleaded and they are both affirmative defenses which must be pleaded. *Kendrick* v. *Bowden,* 211 Ark. 196, 199 S.W.2d 740 (1947). The trial court specifically did not rely on the decree in his judgment. Therefore, we cannot rely on the decree as controlling on the issue.

Reversed and remanded.

Richard Alan CURRY *v.* STATE of Arkansas

CR 82-157 649 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered May 2, 1983
[Rehearing denied May 16, 1983.]

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant, Richard Alan Curry, was convicted of the crime of possession of a controlled substance, methaqualone, under the Arkansas Uniform Controlled Substances Act. On appeal he contends that the Act must be declared invalid for either of two reasons: First, it is an unconstitutional delegation of legislative authority and, second, it violates the fair notice requirements of due process of law. We affirm the convic-

tion. Jurisdiction is in this Court since the appeal involves a challenge to the constitutionality of an act of the General Assembly. Rule 29 (1) (a) and (c).

I

The doctrine of separation of powers is well established in Arkansas. Ark. Const. Art. IV, §§ 1, 2; amend. VI, § 2; amend. VII, § 1. The authority to define crimes and fix the punishment for those crimes is vested exclusively in the legislative branch of government. If an act is incomplete and authorizes a commission to decide what shall and what shall not be a violation of the law it will be held unconstitutional as an improper delegation of legislative authority. *Trice* v. *City of Pine Bluff,* 279 Ark. 125, 649 S.W.2d 179 (1983). However, the limitation against the delegation of lawmaking power does not prevent the General Assembly from authorizing boards or commissions to determine facts upon which the law would be put into execution. *McArthur* v. *Smallwood,* 225 Ark. 328, 331, 281 S.W.2d 428, 431 (1955).

The act at issue is a Uniform Act which has been adopted in 46 states, the Virgin Islands and Puerto Rico. It is comprised of six articles: Definitions, Standards and Schedules, Regulation of Distribution by Prescription, Criminal Penalties, Enforcement and Administrative Provisions, and Procedure and Title. Appellant contends that Article II, the determination of controlled substances article, is unconstitutional. That article embraces six different schedules of controlled substances which are codified in 16 statutes, Ark. Stat. Ann. §§ 82-2602 through 82-2614.3 (Repl. 1976 & Supp. 1981). Appellant makes numerous arguments in favor of his contention. For example, in oral argument he contended that the distinctions between Schedule III substances, Ark. Stat. Ann. § 82-2608 (Supp. 1981), and Schedule IV substances, Ark. Stat. Ann. § 82-2610 (Supp. 1981) are so slight that the General Assembly had abdicated to the executive branch its duty to decide what shall and what shall not constitute a crime. He makes similar arguments with regard to Schedules V and VI. He challenges each of the six Schedules contained in Art. II. However, we do not reach constitutional issues on such a broad basis. A party has

standing to challenge the constitutionality of a statute only so far as it affects his own rights. *Bushong* v. *State,* 267 Ark. 113, 589 S.W.2d 559 (1979). Traditionally we do not decide constitutional issues on a broader basis than the record requires. Since we will not pass on the validity of any part of the Arkansas Uniform Controlled Substances Act now shown to have been violated, our review will be limited to the statute under which appellant was convicted, Schedule II or Ark. Stat. Ann. § 82-2606 (Supp. 1981).

The Arkansas Uniform Controlled Substances Act became law in 1971. 1971 Ark. Acts 590. The 1981 Act listed the substances which were contolled pursuant to Schedule II, 1971 Ark. Acts 590, Art. 2, § 6 (codified at Ark. Stat. Ann. § 82-2607 [Repl. 1976]). The original act and all of its amendments provide for a commissioner who could add to, delete, or reschedule the substances enumerated by using certain criteria. Ark. Stat. Ann. §§ 82-2602, -2606 (Supp. 1981). The listing of substances in Schedule II was repeated by § 23 of Act 898 of 1979 which provided that the schedules in effect on the effective date of the Act should remain in effect until rescheduled by the Commissioner. The original act and all amendments provide that if a substance becomes controlled under federal law it shall also become controlled under state law unless the Commissioner objects to its inclusion. Ark. Stat. Ann. § 82-2602 (d) (Repl. 1976 & Supp. 1981).

The facts which create the narrow issue in this case are that methaqualone was classified as a Schedule II controlled substance by the federal government effective October 4, 1973. Notice of that Ruling was given in the Federal Register. 38 Fed. Reg. 27516 (1973). The state Commissioner did not object to methaqualone becoming a controlled substance and so, by operation of law, it became controlled in this State. *See* Ark. Stat. Ann. § 82-2602 (d) (Supp. 1981). Upon this factual basis, two questions concerning delegation arise: (1) Whether there was an unlawful delegation to the federal government, and (2) whether there was an unlawful delegation to the Commissioner.

In answer to the first question appellant argues that prior to 1979, federal modifications of the schedules resulted

in automatic modifications of the Arkansas schedules under our law. Since methaqualone was scheduled prior to 1979, appellant argues that the Arkansas Uniform Controlled Substances Act unconstitutionally delegated legislative determinations of what a controlled substance is to the Federal Register.

If appellant's argument was factually correct and, in those years prior to 1979 when methaqualone was listed, the legislature had given to the federal government all control over scheduling, there would have been an unlawful delegation of authority. *Cheney* v. *St. Louis & Southwest Railway Co.*, 239 Ark. 870, 394 S.W.2d 731 (1965); *Crowley* v. *Thornborough*, 226 Ark. 768, 294 S.W.2d 62 (1956). However, contrary to appellant's assertions, the original act of 1971, the 1973 amendment and the 1979 amendment all gave the Commissioner authority to reject the listing of any federally controlled substance. 1971 Ark. Acts 590, § 1 (d), p. 1321; 1973 Ark. Acts 186 § 1, p. 640 (codified at Ark. Stat. Ann. § 82-2602 (d) [Repl. 1976]); 1979 Ark. Acts. 898 § 3, p. 1977 (codified at Ark. Stat. Ann. § 82-2602 (d) [Supp. 1981]). Thus there was no unlawful control or delegation of legislative power given to the federal government.

The obvious succeeding question is whether Schedule II of the Arkansas Uniform Controlled Substances Act constitutes an unlawful delegation of legislative authority to the Commissioner. The General Assembly has defined the type of possession of a controlled substance which will constitute a crime. It has mandated that no substance shall be listed as controlled unless it has a potential for abuse and a history or pattern of abuse. In addition, the following are considered: The significance of that pattern of abuse, the risk to the public, the substance's potential to produce psychic or psychological dependence viewed in the light of current scientific knowledge, the scientific evidence of its pharmacological effect, if known, and whether the substance is an immediate precursor of an already controlled substance. Ark. Stat. Ann. § 82-2602 (a) (Repl. 1976 & Supp. 1981). The General Assembly more particularly defined Schedule II substances as those which have a high potential for abuse but are currently accepted in medical use, and the

abuse of which may lead to severe psychic or physical dependence. Ark. Stat. Ann. § 82-2606 (Repl. 1976 & Supp. 1981). These are illuminating criteria which direct the Commissioner to reject any federal listings which might not be in conformity with them. They guide the Commissioner in determining the facts upon which the law is to be put into execution. They are not vacant standards which allow a Commissioner to determine what shall and what shall not constitute a crime. The General Assembly has not abdicated its legislative authority.

We are not unmindful of contrary decisions from other jurisdictions. *See, e.g., State* v. *Krego,* 433 N.E.2d 1298 (Ohio Misc. 1981); *State* v. *Rodriguez,* 379 So.2d 1084 (La. 1980); *State* v. *Gallion,* 572 P.2d 683 (Utah 1977); *Sundberg* v. *State,* 216 S.E.2d 332 (Ga. 1975); *Howell* v. *State,* 300 So.2d 774 (Miss. 1974). Some of these cases are distinguishable because of wording differences in the pertinent schedule or statute. However, the majority of jurisdictions hold in accord with our view. *See, e.g., Ex parte McCurley,* 390 So.2d 25 (Ala. 1980) (involving the identical Schedule II); *State* v. *Lovelace,* 585 S.W.2d 507 (Mo. 1979); *State* v. *Uriel,* 255 N.W.2d 788 (Mich. 1977); *State* v. *King,* 257 N.W.2d 693 (Minn. 1977); *Threlkeld* v. *State,* 558 S.W.2d 472 (Tex. Crim. 1977); *Cassell* v. *State,* 317 So.2d 348 (Ala. 1975); *State* v. *Lisk,* 204 S.E.2d 868 (N.C. 1974); *Hilton* v. *State,* 503 S.W.2d 951 (Tenn. 1973); *Hohnke* v. *Commonwealth,* 451 S.W.2d 162 (Ky. 1970); *State* v. *Davis,* 450 S.W.2d 168 (Mo. 1970); *State* v. *Sargent,* 449 P.2d 845 (Or. 1969). *See also* Annot., 47 A.L.R. Fed. 869 (1980) (sets out the analogous federal cases which have unanimously held in accord with our majority view).

This decision is based solely on principles of law but we are not unmindful that it is also a practical one. The General Assembly meets in regular session only 60 days every other year. This infrequency of sessions does not offer timeliness to the amorphous and ubiquitous problems associated with the manufacture and distribution of illicit drugs. In addition, even if the members of the General Assembly were all trained chemists and pharmacists, which they are not, it would be impossible for them to keep abreast of the constantly changing drugs and their dangers. A Commis-

sioner with specialized knowledge of these changes can schedule substances in a timely manner.

This interpretation of the Act is consistent with our well-established rule of statutory interpretation that an act of the legislature is presumptively constitutional and all doubt as to its validity must be resolved in favor of the act unless it is clearly incompatible with our constitution. *Redding* v. *State,* 254 Ark. 317, 493 S.W.2d 116 (1973).

II

Appellant next contends that he was denied fair notice that possession of methaqualone constituted a crime and, therefore, he was denied due process. The Arkansas Uniform Controlled Substances Act requires that the schedule be published in accordance with the Administrative Procedure Act, Ark. Stat. Ann. § 5-703 (Repl. 1976 & Supp. 1981). Appellant does not contend that the notice provisions of the Administrative Procedure Act were not complied with. Instead, he cites 3 Ark. Reg. 1068-69 and argues that he lacked notice because the schedules were not published in the Arkansas Register. However, the schedules were in fact published with methaqualone appearing as a Schedule II substance in 1 Ark. Reg. 915 at page 918 and 2 Ark. Reg. 372 at page 375. Therefore, appellant's argument has no merit.

The appellant makes a three sentence argument which might be construed as a contention that compliance with the Arkansas Administrative Procedures Act is not sufficient to comport with the constitutional requirements of due process. However, the appellant offers no convincing argument or citation of authority. Thus we do not consider it. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

Affirmed.

AIRPORT CONSTRUCTION AND MATERIALS, INC. and NATIONAL BONDING AND ACCIDENT INSURANCE COMPANY *v.* Don BIVENS, d/b/a DON BIVENS CONSTRUCTION COMPANY

83-78 649 S.W.2d 830

Supreme Court of Arkansas
Opinion delivered May 2, 1983

Clark, McNeil & Adkisson, for appellants.

Friday, Eldredge & Clark, by: *Bill S. Clark;* and *David Orsini,* for appellee.

STEELE HAYS, Justice. On September 5, 1978, Airport Construction and Materials, Inc. entered into a contract with the United States for the repair of streets at the Little Rock Air Force Base. On April 11, 1979, ACM subcontracted with Bivens for part of the work. A dispute arose as to the amount ACM was to pay Bivens, and this suit was brought by Bivens against ACM and its bonding company, National Bonding and Accident Insurance Company.

ACM defended on the ground that Bivens was not a licensed contractor under Ark. Stat. Ann. § 71-701[1] and

[1]71-701. Contractor defined — Exceptions. — For the purposes of this Act [§§ 71-701 — 71-720], a "contractor" is defined to be any person, firm, partnership, copartnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, or to manage the construction, erection, alteration, or repair, or has or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading or any other improvement or structure, except single-family residences, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including but not limited to labor and materials, is twenty thousand dollars ($20,000.00), or more,[.] It is the intention of this definition to include all improvements or structures, excepting only single-family residences.

Architects and engineers, whose only financial interest in a project shall be the architectural or engineering fees for preparing plans, specifications, surveys, and such supervision as is customarily furnished by architects and engineers, are specifically excluded from this Act.

therefore under § 71-713[2] Bivens was not permitted to bring any action in law or equity to enforce a contract entered into in violation of § 71-701. ACM also disputes the amount awarded Bivens. National Bonding made a motion to dismiss the complaint, on the grounds that the state court was without jurisdiction, that under the Miller Act (40 U.S.C. § 270a-270e), the suit must be brought in federal court. The motion was denied. The trial court found § 71-701 and § 71-713 inapplicable to the case and awarded $19,479.25 to Bivens. ACM and National Bonding have appealed.

I

ACM argues that the trial court erred in refusing to dismiss the case for appellee Bivens' failure to comply with the licensing statute which would preclude him from bringing suit under § 71-713. Bivens relies on *Leslie Miller Inc.* v. *State of Arkansas,* 352 U.S. 187 (1956). In that case the U.S. contracted with Miller for construction work on an Air Force base in Arkansas. Miller was not licensed under § 71-701 and the state filed an information accusing him of violating § 71-713, which makes such an activity a mis-

[2]71-713. Penalties for operating without certificate or giving board false evidence. — Any contractor who for a fixed price, commission, fee or wage, attempts to or submits a bid or bids to construct or contracts to construct, or undertakes to construct, or assumes charge in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, of any building, highway, sewer, grading or any other improvement or structure, when the cost of the work to be done by the contractor, including but not limited to labor and materials, is twenty thousand dollars ($20.000.00) or more without first having procured a license to engage in the business of contracting in this state, or who shall present or file the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate of license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than one hundred dollars ($100.00), nor more than two hundred dollars ($200.00) for each offense, each day to constitute a separate offense. No action may be brought either at law or in equity to enforce any provision of the contract entered into in violation of this act [§§ 71-701 — 71-720]. The doing of any act or thing herein prohibited by any applicant or licensee, shall in the discretion of the Board constitute sufficient grounds to refuse a license to an applicant or to revoke the license of a licensee.

demeanor. Miller was found guilty, this court affirmed, 225 Ark. 285, 281 S.W.2d 946 (1955), and the U.S. Supreme Court reversed. ACM's basic contention is that while that case involved a contractor in a direct relationship with the federal government, the contract here is a private matter and the federal government is only coincidentally involved. ACM points out that the subcontract was made seven months after its contract with the U.S. and consequently the prime contract was in no way influenced by ACM's subcontract with Bivens.

A reading of *Miller,* however, supports the trial court's finding that the statutes in question are inapplicable to this case, and the stated rationale of that case would extend to the subcontractor here. This is not simply a private contract with the federal government coincidentally involved. The *Miller* court reviewed and compared federal and state requirements for licensing contractors and found conflict with the action each would take to ensure reliability of persons and companies contracting with the federal government. "Subjecting a federal contractor to the Arkansas contractor license requirements would give the state's licensing board a virtual power of review over the federal determination of [the best candidate] and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *Miller* at 258.

Amplification of this policy makes it clear that were even the subcontractor subject to state regulations, the federal policy would be frustrated. *Miller* goes on to quote from *Johnson* v. *State of Maryland,* 254 U.S. 51, 41 S.Ct. 16 (1920):

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders

> and requires qualifications in addition to those that the Government has pronounced sufficient. *Miller* at 259.

As *Miller* points out, when the government determines whom it will choose as the "responsible bidder" (pursuant to the Armed Services Procurement Act) a number of factors are considered. "[I]t involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources and other factors." The Court notes that the Armed Services Procurement Regulations defining a responsible contractor include:

> (c) Has the necessary experience, organization, and technical qualifications and has or can acquire the necessary facilities (*including probable subcontractor arrangements*) to perform the proposed contract. 32 CFR § 2-406-3, *Miller* at 258. (our emphasis)

The government has chosen a specific bidder because it has determined that bidder can adequately fulfill the above stated requirements, including the choice of a competent subcontractor. Whether the federal government had relied specifically on a certain subcontractor, does not change the reasons for the policy. Were a government contract subject to interruption because of varying state requirements, when the federal government has already determined that the contractor has the capability to fulfill its requirements and control the project to its satisfaction, the supremacy policy would be largely undermined.

ACM also notes that the State of Arkansas has a legitimate interest in the standards of [bidder] responsibility, but such a point is without merit where the contract, as here, is made by the federal government, for work to be performed on federal property for federal use.

II

National Bonding argues that the trial court erred in its refusal to dismiss the complaint as to National for lack of jurisdiction. The bond furnished by National was a Miller Act Bond (required for specified federal construction

projects under 40 U.S.C. § 270a-270e), which National argues gives federal courts exclusive jurisdiction. The requirement of a performance bond and payment bond is found in 40 U.S.C. § 270a. Section 270b (b) dictates the proper U.S. District Court in which any suit on a Miller Act Bond must be brought. Bivens argues that § 270b (b) is only a venue statute, and such a suit may be brought in state court as well as federal. We agree that this section indicates venue, but only in the context of venue within the federal system. It appears well settled that federal jurisdiction is exclusive on any Miller Bond suit. See 40 U.S.C. § 270b, n.7; 100 ALR 2d 456.

Bivens argues further that his suit was not based on the Miller Act, but rather on National's liability under its payment bond under state law. But the plain language of the Miller Act under § 270a clearly requires both a performance and a *payment* bond under this contract. Bivens offers no basis for release from that clear language. He does cite *Lichter* v. *Henke,* 35 F.Supp. 388 (W.D. Mo. 1940), but that case does not sustain the point. There, the plaintiff sued on a bond under the Miller Act in federal court, but maintained a second count for breach of contract. The district court merely held that the breach of contract action was not within the jurisdiction of that court and must be brought in state court.

A similar contention was made in *General Equipment Inc.* v. *U.S. Fidelity and Guaranty Insurance Co.,* 292 So.2d 806 (La. App. 1974). Appellants claimed that *apart* from the payment bond under the Miller Act, there existed a separate surety agreement upon which they were suing. The court found the claim unsubstantiated by the evidence. But the court stated *and* the appellants agreed that a "suit against a surety on a performance and *payment* bond [under the Miller Act] must be brought in the U.S. District Court." (our emphasis) *General Equipment* at 807.

III

Finally, ACM argues that the trial court erred in calculating the amount due Bivens under his subcontract.

The judgment includes two items which ACM disputes:

Item 4	1,100 tons SB2 at $8.00	$8,800.00
Item 8	1,903 tons SB2 at $8.00	$15,224.00

ACM insists that Bivens did not furnish the 1,100 tons of SB2 under item 4, nor the 1,903 tons of SB2 under item 8 and contends there is no evidence that items 4 and 8 were furnished by Bivens. Admittedly, there is confusion over these items, which doubtless stems from a change in the specifications of the contract which the parties agreed to while the contract was in progress. Bivens testified that after the work had progressed for several days he was asked by ACM if he would agree to switch to asphalt in place of SB2 as a base material in the patching process, which would enable the work to move more rapidly. (T. 88-92). He testified that he agreed on the understanding that ACM was to supply the asphalt. Evidently the trial court accepted that testimony and while we cannot independently verify these two disputed items, we are satisfied that the trial court accurately computed what was due. For one thing, Bivens submitted an invoice to ACM dated August 17, 1979, showing a balance of $19,479.25 due him. When ACM answered on September 17, 1979, it acknowledged in effect the correctness of "Item 4, Base Course 1,100 tons, $8.00, $8,800." Thus, the argument that Bivens is not entitled to this amount loses its force. As to item 8, we are unable to identify it in the testimony, but we can rely, and do, on the fact that two exhibits to Bivens' testimony were introduced in evidence consisting of copies of his itemized invoices to ACM showing the balance due of $19,470.25, which coincides (approximately) with the amount determined by the trial court to be due, i.e. $19,282.00. We conclude that the trial court's calculations are not clearly erroneous. ARCP 52.

The judgment is affirmed as to appellant, Airport Construction and Materials, Inc., and reversed and dismissed as to appellant, National Bonding and Insurance Company.

Joyce T. FERGUSON et al *v.* Jake BRICK et al

82-288 649 S.W.2d 397

Supreme Court of Arkansas
Opinion delivered May 2, 1983

Claudell Woods, East Arkansas Legal Services, for appellants.

McHenry, Skipper & Barns, by: *Merl O. Barns,* for appellees.

PER CURIAM. We deny movant permission to file an amicus curiae brief. Last week we denied a similar motion. These rulings represent a slight shift in the practice of this Court and, for the benefit of the bar, we issue this per curiam opinion.

The term "amicus curiae" is old Latin which literally means "a friend of the court." 3A C.J.S. *Amicus Curiae* § 2 (1973). Historically, courts welcomed the aid of an amicus since "it is for the honor of a court of justice to avoid error." *The Protector* v. *Geering,* Hardees 85-86 (1656) 145 E.R. 394 (Ex.); *see* Note, *Amici Curiae,* 34 Harv. L. Rev. 773 n. 5 (1921). While the name has remained static, the undertaking of the amicus has changed from that of an impartial friend of the court to that of an acknowledged adversary. The transition has been discussed in three excellent law review articles. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 Yale L. J. 694 (1963); Wiener, *The Supreme Court's New Rules,* 68 Harv. L. Rev. 20 (1954); Harper and Etherington, *Lobbyists Before the Court,* 101 U. Pa. L. Rev. 1172 (1953). Krislov, in discussing the transition, states:

> The Supreme Court of the United States makes no pretense of such disinterestedness on the part of "its friends." The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented. At this level the transition is complete; at the other court levels it is in process. Thus the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy. [Footnote omitted.]

72 Yale L. J. at 704.

The consequences of the shift have been dramatic. A form of judicial lobbying is now regularly practiced by the United States Department of Justice as well as various other groups, particularly minority groups. As stated by Krislov:

> Such briefs reached an apex of notoriety and criticism during the last half of the forties and the early

fifties. A previous rise in the number of filings was a major factor in this criticism. In a classic instance, *Lawson* v. *United States,* [176 F.2d 49 (D.C. Cir. 1949), *cert. denied,* 339 U.S. 934 (1950)] the problem of the Hollywood "unfriendly ten" evoked attention through amicus curiae briefs from forty organizations. Left-wing groups were both aggressive and open in their efforts to exploit the increased significance of this avenue to interest participation. The National Lawyers Guild, for example, both was and is a major filer of amicus curiae briefs. The relation of the amicus brief to standard pressure group tactics has been made even more overt. Thus, the Communist *Daily Worker* has called upon individuals to file "personal" amicus curiae briefs by writing letters directly to the Justices. Clearly, amicus briefs are merely the most formal of a number of lobbying tactics which include other devices such as the picketing utilized during the trial of Communist Party leaders under the Smith Act in New York City. Similarly in 1953, petitions were circulated by the National Committee to Secure Justice in the *Rosenberg Case.* A campaign of telegrams was part of the effort to save the life of Willie McGee, who had been sentenced to death in Mississippi. Mr. Justice Black, who had been generally sympathetic to interest group expression, found this a repugnant development and condemned the "growing practice of sending telegrams to judges in order to have cases decided by pressure." He refused to read them and noted that "counsel in this case has assured me they were not responsible for these telegrams."

The lack of discreetness here — the ignoring of the traditions and practices of the judicial process — has even been demonstrated by attorneys. Wiener characterizes a brief in *Girouard* v. *United States* as purposely ignoring in its preoccupation with propaganda the decisive issue on which the case turned. Similarly, the American Newspaper Publishers brief in *Craig* v. *Harney* [331 U.S. 367, 397 (1947)] evoked from Mr. Justice Jackson a strong response indicating that he thought its emphasis on the size and power of the

> constituent newspapers was neither of legal significance nor an accident but simply intimidation. (In fairness, it should be noted that size and distribution of membership are relevant to any showing of interest in an instant case and even amicus curiae briefs are expected to represent a specified rather than a diffuse interest.) [Footnotes omitted.]

Id. at 710-11.

Perhaps an even more dramatic consequence of the change is the change in the attitude of the court that appoints an amicus to actively seek implementation of a decree. This consequence is described by Krislov as follows:

> Indeed "friendship" at this point becomes a peculiar form of advocacy. The amicus becomes the spokesman for court interests in a vital and active sense. This is well borne out in the recent cases involving desegregation. The Supreme Court's device of delegating to the district courts the implementation of its desegregation decision has thrust upon the district courts an unusual burden of decision and activity. Where defiance has occurred, the courts have been particularly dependent upon the activities of the executive and have acknowledged this dependency.
>
> So in both the Little Rock, Arkansas, and the University of Mississippi integration crises the federal district court, on its own initiative, designated the United States Attorney General and The United States Attorney as amici and specifically instructed its designated amici to carry out activities on behalf of the court. On September 9, 1957, in order to enforce its prior determinations the district court in Arkansas invited the Attorney General of the United States and the United States Attorney to
>
>> come into the case as [amici] curiae and to commence injunction proceedings against the Governor and his subordinates "to prevent the existing interferences with and obstructions to the

> carrying out of the orders heretofore entered by this Court in this case." [*Aaron* v. *Cooper,* 163 F. Supp. 13, 16 (E.D. Ark. 1958)].

On appeal to the Court of Appeals for the Eighth Circuit, the case was styled *Faubus* v. *United States* (amicus curiae) [254 F.2d 797 (8th Cir. 1958)]. Among other claims, the attorneys for Governor Faubus argued that the United States had no standing to file such a petition for injunctive relief and that the court had erred in giving the United States such powers. The court of appeals, however, found that this was in accordance with past procedure and that it was "proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgments." The district court had acted properly in asking the law officers of the United States to act on its behalf for it "could not with propriety employ private counsel to do the necessary investigative and legal work. It has, we think, always in the past been customary for a federal district court to call upon the law officers of the United States for aid and advice in comparable situations."

There was no need to go into the legal theory too thoroughly, the court of appeals pointed out, inasmuch as the plaintiffs in the *Aaron* case were still real parties in interest and had joined the government in requesting this injunction. Nonetheless, the court of appeals emphatically upheld the authority both of the court and its amici:

> In our opinion the status of the attorney general and the United States attorney was something more than that of mere amici curiae in private litigation. They were acting under the authority and direction of the court to take such action as was necessary to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice. [Footnotes omitted.]

Id. at 718-19.

In Arkansas, this Court for many years has authorized attorneys to come into cases as amicus curiae. Although we have consistently limited their briefs to the facts proven at trial and the points raised by the parties on appeal, *Mears* v. *Little Rock School District,* 268 Ark. 30, 593 S.W.2d 42 (1980), we have traditionally welcomed these briefs for there is always the possibility that an amicus brief will have legal significance. For example, in a recent case we received 20 highly partisan amici briefs from the financial community. *McInnis* v. *Cooper Communities, Inc.,* 271 Ark. 503, 611 S.W.2d 767 (1981). At the most, two of the briefs had legal significance, while the rest were simply endorsements of the briefs filed by the parties and added nothing to the arguments except the supposed political prestige of the group making the endorsement. To knowingly allow such briefs is to invite a charge of political pressure and, in addition, waste our time.

In the federal court system there appears to be a new trend to question the filing of amici briefs, especially at the district court level. *New England Patriots Football Club, Inc.* v. *University of Colorado,* 592 F.2d 1196 (1st Cir. 1979); *Strasser* v. *Doorley,* 432 F.2d 567 (1st Cir. 1970); *Leigh* v. *Engle,* 535 F. Supp. 418 (E.D. Ill. 1982). We share in questioning the filing of amici briefs in one circumstance and, henceforth, we will deny permission to file a brief when the purpose is nothing more than to make a political endorsement of the basic brief.

The obvious difficulty with this approach is that we normally wade through the entire brief before we can know whether it serves a valid purpose. However, Rule 19 (a) requires the movant seeking permission to file as an amicus to show why such a brief is "thought to be necessary."

On the motion now before us the movant states:

1. Mr. Jackson is a resident and a registered voter of West Memphis, Arkansas.
2. Mr. Jackson voted in the mayoral election held on November 2, 1982.
3. It is Mr. Jackson's good faith belief that the

mayoral election was held in a fair manner and that Leo Chitman is the duly authorized Mayor of West Memphis.

4. Mr. Jackson believes that to not retain Leo Chitman as Mayor of West Memphis would be detrimental to minority and low income persons in the state and to their belief in the political process.

5. As a citizen of West Memphis, Mr. Jackson would like to have further input into retaining Leo Chitman as Mayor of West Memphis by filing this brief.

In this particular motion for permission to file an amicus curiae brief it is obvious that the movant anticipates discussing nothing of legal significance. The proposed amicus brief would be solely for the purpose of judicial lobbying. Therefore we deny permission to file the brief.

William E. PITCOCK *v.* STATE of Arkansas

CR 83-48 649 S.W.2d 393

Supreme Court of Arkansas
Opinion delivered May 2, 1983

Petitioner, *pro se*.

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

PER CURIAM. Petitioner William E. Pitcock was convicted by a jury of burglary, theft of property and robbery and sentenced to a total term of 20 years imprisonment in the Arkansas Department of Correction and fined $300.00. The Court of Appeals affirmed. *Pitcock* v. *State,* not designated for publication (August 26, 1981). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37.

I.

Petitioner raises a number of issues in his lengthy petition. He contends that each one establishes that his sentence was imposed in violation of the laws and constitution of this State and the United States. The allegations of constitutional violations are:

A.

> Petitioner was denied a speedy trial and denied due process because he was held in jail without counsel from the date of his arrest on December 26, 1979, until May 1, 1980.

We find no merit to either argument. The trial in this case was held in November, 1980, more than six months after counsel was appointed. Petitioner does not say that he was denied a fair trial or that he was prejudiced by the delay in appointing counsel. Relief cannot be granted on an unsupported allegation. *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1982). There is also no merit to the claim that he was denied a speedy trial. Petitioner's trial was held within the second full term of court following his arrest, which was within the time period for a speedy trial; in fact, since his parole was revoked and he was incarcerated for another crime pending trial on the instant charges, he could have been tried even later. Furthermore, the speedy trial issue was raised at trial and could have been raised on appeal. The question of the proper time for appointment of counsel

could also have been raised at trial. Rule 37 was not designed to take the place of raising issues in accordance with procedure. *Collins* v. *State,* 271 Ark. 825, 611 S.W.2d 182 (1981).

B.

Petitioner was prejudiced by the prosecutor's commenting in closing argument that he was brought from prison for trial and by the failure of the court reporter to transcribe the entire opening statements and closing arguments.

The court reporter transcribed only the objections made during the opening statements and closing arguments. This in itself is not a denial of due process of law as petitioner suggests. The State is required to afford appellant a record of sufficient completeness so that proper consideration can be given to the errors argued on appeal. *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971); *Butler* v. *State,* 264 Ark. 243, 570 S.W.2d 272 (1978). There is no absolute right to a verbatim transcript of the opening and closing remarks.

If the prosecutor did mention petitioner's being in prison on other charges, it may have been error; but since the issue could have been raised at trial relief can be granted under Rule 37 only if the error was a fundamental one because petitioner is alleging a constitutional violation, not ineffective assistance of counsel. An evidentiary hearing is warranted when an allegation of ineffective assistance of counsel indicates that counsel's representation prejudiced the petitioner, and that the prejudice was such that he may have been denied a fair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). To prevail on an allegation of a constitutional violation, however, the constitutional question presented must be of such fundamental nature that the judgment is rendered void. *Swindler* v. *State,* 272 Ark. 340, 617 S.W.2d 1 (1981); *Hulsey* v. *State,* 268 Ark. 312, 595 S.W.2d 934, reh. denied. 268 Ark. 315, 599 S.W.2d 729 (1980). See also *Collins, supra;* and *Rogers* v. *State,* 265 Ark. 945, 582 S.W.2d 7 (1979). Rule 37 does not provide a method for the review of mere error in the conduct of the trial or to serve as a

substitute for raising issues at trial or on appeal. *Swindler, supra; Clark* v. *State,* 255 Ark. 13, 498 S.W.2d 657 (1973). Even if we accepted petitioner's statement of the prosecutor's remarks, we do not find that the error was of such fundamental nature that the judgment in his case was rendered void. (Petitioner did not take the stand, therefore the question of his prior crimes did not arise in testimony. The State withdrew the habitual offender allegation on its own motion and the record contains no reference in the presence of the jury to petitioner's prior convictions or to his incarceration in prison. Defense counsel made a point of asking the court to excise one word from a pre-trial statement given by petitioner which suggested that he was out on bond when the crime was committed. The emphasis placed on assuring that no reference would be made to petitioner's prior offenses casts doubt on petitioner's claim that the prosecutor made the prejudicial statement as alleged.)

C.

The pretrial identification procedures were unconstitutional and the jury should have been instructed on identification testimony.

Petitioner says that a photograph was taken of him at the county jail and shown to witnesses so that they could identify him at trial. The record indicates that the witnesses who identified petitioner at trial were eyewitnesses to the crime. They testified that they recalled him from the crime scene. No mention is made of a photograph, and petitioner has not demonstrated any undue prejudice to him resulting from the identification process.

Petitioner's allegation that the court refused to instruct the jury on identification testimony is unclear. It does not appear from the record that any such instruction was requested. Petitioner seems to say that he was entitled to an instruction of some sort on identification testimony and that the trial court should have supplied it of its own volition. If this is his meaning, he is not correct. See *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980).

D.

His conviction was based on evidence that was circumstantial, insufficient and inadmissible hearsay.

Attacks on the nature and sufficiency of the evidence and the credibility of witnesses are direct challenges to the judgment; and, as such, they are not proper challenges under Rule 37. *McCroskey* v. *State,* 278 Ark. 156, 644 S.W.2d 271 (1983). Rule 37 affords a remedy when the sentence in a case was imposed in violation of the constitution of the United States or of this State or "is otherwise subject to collateral attack." Rule 37.1; *Swisher* v. *State,* 257 Ark. 24, 514 S.W.2d 218 (1974); *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W.2d 553 (1969); *Clark* v. *State,* 242 Ark. 584, 414 S.W.2d 601 (1967).

II.

Petitioner also alleges ineffective assistance of counsel in that his attorney did not point out that people involved in the "scheme" were not charged. He does not say who the other persons were or to what scheme he is alluding. As a conclusory statement, the allegation does not merit further consideration. *Bosnick, supra; Smith* v. *State,* 264 Ark. 329, 571 S.W.2d 591 (1978).

He contends that counsel conferred with him less than one hour and was thus unprepared for trial. He gives no example of counsel's lack of preparation, nor does he allege that he was prejudiced by counsel's conduct. To establish ineffective assistance of counsel, a petitioner must show by clear and convincing evidence that he was prejudiced by his attorney's representation and the prejudice was such that he was denied a fair trial. *Hill* v. *State,* 278 Ark. 194, 644 S.W.2d 282 (1983). Petitioner here has not demonstrated that counsel was less than competent.

Petition denied.

Jerome Allen BARGO, Terry Gene HOWELL, Gary MORSE, et al *v.* A. L. LOCKHART, Director, Arkansas Department of Correction, and Steve CLARK, Attorney General

CR 82-143 650 S.W.2d 227

Supreme Court of Arkansas
Opinion delivered May 9, 1983

Appellants, *pro se.*

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

RICHARD B. ADKISSON, Chief Justice. Appellants, Jerome Allen Bargo, Terry Gene Howell, and Gary Morse filed a petition for writ of habeas corpus with the Lincoln County Circuit Court wherein they challenged the determination of their parole eligibility date by the Arkansas Department of Correction. The trial court dismissed, and on appeal we affirm.

The relevant facts can be summarized as follows: Appellants had all been convicted of various offenses and

were serving time in the Department of Correction. In 1979 appellants were convicted and given additional sentences for escape. Appellant Bargo was given a six-year sentence to run concurrent with his original five-year sentence. Appellants Howell and Morse were given four-year sentences to run consecutive to their original 21 and 18-year sentences respectively.

Sometime after these escape convictions the Department of Correction informed appellants that their parole eligibility would now be determined under the more stringent provisions of Ark. Stat. Ann. § 43-2829 (Repl. 1977 rather than Ark. Stat. Ann. § 43-2807 (Repl. 1977), which had governed their original sentences. Appellants responded by filing this petition.

We must first decide whether a writ of habeas corpus is the appropriate method to challenge the determination of appellants' parole eligibility, and we conclude that it is not. Habeas corpus petitions are restricted to the questions of whether the petitioner is in custody pursuant to a valid conviction or whether the convicting court had proper jurisdiction. *Mitchell* v. *State,* 233 Ark. 578, 346 S.W.2d 201 (1961).

Furthermore, in the similar case of *Webb* v. *Bishop,* 242 Ark. 320, 413 S.W.2d 862 (1967) we held that a habeas corpus petition was not the correct way to attack a revocation of parole. "Such an attack must be by direct proceeding and not collateral, as was attempted by appellant Webb." *Webb, supra,* See also *Davis* v. *Mabry,* 266 Ark. 487, 585 S.W.2d 949 (1979) where this Court ruled upon an inmate's parole eligibility date after he had filed a "petition for declaratory judgment and mandamus" in circuit court.

The trial court's dismissal of appellants' writ of habeas corpus is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. These appellants sought the same relief we granted in *Davis* v. *Mabry,* 266 Ark.

487, 585 S.W.2d 949 (1979). We granted relief to Davis, who filed a petition in the circuit court which was described as a petition for declaratory judgment and mandamus. The petition named the Director of the Department of Corrections and members of the parole board as respondents and sought to force a hearing on parole consideration. The circuit court denied the petition as it did in the case before us. We reversed there as we should do in this case. In *Davis* we stated:

> There is no doubt that a parole statute less favorable to one who had been sentenced prior to its passage than the parole law existing at the time of his sentencing would be unconstitutional as an ex post facto law, in violation of Art. 2, § 17 of the Constitution of Arkansas . . . We hold that the parole law which governed . . . on the date appellant was sentenced . . . is the statute to be applied to appellant's application for parole, if the application of a later statute would operate seriously to his disadvantage, as Act 93 of 1977 would, in this case . . .

Each of the present petitioners was serving a sentence prior to being sentenced for escape from that confinement. They would have been entitled to a hearing on their parole eligibility at a fixed time. However, being sentenced after Act 93 of 1977 was passed they are not now eligible for parole on the dates they would have been considered had they not been sentenced for escape. A more clear and distinct *ex post facto* application could not be found. It does not matter that petitioners may not make parole because of subsequent activities. They are nevertheless entitled to be considered on the dates they would have been considered without passage of Act 93. This is the same act we considered in *Davis* v. *Mabry, supra.*

The majority opinion does not reach the argument presented by appellants but instead denies relief on the ground that appellants, who are acting *pro se,* placed the wrong title on their petition. This is not only a waste of judicial time it is a denial of a substantial right of the appellants. We have treated a petition as amended to conform with the intention of petitioner. *Walker* v. *State,*

251 Ark. 182, 471 S.W.2d 536 (1971). In *Walker* we said, "Criminal Rule 1 was adopted, not only to afford post-conviction relief where no established procedure existed, but to avoid technical niceties in existing procedures." On an occasion where a petitioner failed to verify his petition as required under Rule 1, his petition was denied by the trial court at least partially on the failure to verify. On appeal we reversed and directed the trial court to consider the petition after allowing verification. *Clark* v. *State,* 242 Ark. 584, 414 S.W.2d 601 (1967). We have not heretofore been bothered by the name of the pleading but instead looked to substance rather than to form.

The majority opinion denies petitioners' right to a parole hearing simply because it was called a petition for a writ of habeas corpus rather than a petition for declaratory judgment or for a writ of mandamus. I cannot be a part of such a waste of time and expense. Furthermore, I am of the opinion that a petition for a writ of habeas corpus is proper. It is the instrument by which relief is sought in federal courts upon the same factual situation.

James SURRIDGE *v.* STATE of Arkansas

CR 82-105 650 S.W.2d 561

Supreme Court of Arkansas
Opinion delivered May 9, 1983
[Rehearing denied June 13, 1983.]

Harkey, Walmsley, Belew & Blankenship, by: *John M. Belew,* for appellant.

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

GEORGE ROSE SMITH, Justice. Russell Ratliff, 61, had been a resident of Pine Bluff for some time before he disappeared on December 4, 1980. More than a month later his badly decomposed body was found by police officers on the Surridge property in Desha County, over 50 miles from Pine Bluff. James Surridge, the appellant, was charged with capital murder in the course of robbery. He was found guilty of first-degree murder and was sentenced to a 50-year term, to run concurrently with a commuted life sentence for murder from which he was on parole at the time of Ratliff's death. For reversal it is argued that the State's evidence was insufficient to present a jury question and that certain hospital records and x-rays should not have been considered by the medical examiner in identifying Ratliff's body.

First, the sufficiency of the evidence. The State's proof was entirely circumstantial in that there was no eyewitness testimony about the shooting. The jury was correctly instructed that circumstantial evidence must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. AMCI 106. On appeal, however, the judgment must be affirmed if the verdict is supported by substantial evidence. "Substantial evidence is that which is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Phillips* v. *State,* 271 Ark. 96, 607 S.W.2d 664 (1980). Evidence is not substantial if it leaves the fact finders "only to speculation and conjecture in choosing between two equally reasonable conclusions, and merely gives rise to a suspicion." *Smith* v. *State,* 264 Ark. 874, 575 S.W.2d 677 (1979).

There is no possible doubt about Ratliff's having been murdered. There is no possible doubt that some person committed the murder by shooting Ratliff twice in the back

of his head. The issue is simple: Was the evidence so evenly balanced that the jury had to resort to guesswork in finding that the crime was committed by Surridge rather than by someone else? No. We have no doubts about the sufficiency of the proof. In fact, we think the evidence clearly establishes Surridge's guilt to the exclusion of any other reasonable conclusion.

For several months before Ratliff's disappearance on December 4, he and Surridge, age 74, both living alone, had lived across the hall from each other in an 8-unit apartment house in Pine Bluff. During that fall Surridge made several inquiries about obtaining a gun, for protection and squirrel hunting. Some weeks before Ratliff's disappearance Surridge acquired a rifle with a detachable scope (telescopic sight). He showed the rifle to three persons who testified at the trial: Russell Ratliff's brother; the owner of the apartments; and the greatgrandson of Mrs. Jewell Cook, a lady whom Surridge was seeing about every day.

In October, Russell Ratliff received $1,619 in a personal injury settlement. For a time he left the money with his lawyers for safekeeping, but in November he obtained the money from them and deposited the check in a bank.

Russell Ratliff, who had a drinking problem, called his brother, W. E., apparently in late November, and asked him to get a lawyer to defend Russell on a public drunkenness charge. W. E. went to Russell's apartment on December 1 and had to wait a few minutes until Surridge and Russell drove up in Surridge's pickup truck, saying they had been to the bank. In Surridge's presence Russell took two rolls of bills from his pockets and from one of the rolls handed W. E. two twenties and a ten to pay the lawyer's $50 fee.

On December 4, the day of Russell's disappearance, he called W. E. early in the morning and asked W. E. to take him to see a doctor. W. E. was unable to do so. Russell said he would get Surridge to take him. Russell did not have a car, and Surridge had often furnished him transportation. The State proved that Russell did go to the doctor that morning and was given three prescriptions, which he had filled at a

pharmacy at about 11:00 a.m. There is no proof that he was ever seen alive again.

A day or two later W. E. went to Russell's apartment, but he was not there. W. E. visited with Surridge, who said that on Thursday (December 4) he had taken Russell to a doctor's office, a drugstore, and a grocery, where Russell had bought beer. Surridge said that when they got back to the apartment house there were two black men waiting in a gray pickup truck. Ratliff joined the two men, after telling Surridge that one of them had worked for him in the past.

W. E. continued to worry about Russell's absence and came to see Surridge daily until Surridge began to dodge him. On December 9, W. E. reported to the police that Russell was missing and gave them the information Surridge had supplied. A week or so later the police found Surridge, at Mrs. Cook's house. He talked freely, telling the police the same story he had told W. E. and adding that after dropping Ratliff near the apartment house he had himself gone to the Senior Citizens Center for lunch.

Eventually Surridge became the principal suspect. Among the incriminating facts discovered by the police and later disclosed to the jury were three in particular. One, Surridge's tale about Ratliff's having recognized one of the two black men was quite improbable. Ratliff himself had been unemployed for more than ten years, so it was hardly likely that his former employee, after that length of time, would turn up to renew Ratliff's acquaintance at the very moment when Surridge needed someone to blame for Russell's disappearance. Two, the Senior Citizens Center kept records which indicated that Surridge had not come for his meal on December 4. Third, Surridge had openly displayed his .22 rifle when he had no motive for murder, but after Ratliff's disappearance Surridge denied to the police that he had owned or possessed a rifle. It is a familiar rule that a defendant's false and improbable statements explaining suspicious circumstances against him are admissible as proof of guilt. *Jones* v. *State,* 61 Ark. 88, 101, 32 S.W. 81 (1895); see also *Kellensworth* v. *State,* 276 Ark. 127, 633 S.W.2d 21 (1982).

On January 6, 1981, Desha County officers and Pine Bluff officers searched the Surridge property. It is deserted and remote from any town. It is reached by traveling 1.5 miles east from Rohwer to the Mississippi River levee and then 4.4 miles south along the road on the levee. The Surridge property is next to the levee. The house, 439 feet west of the levee, had once been occupied by Surridge's brother, but it had been vacant for almost 20 years. The land had grown up in weeds and bushes. The police found Ratliff's body 84 feet north of the house. The weeds were over six feet high and so thick that one had to be "almost on top of the body" to see it. Owing to the cold there was very little odor. The body was clothed, with nothing in the pockets. Next to the body were a half-used matchbook and a beer can half full. The only witness for the defense testified that fingerprints on the can were not Surridge's. Whether they were Ratliff's is not shown; the medical examiner's assistants could not raise fingerprints from the decomposed body.

Surridge was arrested on January 7 and readily consented to a search of his apartment, saying he had nothing to hide. In the apartment the officers found a Glenfield scope for a .22 rifle, on the floor under a dresser. They also saw some matchbooks, the significance of which they did not then realize. A week later they went back and got the matchbooks, which were of an unusual design that matched the one found by Ratliff's body.

There was expert testimony that death was caused by two .22-rifle shots into the back of Ratliff's head, at such close range that the weapon was in contact with the skin. The fragments of the bullets could have been fired from a Glenfield rifle or any one of three other makes. The date of death was fixed as having been between December 3 and December 10.

No possible suspect except Surridge himself is shown to have been familiar with the Surridge property. Mrs. Cook and Surridge went to Desha County twice in the fall to visit Surridge's friends who lived five or six miles from the Surridge land, but they did not to go the Surridge property on those trips. Mrs. Cook testified that they went back on

New Year's Day, but spent only about 15 minutes there looking at the house, which Surridge talked about repairing if the two of them should marry. Surridge also took Ratliff to Desha County in about October, but there is no indication that they visited or had any reason to visit the deserted Surridge property.

We need not narrate the proof in complete detail. It was argued to the jury and again here that the unidentified black men may have murdered Ratliff, but that argument rests only on Surridge's unsworn statements and fails for want of any indication that either the men or Ratliff could somehow have found the way to the Surridge property, for no apparent reason.

By contrast, the State proved that Surridge had robbery as a possible motive, that he was the last person known to have seen Ratliff alive, that he had a rifle similar to the one that was used, that he denied that incriminating fact, that he had the opportunity to commit the crime, that he alone was familiar with the Surridge property over 50 miles from Pine Bluff, and that the telltale scope and matchbooks were in his apartment. The defense stresses the fact that the weapon was never found, but that argument cuts both ways. In the fall Surridge wanted to own a rifle and openly displayed it. But after the murder it would have been incriminating and could readily have been disposed of as Surridge drove homeward along the river for more than four miles. To say that the jury was confronted with a choice between two equally reasonable explanations of the murder appears to us, as it did to the jurors, to be a wholly untenable position. In fact, any attempt to construct an alternative theory, such as that the black men somehow went to the Surridge property and killed Ratliff, necessarily involves unfounded speculation and conjecture.

The appellant's other point for reversal questions the trial judge's action in permitting Dr. Malak, the state medical examiner, to identify the body by comparing x-rays taken during the autopsy with x-rays of Russell Ratliff that Dr. Malak had obtained from St. Vincent Hospital in Little Rock. The argument is that under Uniform Evidence Rule

803 (6), Ark. Stat. Ann. § 28-1001 (Repl. 1979), the custodian of the hospital x-rays should have been called to identify them as records made in the usual course of business. That rule, however, has been modified by Act 255 of 1981, which permits hospital records to be authenticated by an affidavit of the custodian with the same effect as if the custodian were present and testified to the matters stated in the affidavit. Ark. Stat. Ann. §§ 28-935 to -943 (Supp. 1981). That statutory procedure was followed in this case; so Dr. Malak's comparison of the two sets of x-rays, which he showed to be identical, was proper. Moreover, Uniform Evidence Rule 703 provides that an expert witness may base his opinion upon facts or data not admissible in evidence if of a type reasonably relied upon by experts in the particular field. The St. Vincent records and x-rays were not introduced in evidence, but they were marked for identification and are in the record. They, together with the medical examiner's testimony, form an adequate basis for the identification of the body.

Affirmed.

Terry HUTCHERSON *v.* Hoyle WOOD and T. E. ADAIR

83-79 650 S.W.2d 229

Supreme Court of Arkansas
Opinion delivered May 9, 1983
[Rehearing denied May 31, 1983.]

Robert G. Bridewell of *Holloway & Bridewell,* for appellant.

William E. Johnson, for appellees.

FRANK HOLT, Justice. This is a usury case and is certified to us by the Court of Appeals pursuant to Rules of the Supreme Court and Court of Appeals, Rule 29 (1) (*l*). The transaction predates the recently enacted Amendment 60 to the Constitution of Arkansas (1874).

Three different instruments are involved in the transactions that ultimately gave rise to this action by the appellant Hutcherson to cancel the third instrument on the ground that it was usurious. The first instrument was an Oklahoma note executed by appellee Wood to appellee Adair in the amount of $20,000 with interest at 14% per annum. No contention is made that this instrument is invalid under Oklahoma law nor that Arkansas law applies to it. Subsequently, the appellant Hutcherson executed a promissory note in Arkansas in the amount of $30,000 to Wood with interest at 10% per annum. No contention is made that this instrument is usurious. The third instrument, which the appellant argues is usurious, was an assignment in Arkansas by Wood to Adair, signed by Hutcherson, of a portion of the $28,042.41 balance owed Wood by Hutcherson in an amount sufficient to retire the balance owed Adair by Wood on the $20,000 note. Wood had paid $6,029.77 on his note to Adair, leaving a balance of $13,970.23 owed with an interest rate of 14%. Hutcherson defaulted and later filed this action to cancel the assignment on the ground that it was usurious. Adair filed a cross-claim

against Wood and a counterclaim against Hutcherson alleging default.

The chancellor found the assignment not to be usurious and entered judgment in favor of Adair against Hutcherson and Wood jointly and severally. He found that the assignment stated the balance from Wood to Adair to be $13,970.23 carrying a valid 14% interest rate, and that Hutcherson's debt ($28,042.41) to Wood was considerably more than that amount at the time of the assignment. From the exhibits and testimony, he construed the assignment as not increasing Hutcherson's interest liability on his $30,000 note to Wood, but as merely directing a dollar figure to be paid Adair, for which Hutcherson could take credit on his valid 10% obligation to Wood.

The appellant argues that the assignment increased his interest liability on a portion of the note executed by him to Wood from a valid 10% to an illegal 14% and that the chancellor erred in finding the assignment not to be a usurious transaction. We have said on many occasions that an intention to charge a usurious rate of interest will never be presumed, imputed or inferred where the opposite result can fairly and reasonably be reached. *Pulpwood Suppliers* v. *Owens,* 268 Ark. 324, 597 S.W.2d 65 (1980); *McCoy Farms, Inc.* v. *J & M McKee,* 263 Ark. 20, 563 S.W.2d 409 (1978); *Key* v. *Worthen Bank & Trust Co.,* 260 Ark. 725, 543 S.W.2d 496 (1976); *Brown* v. *Central Ark. Prod. Cred.,* 256 Ark. 804, 510 S.W.2d 571 (1974); *Peoples Loan & Inv. Co.* v. *Booth,* 245 Ark. 146, 431 S.W.2d 472 (1968). Here, the conclusion that the transaction was non-usurious can be reached fairly and reasonably.

As the chancellor held, appellant Hutcherson's basic indebtedness to Wood on the Arkansas $30,000 note at 10% interest was not increased by the assignment and the assignment or transaction merely provided a dollar figure to be paid Adair by Hutcherson for which Hutcherson could take credit on his valid 10% obligation to Wood. It appears that in no event will Hutcherson be required to pay more on the Arkansas obligation than the unpaid principal plus 10%. Hutcherson, himself, testified that his underlying obliga-

tion was limited to 10% on the $30,000 Arkansas note to Wood and that he could not say that he owed more than 10% interest on the $30,000 note. This assignment did not infect the original or borrowing transaction with usury nor constitute a cloak for usury.

Affirmed.

HICKMAN, J., concurring, would affirm because of noncompliance with Rule 9, Rules of the Supreme Court and Court of Appeals.

Clarence WALTON *v.* STATE of Arkansas

CR 82-136 650 S.W.2d 231

Supreme Court of Arkansas
Opinion delivered May 9, 1983

Jesse E. "Rusty" Porter, Jr. of *Porter & King,* for appellant.

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

DARRELL HICKMAN, Justice. Clarence Walton was charged with the rape and attempted capital murder of a mother of four who clerked in a twenty-four hour convenience store called the Jr. Food Mart in Marianna, Arkansas. He was convicted on both counts and sentenced to life imprisonment for the attempted murder, and fifty years and a $15,000 fine for the rape, the sentences to be served consecutively.

On appeal he argues that seven errors were committed. We find one of them meritorious. Sarah J. Hood, who ultimately served as foreman of the jury, was challenged for cause and the court should have sustained the challenge. Not doing so was prejudicial error which requires us to reverse the judgment and remand the cause for a new trial.

On May 29, 1981, at about 3:30 A.M., the victim, while working at the store, was violently assaulted and raped.

Walton, eighteen, was charged with the offense. He is black and the victim is a white woman.

His first trial resulted in a mistrial because the jury was unable to reach a verdict. The jury impaneled for a second trial was ordered quashed by the trial court when it was challenged by Walton's attorneys. That jury was selected by jury commissioners rather than by random selection using a jury wheel in accordance with Ark. Stat. Ann. § 39-205.1 (Supp. 1981). A total of forty-four jurors were examined, seventeen were excused by the court for various reasons, and the jury was selected only after individual voir dire examination in the judge's chambers. The trial judge was careful in the formation of the jury which heard Walton's case. But, even so, we are satisfied that the trial court abused its discretion in allowing Mrs. Hood to sit on this jury because the record reflects that Mrs. Hood was simply not candid with the court. There is no question that a proper motion to strike her for cause was made; all the appellant's peremptory challenges had been exhausted.

Mrs. Hood is a teacher at a private school in Lee County. She brought her government class to the second day of Walton's first trial and evidently was present during most of the day. We cannot be certain from the record exactly what she heard in the way of testimony, because she was somewhat vague about it and denied any knowledge of what actually transpired. She did say that she and her class had discussed the case, but explained that the discussion was mostly about the procedural aspects of the trial. Mrs. Hood had been a teacher of the deputy prosecuting attorney. She said she wanted to serve on the jury because she never had been a juror. No doubt this desire affected her answers to questions about her qualifications.

Mrs. Hood's initial examination by the court reads:

BY THE COURT:

Q. Good morning, Mrs. Hood.

A. Good morning.

Q. Mrs. Hood, this is the case of the State of Arkansas against Clarence Walton. He is charged with rape and attempted capital murder. This is a criminal trial. The charge alleges that on or about May the 29th of last year that he committed these two offenses. The victim was _____. *Mrs. Hood, do you know anything about this case?*

A. *I have no personal knowledge of the case, no, sir.*

Q. Have you read anything about it in the local newspaper?

A. Yes, sir.

Q. From what you have read about it in the newspaper, have you formed any opinion about this case one way or the other?

A. No, sir, I have not.

Q. *Have you heard anybody discuss the case where you work, or in your home, or throughout the community?*

A. *No, sir.*

Q. Have you heard any talk about the case in the community at all?

A. Just casual conversation.

Q. From the casual conversation that you may have heard about this case, have you formed any opinion, Mrs. Hood?

A. No, sir, I have not.

Q. Mrs. Hood, Clarence Walton is sitting at the table here this morning. Do you know Clarence Walton?

A. No, sir.

. . .

> Q. As you sit here this morning, Mrs. Hood, *do you have anything that is running through your mind that you think you ought to tell me or the lawyers that might in some fashion affect your ability to be a fair and impartial juror no matter what it is, legal, moral, or anything?*
>
> A. *No, sir.*
>
> (Emphasis added.)

She was next examined at length by the prosecutor and she did not reveal that she had heard one day's testimony in the first trial. She did not disclose this until she was examined by the defense attorney. Then, in response to a direct question, she answered that she had indeed been in the courtroom with her government class at Walton's first trial and had listened to testimony for one full day. She obviously should have volunteered this information to the trial court when initially examined. The judge refused to strike her for cause, but the record reflects that the trial judge did not accurately remember her first answers because he did not think she had been evasive. The defense attorney said:

> Your Honor, I believe, as the court inquired of Mrs. Hood, she indicated that she had not heard any testimony of the case other than possible talk; is that correct, when she first started talking?

The court replied:

> I can't honestly say. That is the forty-second juror we have questioned, and I have asked all of them if they know anything about the case, and she indicated she knew something and could set it aside. What her precise answers were, I do not know.

Clearly, the court did not recall that Mrs. Hood had been deceptive in her answers to the court's questions. In our judgment her answers were not truthful and, in view of that,

she should not have been allowed to sit on this jury. We do not imply that if a prospective juror is aware of testimony in a case he can never be allowed to sit as a juror. *See Holland* v. *State,* 260 Ark. 617, 542 S.W.2d 761 (1976). However, that is not the situation presented here. The case before us involves a prospective juror, who later served as foreman of the jury, who was not candid with the court. She knew a considerable amount about the case, or she certainly could have; she did or could have easily formed some opinions from hearing evidence at the first trial which could have influenced her judgment of the case. When examined closely about what she heard, all her answers were phrased to deny any knowledge that would disqualify her. She expressed a special desire to serve on the jury because she had always wanted to serve on a jury, had been a registered voter for at least twenty-one years, and never been called. She thought it would be quite an experience. Perhaps that desire affected her answers. But it was not until she was specifically asked whether she attended the first trial did she answer candidly. We cannot easily overlook this fact simply because she said she could set aside any conceptions, information or opinions she may have had. While a venireman is generally "impartial" when he states that he can put aside any preconceived opinions and give the accused the benefit of all doubts that the law requires, it is not an automatic cure-all for opinions, relationships or information that could disqualify one. *Glover* v. *State,* 248 Ark. 1260, 455 S.W.2d 670 (1970). Art. 2, § 10, ARK. CONST. *See* also Ark. Stat. Ann. §§ 43-1919, 43-1920. In *Glover* v. *State, supra,* we independently reviewed the voir dire examination and found it error to allow four jurors to be seated who said they could set aside opinions they held about the guilt of the defendant.

And in *Swindler* v. *State,* 264 Ark. 107, 569 S.W.2d 120 (1978) and *Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980), we found error in the court's decision to allow jurors to serve who in our judgment could have been biased because of certain relationships. In both cases the jurors said they could put aside their personal feelings, or be objective. Some opinions and relationships cannot be overcome by a mere recitation by the prospective jurors that they will set aside objectionable factors. And we have reversed cases where a

juror deliberately withheld information. *Baysinger* v. *State,* 261 Ark. 605, 550 S.W.2d 445 (1977); *Bryant* v. *Brady,* 244 Ark. 807, 427 S.W.2d 179 (1968).

We have said that statutes concerning qualifying a juror must be liberally construed to safeguard the guarantee of an impartial trial. "The polestar should be brighter and more clearly visible in a criminal case than in a civil one," and "justice ought not only to be fair, but appear to be fair." *Beed* v. *State, supra.* In view of Mrs. Hood's answers we can only conclude she should not have been allowed to serve.

Other issues that we must discuss will be dealt with briefly. It is argued three other prospective jurors should have been excused for cause, but we need not examine that claim since they were excused peremptorily.

There was substantial evidence to support the finding that Walton was guilty of rape and attempted capital murder. The victim was brutally assaulted in the store, dragged a considerable distance, and beaten about the head and face; she was raped, and according to her testimony, she was strangled with a belt and survived only because the blood from her wounds made the belt slippery enough for her to remove it. She said that she knew the man who raped her, that he had been in the store several times to buy magazines. Walton only lived about 200 yards from the store, and was seen in the store close to the time of the rape by at least one witness. This was about 3:00 A.M.

The trial court's ruling that the victim's in-court identification of the defendant was admissible was not error. The trial court was careful to limit the State's use of the identification evidence so that no prejudicial evidence would be admitted. No mention was to be made by the State of a lineup or identi-kit. (A picture made up of the assailant from her description by the State in its examination of the victim.) Actually the defense brought up both matters in its cross-examination. Immediately after the assault the victim talked to a policeman and generally described her assailant as about six feet tall, black, medium complexioned, with a beard and wearing khaki pants. The policeman said blood

was coming out of her eyes. Her lower lip had been split almost to the chin exposing her teeth and gums. She had been choked and had massive bruises, abrasions and contusions. The day after her assault the victim was unable to identify the appellant as her assailant from a group of photographs. But there was testimony that her condition could have easily affected her judgment. Her eyes were virtually swollen shut and she was under medication. At the first physical lineup, held June 11, 1981, she could not identify the appellant until he turned sideways and at that point she did identify him as her assailant. She was positive. She testified positively that she had seen him because he often bought magazines which she described as "girly" magazines. She did say that she thought her assailant was thirty years old and as it turns out he was not nearly that age. But his photograph demonstrates why she could have been that far off on his age. One could easily be of the opinion that that person was well over eighteen. Her other descriptions of him were generally close to his physical appearance. Victims of violent crimes rarely give descriptions that later square in all respects with the physical characteristics of their assailants and that is understandable. Sometimes identification is unreliable, and for that very reason reliability is considered an important factor, and the trial court must decide if the identification is reliable enough to be considered by a jury. The trial court decided the victim's identification was reliable and we cannot say that he abused his discretion. *Kellensworth* v. *State,* 278 Ark. 261, 644 S.W.2d 933 (1983).

The photographs taken of her immediately after the incident and used as evidence were certainly graphic proof of the vicious beating she suffered. But merely because photographs are inflammatory is not reason enough to exclude them. *Cotton* v. *State,* 276 Ark. 282, 634 S.W.2d 127 (1982). In this case the appellant was charged with attempting to kill the victim and the photographs were evidence of the viciousness of the attack, from which the jury could easily conclude that the assailant tried to kill her. *Hulsey* v. *State,* 261 Ark. 449, 549 S.W.2d 73 (1977).

The trial court denied a motion for change of venue. There were twenty affidavits filed by people who said they

heard talk or knew the appellant could not get a fair trial in Lee County. Some of them were of the opinion that a black man accused of raping a white woman could not get a fair trial in Lee County. The State filed counter-affidavits by several people who said that in their judgment the appellant could get a fair trial. There was no evidence at all there was undue publicity in this case as there was in the case of *Swindler* v. *State, supra.* Nor does the voir dire record reveal that an undue number of jurors had to be stricken because of their knowledge of the case, or feelings about the case, as was the case in *Ruiz* v. *State,* 265 Ark. 875, 582 S.W.2d 915 (1979). We cannot say on the basis of this record that the trial court was wrong in denying the appellant a change of venue. This was an all white jury composed of two men and ten women. There was a general challenge to the panel as not being fairly representative of blacks and men. Both arguments are meritless. The State only used two of its peremptory challenges and, evidently, those were used on blacks. That, however, does not constitute error. *Beed* v. *State, supra.* A black person has no constitutional right to a jury that has one or more black people on it. *Brown* v. *State,* 239 Ark. 909, 395 S.W.2d 344 (1965), *cert. denied* 384 U.S. 1016 (1966); *Conley* v. *State,* 272 Ark. 33, 612 S.W.2d 722 (1981). Merely because no member of a party's race is on a jury is not in itself cause to quash a jury. *Lewis* v. *Pearson,* 262 Ark. 350, 566 S.W.2d 661 (1977). Nor is it prejudicial in a rape case that women compose a substantial part of the jury. *Urquhart* v. *State,* 275 Ark. 486, 631 S.W.2d 304 (1982). The appellant had the burden of showing a systematic exclusion of black people, and failed to meet that burden. *Beed* v. *State, supra.*

Objection was made that the maintenance of the master jury list violated Ark. Stat. Ann. § 39-206 (Supp. 1981). The appellant's argument is somewhat confusing. Evidently after the panel was chosen by random selection, using two numbers to select registered voters, a list of the panel was prepared. Then the list was cut up so that the names were on individual slips of paper; they were placed in a metal, three by five, file box. It was always in the custody of the clerk and locked in a vault at night. Defense counsel compared the slips with the master list and could show no discrepancy. He challenged the correctness of the procedure but where there

is no prejudice shown, we find no error. *Renton* v. *State,* 274 Ark. 87, 622 S.W.2d 171 (1981).

On appeal, for the first time, it is argued that Walton's conviction and sentence for both attempted capital murder and rape subjects him to double jeopardy and violates Ark. Stat. Ann. § 41-105. We agree that the statute does prohibit such sentences. *Rowe* v. *State,* 271 Ark. 20, 627 S.W.2d 16 (1982); *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). On retrial the trial court will no doubt see that these decisions are followed in the event the appellant is found guilty of both charges as he was in this case.

Reversed and remanded.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. I dissent from this Court's conclusion that Mrs. Hood was untruthful in her answers to questions on *voir dire.*

The correctness of Mrs. Hood's answers is undisputed. Mrs. Hood correctly stated that she had no personal knowledge of the case, that she had not heard anyone discuss the case out in the community, and that she knew of nothing running through her mind that would affect her ability to be a fair and impartial juror.

The majority has no other basis on which to reverse this case other than the fact that Mrs. Hood had heard some bits of the testimony on the first trial of the case. This is not a sufficient reason for disqualification of a juror. *Holland* v. *State,* 260 Ark. 617, 542 S.W.2d 761 (1976).

The trial judge heard the *voir dire* of Mrs. Hood and concluded that she was not evasive in her answers. The record reflects that she answered each question accurately. The trial judge's conclusion that she was not evasive is not only not clearly erroneous but is clearly correct.

I would affirm this case.

SIMMONS FIRST NATIONAL BANK *v.*
Harold D. WELLS

83-45 650 S.W.2d 236

Supreme Court of Arkansas
Opinion delivered May 9, 1983

Coleman, Gantt, Ramsay & Cox, for appellant.

Gill & Johnson, by: *Marion S. Gill,* for appellee.

STEELE HAYS, Justice. This suit presents the issue of whether the interest of a secured creditor in the inventory of a grain dealer is superior to that of a rice grower who subsequently deposits his rice with that dealer.

On May 1, 1980, Simmons First National Bank made a loan of $520,000 to Western Rice Mills, Inc., for which Western granted Simmons a security interest in all of its real and personal property, including all inventory and after acquired property. Western defaulted and in September of 1981, a receiver was appointed. Shortly thereafter, Harold Wells intervened, claiming ownership of certain rice and proceeds from the sale of rice, pursuant to a previous agreement with Western.

Wells had dealt with Western for a number of years, the standard arrangement being that Western would buy the rice outright from Wells, would mill it and then sell it. In April and May of 1981, because of financial difficulties, Western could not buy the rice outright from Wells. Wells and Western orally agreed instead that Western would mill the rice for a certain price and then market the rice at an agreed minimum price for Wells. The charge for milling would be

deducted when Western sold the rice, and the remaining proceeds would go to Wells. In the interim, the rice was stored with Western.

The trial court, relying on the rationale of *In Re Sitkin Smelting and Refining, Inc.*, 639 F.2d 1213 (5th Cir. 1981), found the arragement between Wells and Western to constitute a bailment and found Ark. Stat. Ann. § 85-2-326 (Add. 1961)[1] inapplicable. Under this finding, the inventory lien of the bank did not extend to the rice or to the proceeds claimed by Wells.

Simmons argues for reversal that the Chancellor erred in finding that § 85-2-326 was inapplicable to the facts of this case. We agree and find that § 85-2-326 *is* applicable and we reverse as to those grounds.

The Chancellor mistakenly relied on *Sitkin,* whereby he found the arrangement to be a bailment and, apparently,

[1]§ 85-2-326. Sale on approval and sale or return — Consignment sales and rights of creditors. — (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use, and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the Article on Secured Transactions (Article 9 [§§ 85-9-101 — 85-9-507]).

found that that precluded the possibility of finding a consignment and § 85-2-326 applicable. We see two flaws in this analysis: first, the *Sitkin* case is factually distinguishable, the main issue there being whether the arrangement was a sale or a bailment. Second, even if a particular arrangement is found to constitute a bailment as opposed to a sale, that does not preclude a finding that there is also a consignment arrangement and, hence, § 85-2-326 is applicable.

In *Sitkin,* the issue was whether the bankruptcy court had erred in determining that possession of film entrusted to a bankrupt metal refiner, Sitkin, should be given to a secured creditor of the refiner rather than to the film manufacturer, Kodak, which had entrusted it to Sitkin. The arrangement between Sitkin and Kodak was basically that Sitkin would retain possession of film waste delivered to it by Kodak. But for Kodak's business purposes, not until the film had been reduced and destroyed and the silver content removed by Sitkin, would Kodak's ownership cease, and at that time a "settlement" would be made as to the amount owed by Sitkin. The court looked at a number of factors surrounding the transaction and found it to be a bailment and not a sale. The court also determined that the transaction was not a "sale or return" within the meaning of § 85-2-326 since the goods were not delivered for resale with an option to return. Although we are not convinced that the court was correct in finding a bailment and not a sale in *Sitkin,* that is irrelevant here.

Whether the arrangement in this case was a bailment or a sale is not determinative of the rights of the parties. Even if under the analysis of *Sitkin,* the trial court found a bailment and not a sale, the question of whether § 85-2-326 is applicable must still be answered. Western could have been a bailee for Wells and at the same time been a consignee under § 85-2-326. We emphasize the following language of § 85-2-326 (3) which we find applicable to this fact situation:

> (3) Where goods are *delivered to a person for sale* and *such person maintains a place of business at which he deals in goods of the kind involved, under a name other*

> *than the name of the person making delivery,* then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum" . . . .

The comment to this section reinforces the policy indicated by the language of this section:

> 2. Pursuant to the general policies of this Act which require good faith not only between parties to the sales contract, but as against interested third parties, subsection (3) *resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of the buyer* . . . . (our italics).

Here, Wells delivered his goods, the rice, to Western for sale and Western maintained a place of business where it dealt in goods of that kind, under a name other than the name of the person making the delivery, Wells. With regard to the rights of creditors, it is irrelevant whether the transaction between the two parties was a bailment or a sale if the provisions of § 85-2-326 (3) are also satisfied.

We find *In Re KLP, Inc. Finance Co. of America* v. *Morris,* 7 BR 256 (Bankr. N.D. Ga. 1980) more analogous to our case and it provides a more appropriate and clearer application of § 85-2-326. In *KLP,* the plaintiff had leased space from the debtor to store two organs. The organs were delivered to the debtor's warehouse where the debtor had traditionally dealt in organs and related goods. At the time of delivery, the agreement was modified to allow the debtor to secure offers for the purchase of the organs, subject to the debtor obtaining prior approval of the offers and sale by the plaintiff. When the debtor filed for bankruptcy, the plaintiff filed to recover the organs. The court ruled in favor of the Trustee whose status under the Bankruptcy Code is that of a hypothetical lien creditor who would have priority over a consignment seller who failed to comply with the require-

ments of UCC § 2-326. The following passage states the policy and reasoning behind UCC § 2-326.

> The applicable UCC provision, § 2-326, is not only one of the more important UCC sections, but is also one of the most unique provisions in the UCC article which governs the sale of goods. The uniqueness of the section lies primarily in the fact that the section applies to transactions which are not true sales at all, since the section governs agreements which somehow provide that "delivered goods may be returned by the buyer *even though they conform to the contract.*" The section's importance lies primarily in the role it plays, along with the notice provisions of article nine, in giving disclosed claims to property priority over secret claims. To encourage disclosure of in rem claims is a central feature of any well-reasoned system of commercial law.
>
> Accordingly, UCC § 2-326 provides that whenever goods are delivered under a contract which allows the buyer to return nonconforming [sic] goods and the goods were delivered "primarily for resale," § 2-326 (1) (b), then goods so delivered become "subject to," § 2-326 (2), the claims of creditors of the receiving party as long as the goods remain in that party's possession. In such a situation, the delivering party may be referred to as the "consignment buyer."
>
> Of particular importance to the instant case is the fact that certain types of transactions are "deemed" by § 2-326 (3) to constitute "consignment sales." The statute so characterizes a transaction when the following three circumstances are present:
>
> (1) when goods are delivered for sale,
> (2) when the "consignment buyer" maintains a place of business at which he deals in goods of the kind so delivered, and
> (3) when the business name of the "consignment seller" is different than the business name of the consignment buyer.

> If a transaction is so deemed to constitute a consignment sale, the consignment seller may obtain priority over the consignment buyer's creditors only by complying with the notice requirements of UCC § 2-326 (3).

The facts of this case require us to examine § 85-2-326 for its applicability. The language of the statute and the commentary convince us that the reasoning of the court in *KLP* is sound. See also, *Bufkor, Inc.* v. *Star Jewelry Co., Inc.*, 552 S.W.2d 522 (Tx. 1977); *Manger* v. *Davis,* 619 P.2d 687 (Utah 1980). Therefore, because we think the theory on which the case was tried would bring it within § 85-2-326, and since there was no evidence or argument that Wells complied with any of the requirements of § 85-2-326 (3) so as to remove him from the provisions of that section, the priority of Simmons' interest would prevail on that issue.

The appellee makes two arguments that should be addressed. First, that for § 85-2-326 to apply, there must have been an actual sale between the consignor and the consignee, which, he submits, is not present here. We find that interpretation is not a correct statement of the law. *KLP* and the other cited cases make this clear by direct implication. The identical issue was dealt with in *General Electric Co.* v. *Pettingell Supply Co.,* 199 N.E.2d 326 (Mass. 1964) and that contention is found to be without merit.

Appellant also argues that Arkansas Act 401 of 1981 (Ark. Stat. Ann. §§ 77-1339 et seq[2]) provides that in a case such as this, the grain warehouseman cannot sell or encumber

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[2]Pertinent provisions:

§ 77-1339. Definitions.

(b) "Public grain warehousemen" means any person, firm or corporation who operates any building, structure or other protected enclosure used for the purpose of storing grain for a consideration.

§ 77-1340. Title to grain.

Ownership of grain shall not change by reason of an owner delivering grain to a public grain warehouseman, and no public grain warehouseman shall sell or encumber any grain within his possession unless the owner of the grain has by written document transferred title of the grain to the warehouseman. Notwithstanding any provision of the Uniform Commercial Code (Act 185 of 1961 [§§ 85-1-101 et seq.], as

grain in his custody unless the owner has by written document transferred title to the grain to the warehouseman, which was not done in this case. The Act specifically provides that any such transaction without written authorization will be void, notwithstanding any provision of the Uniform Commercial Code to the contrary. Appellant points out, however, that this argument was not raised below and should not be heard on appeal and the record supports that assertion.

Although we may affirm a decision on a legal theory not argued to the trial court, we must have some basis for that result. As we said in *Palmer, et al* v. *Cline,* 254 Ark. 393, 494 S.W.2d 112 (1973), "We must determine the issues upon the record that was made in the trial court. The facts essential to the question now argued were not pleaded in the court below and therefore cannot serve as the basis for a decision in this court." Here, § 77-1339 defines public grain warehouseman as one who operates any building or structure for the *purpose of storing grain* for a *consideration.* Because this was not argued to the trial court, evidence relevant to Act 401 was not sufficiently developed for us to apply the rule that we will affirm the trial court if the correct result is reached, even if reached on an erroneous theory. We have discretion in determining whether an equity case should be reopened for additional proof on the proper theory. *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S.W.2d 728 (1949); *Nakdimen* v. *Atkinson Improvement Company,* 149 Ark. 448, 233 S.W. 694 (1921). We believe the issue here is of sufficient importance to merit retrial on facts developed in light of Act 401.

Reversed and remanded.

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amended) to the contrary, or any other law to the contrary, all sales and encumbrances of grain by public grain warehousemen are void and convey no title unless such sales and encumbrances are supported by a written document executed by the owner specifically conveying title to the grain to the public grain warehouseman. [Acts 1981, No. 401, § 2, p. ——.]

Eugene Wallace PERRY *v.* STATE of Arkansas

CR 82-19 650 S.W.2d 241

Supreme Court of Arkansas
Opinion delivered May 9, 1983

James E. Davis, for petitioner.

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

PER CURIAM. Petitioner Eugene Wallace Perry was convicted by a jury of capital felony murder and sentenced to death. We affirmed. *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982). Petitioner now seeks a further stay of mandate and permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37.

Petitioner first argues that he is entitled to postconviction relief because the sentence imposed on him was in violation of the Constitution and laws of the United States and this State. He has enumerated twenty-two allegations of constitutional error: (1) the trial court erred in refusing a request for a second change of venue; (2) the trial court erred in denying a request for a handwriting expert at state expense; (3) the trial court erred in refusing to suppress identification testimony by witnesses participating in pretrial photographic and physical line-ups; (4) the trial court erred in denying a motion for directed verdict since the evidence was all circumstantial; (5) the trial court erred in sustaining an objection to a hypothetical question by the defense to witness Linda Godwin; (6) the trial court erred in excluding the testimony of Dr. Stevens regarding identification witness testimony; (7) the trial court erred in not allowing expenses for out-of-state defense witnesses and subpoena power; (8) the prosecuting attorney in three instances made improper comments during closing argument; (9) the trial court erred in admitting State's Exhibit No. 64, a fingerprint card; (10) the trial court erred in failing to grant a mistrial because of a prejudicial television news account shown on July 16, 1981; (11) the trial court erred in overruling a defense objection to the testimony of Chantina Ginn regarding statements by co-defendant Anderson; (12) the trial court erred in refusing a request to sequester the jury; (13) through comparative appellate review this Court should reduce the death sentence; (14) the trial court erred in denying a motion to acquit based on petitioner's indictment by information rather than by grand jury; (15) the trial court erred in admitting State's Exhibit Nos. 1, 2, 3 and 4, photographs of the victims' bodies; (16) the trial court erred

in refusing to grant a mistrial based on the jury's observation of a newspaper headline; (17) the trial court erred in failing to declare Chantina Ginn an accomplice; (18) the evidence was insufficient to convict because Ginn was an accomplice whose testimony was not corroborated; (19) death by electrocution is cruel and unusual punishment; (20) the trial court erred in establishing the juror's qualifications through prejudicial voir dire examination; (21) the trial court erred in permitting the State to empanel a death qualified jury; and (22) Ark. Stat. Ann. §§ 43-1507 and 43-1518 (Repl. 1977) are unconstitutional.

All twenty-two issues were raised on direct appeal and decided adversely to petitioner. Rule 37 was not intended to permit a petitioner to again present questions addressed on appeal. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980); *Hulsey* v. *State,* 268 Ark. 312, 595 S.W.2d 934, *reh. denied,* 268 Ark. 315, 599 S.W.2d 729 (1980). Furthermore, no factual support is provided for the allegations. Conclusory statements without substantiation do not justify postconviction relief. *Hill* v. *State,* 278 Ark. 194, 644 S.W.2d 282 (1983); *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1982); *Cooper* v. *State,* 249 Ark. 812, 461 S.W.2d 933 (1971).

Petitioner also makes five conclusory allegations of ineffective assistance of counsel. He initially contends that counsel failed to request a second change of venue; but since an impartial jury was empaneled, petitioner has demonstrated no prejudice. Counsel cannot be found ineffective absent some showing of prejudice. *Hill, supra; Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981).

Petitioner next alleges that counsel should have requested funds to employ a handwriting expert. Again, petitioner fails to allege any prejudice resulting from counsel's failure to act. As we said on appeal, the State did not use expert testimony to establish the author of any writing. Petitioner has given no reason to support his claim that counsel erred in failing to ask for his own expert.

The trial court sustained the State's objection to a defense question asked of witness Linda Godwin. Petitioner

does not specify where in the record the specific objection can be found as he should have done. See *Hill, supra.* We assume that he is referring to the objection raised on appeal wherein the defense asked a hypothetical question of Godwin which was disapproved as assuming a fact not in evidence. If so, he has not alleged or shown that a proffer was called for under the circumstances. Defense counsel asked the witness:

> If it were developed in the course of this trial that seven (7) people will testify under oath that Gene Perry was in Alabama at the time this occurred, would that change your testimony in any way?

As the trial court said, the question assumed facts not in evidence. The question was not proper and we cannot agree with petitioner that counsel was remiss in not making a proffer of it.

Petitioner alleges that counsel failed to object to an unspecified jury argument by the State which amounted to a comment on petitioner's decision not to testify. We must again assume that petitioner has reference to a point also raised on appeal since he does not quote the State's comment or otherwise identify it. The portion of the State's argument which was questioned on appeal as a comment on petitioner's exercise of his right to remain silent reads as follows:

> Obviously there is a lot of stuff being done here to disguise the names of people. What name is given for Damon when he is down in Florida? Damon Malantino. Why was that name used? Who can tell. It is obviously one thing; it was not the name of Wallace Eugene Perry on any of this stuff. And why not? . . . You do not have eye witnesses. Nobody is going to come in here and say here, I robbed, and I have shot. Whose fault is that? It's the defense's fault. There are no witnesses. You know, criminals are the ones that pick the witnesses for crimes, because criminals are the ones that decide the time and the place of the crime.

Petitioner argued on appeal that this court should reverse because these remarks were an improper comment even

though no objection was made. We declined, stating that the lack of an objection and the total context of the closing argument caused us to conclude that this was not a comment on the right to remain silent. We now hold that even if there had been an objection, the remarks when considered with the argument as a whole did not prejudice petitioner to the degree that he was denied a fair trial. There is a presumption of effective assistance of counsel. *Hill, supra; Thomas* v. *State,* 277 Ark. 74, 639 S.W.2d 353 (1982); *Hoover* v. *State,* 270 Ark. 978, 606 S.W.2d 749 (1980); *Irons* v. *State,* 267 Ark. 469, 591 S.W.2d 650 (1980). To overcome that presumption, a petitioner must show by clear and convincing evidence that he suffered prejudice by the representation of counsel and that the prejudice which resulted was such that he did not receive a fair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). Petitioner has not shown that he was denied a fair trial by counsel's failure to object.

Finally, petitioner asserts that counsel failed to make a proper objection to the hearsay testimony of Chantina Ginn. He does not cite any specific testimony as being objectionable hearsay. We found no reversible error when a similar issue involving Ginn's testimony was raised on appeal. We have no way of knowing whether it is this same testimony that petitioner has reference to in this petition. If so, he has not provided any support for the allegation on which counsel could be found ineffective.

Petitioner's total failure to substantiate any of the allegations of constitutional error or ineffective assistance of counsel may indicate that he is merely seeking to exhaust state remedies with this petition. See *Reynolds* v. *State,* 248 Ark. 153, 450 S.W.2d 555 (1970). In any event, there is no ground for relief which warrants an evidentiary hearing or other postconviction relief. Accordingly, the petition for relief under Rule 37 and the petition for further stay of mandate are denied.

Petitions denied.

VERMEER MANUFACTURING COMPANY *v.* Jimmy VANDIVER, a/k/a VANDIVER EQUIPMENT COMPANY and FORD MOTOR COMPANY

650 S.W.2d 244

Supreme Court of Arkansas
Opinion delivered May 9, 1983

Pollard & Cavaneau, by: *Jerry Cavaneau,* for appellant.

Lightle, Beebe, Raney & Bell, by: *Donald Raney,* for appellee Vandiver.

Smith & Nixon, by: *W. R. Nixon, Jr.,* for appellee Ford Motor Company.

PER CURIAM. This case involves multiple claims of relief and liability among multiple parties. The trial court dismissed one defendant, Ford Motor Company, on the basis of lack of venue. The other parties now seek to appeal that ruling. However, the order of the trial court does not recite that there is no just reason for delaying an appeal nor does it direct the entry of a final judgment in favor of Ford Motor Company. Therefore, ARCP Rule 54 (b) requires that the present appeal be dismissed without prejudice to appeal when a final judgment is entered.

Wayne RICHARDS *v.* STATE of Arkansas

CR 82-162 650 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered May 16, 1983

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

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

RICHARD B. ADKISSON, Chief Justice. Appellant, Wayne Richards, was convicted by a jury of first degree murder and was sentenced by the Hempstead County Circuit Court to 40

years in the Arkansas Department of Correction. On appeal we affirm.

About 7:00 p.m. on January 6, 1982, the victim's body was found on the freeway in Hempstead County a few miles outside of Prescott. The facts leading up to the murder are as follows: Appellant and the victim, who was female, had been seen in Texarkana by a pawnshop owner who testified that appellant and the victim had both come into his shop on December 30; that on January 6, the victim had returned without appellant; and that on the latter occasion he noticed that she had black eyes and bruises on her face. Appellant told the police that he and the victim had left Texarkana on January 6, 1982, traveling east on I-30. According to appellant's statement, they got into a fight, he hit her, and she jumped out of the car. Appellant stated that he was going about 40 m.p.h. when she jumped but that he did not stop the car until he got off the freeway at the next exit. He then stopped at a service station and asked that the police be called.

The testimony of the medical examiner who examined the victim's body did not substantiate appellant's story. He stated that the victim had actually died from manual strangulation associated with blunt trauma to the head and face. He also testified that the victim's body had been run over, after death, by a heavy vehicle.

Appellant first argues that the trial court erred in not dismissing the case for lack of jurisdiction because it is unclear where the crime was committed. Ark. Stat. Ann. § 43-1408 (Repl. 1977) provides:

> Territorial jurisdiction of circuit and justices' courts. — The local jurisdiction of circuit courts and justices' courts, shall be of offenses committed within the respective counties in which they are held.

And, Ark. Stat. Ann. § 41-110 (2) (Repl. 1977) provides:

> The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

We stated in *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978) that before the State is called upon to offer evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court. Appellant alleges that the medical examiner's testimony that the victim's body had been run over by a heavy vehicle after death established that she was killed elsewhere and this constituted the necessary affirmative evidence that Hempstead County did not have jurisdiction. We cannot agree with this contention. The fact that the victim may have been dead when her body left the car is not affirmative evidence that she was killed in any particular place.

Appellant argues that the trial court erred in refusing to allow his brother to testify as to appellant's medical history as a part of his insanity defense. During direct examination the brother was asked about certain medication appellant allegedly took as a child, but after the prosecution objected, the court refused to allow him to answer. We cannot say that this ruling was reversible error because a proffer was never made as to what the brother's testimony would have been concerning the medication.

There are no reversible errors.

Affirmed.

BARNETT RESTAURANT SUPPLY, INC. *v.* Peck VANCE et al

83-46 650 S.W.2d 568

Supreme Court of Arkansas
Opinion delivered May 16, 1983

Henry & Walden, by: *Brent Davis,* for appellant.

Penix, Penix, Mixon & Lusby, for appellees.

GEORGE ROSE SMITH, Justice. The only question on this appeal is whether the trial court was right in denying the plaintiff's motion to strike the defendant Vance's responses to the plaintiff's requests for admissions because the responses were not served and filed within the 30 days allowed by A.R.Civ.P. Rule 36. We find that the trial court was in error.

Barnett Restaurant Supply brought this action against Vance and others upon a $1,894.94 open account. Vance filed an answer denying all allegations in the complaint. On August 17, 1981, the plaintiff filed requests for admissions, the only important one being that Vance admit he owed the plaintiff $1,894.94 for merchandise. No responses were filed until January 6, 1982, the day before trial, when defense counsel learned of their mistake and filed responses with the clerk. At the beginning of the trial the court, after hearing

defense counsel's explanation for the omission, denied the motion to strike the responses, without further comment.

At the hearing Vance's trial attorney stated that responses had been prepared and had been signed and verified by Vance on September 8. Below the verification another member of the law firm had certified that he had served a copy on each of the two opposing attorneys (presumably by mail), but that can hardly have been correct. Neither opposing attorney received a copy, nor had one been filed with the clerk. The secretary who notarized Vance's signature would have testified that he came to the office and signed the responses, that the original was not in the file, and that it was the habit and practice of the office to send the responses to the clerk's office and mail copies to the various parties. Quite evidently there was an oversight, it hardly being possible that all three copies were lost in the postal system.

Rule 36 (a) provides, as did its predecessor, Act 335 of 1953, § 11, that a request for an admission is admitted unless a timely response is served. Rule 6 (c) also requires that a copy be filed with the clerk within a reasonable time. In 1957 we upheld a trial court's decision to permit timely but unsworn responses to be verified on the day of trial. *Kingrey* v. *Wilson,* 227 Ark. 690, 301 S.W.2d 23. Ten years later, however, we explained that when *Kingrey* was decided our lawyers had not had much time to become acquainted with the penalties for failure to comply with discovery procedures. *B. & P., Inc.* v. *Norment,* 241 Ark. 1092, 411 S.W.2d 506 (1967). Our policy through the years has been to require compliance with the rule governing responses to requests for admissions. *White River Limestone Products Co.* v. *Mo.-Pac. Rd. Co.,* 228 Ark. 697, 310 S.W.2d 3 (1958); *Stocker* v. *Hall,* 269 Ark. 468, 602 S.W.2d 662 (1980). A similar trend away from early leniency has been noted with respect to the federal rule. *Driver* v. *Gindy Mgf. Corp.,* 24 F.R.D. 473 (E.D. Pa. 1959).

Our lawyers are familiar with our practice during the past twenty-five years or more. Rule 6 (b) (2) provides broadly for extensions of time in instances of excusable

neglect, but an attorney's shifting of complete responsibility to a secretary does not fall in that category. *DeClerk* v. *Tribble,* 276 Ark. 316, 637 S.W.2d 526 (1982). If this law office took any precautions to avoid oversights such as the one that occurred, trial counsel failed to mention that fact. In the circumstances it would be a step backward for us to recognize an exception to the procedural requirements in this case.

Reversed and remanded for the entry of judgment.

Thomas J. EVANS *v.* Connie WILSON

83-84 650 S.W.2d 569

Supreme Court of Arkansas
Opinion delivered May 16, 1983

James E. Smedley, for appellant.

Butler, Hicky & Hicky, Ltd., by: *Phil Hicky* and *Preston G. Hicky,* for appellee.

GEORGE ROSE SMITH, Justice. This appeal comes to us as a tort case. Rule 29 (1) (o). On October 2, 1979, the plaintiff-appellant, while waiting to turn left at a traffic light, suffered a whiplash injury to his neck when his car was struck from behind by the appellee's car. In appealing from an $11,000 verdict and judgment in his favor, the plaintiff argues that the trial judge violated the collateral source rule by permitting the defendant to prove that as a result of his injuries the plaintiff had received specified disability payments from his employer and from insurance companies. We agree that the trial judge's action was wrong.

The plaintiff's doctors testified in effect that he sustained a serious and painful, though not permanent, injury, that he was necessarily hospitalized from October 4 to October 18, and that he was unable to work for about four and a half months. That proof is undisputed; the defendant offered no testimony contradicting the doctors' assertions.

Why then should the collateral source rule have been disregarded? The appellee argues that she pleaded malingering as an affirmative defense and was properly permitted to prove the plaintiff's disability income in support of that defense, with a cautionary instruction to the jury that the evidence was to be considered only with regard to the asserted malingering, not with regard to any reduction of the plaintiff's actual damages.

This argument does not have substantial support in the record. To begin with, the charge of malingering is not truly

an affirmative defense. It simply denies that the plaintiff was injured at all or as seriously as he contends, casting no affirmative burden of proof on the defendant. We may compare it to the now largely discredited defense of unavoidable accident, which we eventually realized to mean little more than that the defendant was not negligent. *Houston* v. *Adams,* 239 Ark. 346, 389 S.W.2d 872 (1965); AMI Civil 2d, 604 (1974).

There are unquestionably situations in which proof of a plaintiff's collateral income may be admissible for a particular purpose. We mention four such purposes: One, to rebut the plaintiff's testimony that he was compelled by financial necessity to return to work prematurely or to forego additional medical care. *Gladden* v. *P. Henderson & Co.,* 385 F.2d 480 (3d Cir. 1967); *Johnson* v. *Reed,* 464 S.W.2d 689 (Tex. Civ. App. 1971). Two, to show that the plaintiff had attributed his condition to some other cause, such as sickness. *Stanziale* v. *Musick,* 370 S.W.2d 261 (Mo. 1963); *Burrous* v. *American Airlines,* 639 S.W.2d 263 (Mo. App. 1982). Three, to impeach the plaintiff's testimony that he had paid his medical expenses himself. *Fahler* v. *Freeman,* 241 N.E.2d 394 (Ind. App. 1968). And four, to show that the plaintiff had actually continued to work instead of being out of work, as he claimed. *Bookbinder* v. *Rotondo,* 285 A.2d 387 (R.I. 1972).

No comparable situation is shown by the appellee. For the most part she merely asserts that the plaintiff's complaint exaggerated his injuries and property damage, a commonplace occurrence having nothing to do with the collateral source rule. She does have support in the record for arguing that the plaintiff said at the scene of the accident that he didn't think he needed to go to a doctor, that he did not see a doctor until two days later, when he tried to resume work and was not able to do so, and that he consulted an attorney 24 days after the accident (during which he had been in the hospital for two weeks). All those matters were fully accounted for by the plaintiff's witnesses and were not left in doubt by any proof offered by the defense. The trial judge abused his discretion in failing to hold that what slight probative value the testimony in question may have

had was outweighed by the prejudicial effect of proof that the plaintiff had received substantial income from outside sources. Uniform Evidence Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

Reversed and remanded for a new trial.

WESTARK SURGICAL CLINIC, P.A. *v.*
John J. WEISSE

83-30 650 S.W.2d 571

Supreme Court of Arkansas
Opinion delivered May 16, 1983

Thompson, Paddock & Llewellyn, by: *William P. Thompson,* for appellant.

Harper, Young, Smith & Maurras, by: *S. Walter Maurras,* for appellee.

DARRELL HICKMAN, Justice. This is the second appeal of this breach of contract case. John J. Weisse, a newly certified surgeon, was employed in 1976 by Westark Surgical Clinic, a professional association of doctors located in Fort Smith. After one year Weisse resigned and sued Westark for what he claimed was due him under an employment contract. At the first trial the jury awarded him $20,000. We reversed the judgment because of prejudicial evidence submitted to the jury. *Westark Surgical Clinic* v. *Weisse,* 268 Ark. 505, 597 S.W.2d 820 (1980). On retrial the jury awarded Weisse $32,000, and we affirm that judgment.

Weisse visited Westark Clinic twice before beginning his employment. After each visit he received a letter from the Clinic. The first letter generally set forth the terms of employment with the Clinic: salary, benefits, relocation expenses, vacation, etc. The second letter, written in February of 1976, acknowledged Weisse's acceptance of the Clinic's offer of employment. Both letters said that Weisse would receive a written employment agreement.

Weisse started work at the Clinic in July of 1976. It is undisputed that he continually asked for a written contract. And, when he asked about certain benefits, the Clinic physicians answered him that it was covered by the contract he would receive. Finally, in October, the Clinic's attorney sent Weisse a blank contract along with other Clinic documents. The contract included a salary continuation clause which provided that in the event of termination the employee would get 100% of his salary for the first three months following termination, 75% the next three, 50% the next three, and 25% the final three months. In Dr. Weisse's case that would amount to $30,000.

The blank contract was never signed but Weisse testified that he believed it to represent his agreement with the Clinic. When he left the Clinic he was refused salary continuation and he sued for that and for compensation for doing follow-up care on patients he treated while at the Clinic. On retrial, following the first reversal of this case, the jury awarded Weisse $30,000 in termination pay and $2,000 compensation for his work after he left the Clinic.

The Clinic appeals the jury's decision on three grounds. First, it contends that the trial court erred in refusing to allow evidence of customary employment contracts between employing physicians and physicians just beginning practice. The Clinic proffered evidence by a Little Rock lawyer who prepared such employment contracts in six southern states that he had never seen a salary continuation clause in a contract with a physician just out of school.

The trial court correctly found that a custom is admissible as evidence only if it is known to both parties, or is such a widespread custom in a trade that the parties will be presumed to be aware of the custom. *Ben F. Levis, Inc.* v. *Collins,* 215 Ark. 172, 219 S.W.2d 762 (1949). Weisse was from New York and educated there. He completed his residency in Columbia, Missouri. He testified that he had no knowledge of the custom of inserting salary continuation clauses or the lack of them in medical employment contracts. The trial court's ruling, a discretionary one, was on a sound basis. We cannot say that the record proves that such a custom was known to Weisse or so widespread that he would be presumed to be aware of it. To do so would be to rule that the trial judge manifestly abused his discretion — a decision we cannot make.

Secondly, it is argued that the trial court was wrong in allowing Weisse to introduce an exhibit which showed the services Weisse rendered to Clinic patients a short time before he left the Clinic and for two weeks after. These were patients Weisse treated or performed surgery on while at the Clinic, and the exhibit showed the surgery, the post-operative, and the follow-up care and treatment by Weisse. The Clinic argues that the exhibit was prejudicial because it

showed that the Clinic made $10,000 in charges for the treatment and that that was not relevant to what Weisse should receive since Weisse and the Clinic had a salary agreement. Weisse testified that he had been paid for the services that he rendered before he left the Clinic but that he had not been paid for the services given after he left and that he estimated those services to be worth $2,000. Apparently the jury agreed because that is what he was awarded. The trial court ruled that the exhibit was relevant and we cannot say he was manifestly wrong.

Finally, it is argued that the evidence was not sufficient to support the verdict. Essentially the appellant makes a legal argument and the question is whether the jury was entitled to decide the terms of the contract between Weisse and the Clinic. Although there was no signed agreement, evidence existed that the parties contemplated a written agreement and that the Clinic intended the parties' agreement to be governed by the employment contract. The Clinic's only contract in existence, and the one given to Weisse, had a salary continuation provision. When the evidence is considered in a light most favorable to the appellee, we find that there was substantial evidence to support the jury's finding.

Affirmed.

Mark BRADLEY and Linda BRADLEY, Husband and Wife, and CITY OF RUSSELLVILLE, Arkansas et al *v.* Judith A. GALLOWAY et al

83-86 651 S.W.2d 445

Supreme Court of Arkansas
Opinion delivered May 16, 1983
[Rehearing denied June 20, 1983.]

Mobley & Smith, by: *William F. Smith,* for appellants Bradley.

John M. Bynum, City Atty., for appellant City of Russellville.

Jonathan P. Shermer, Jr., for appellees.

JOHN I. PURTLE, Justice. The Pope County Circuit Court issued a writ of mandamus directing the Russellville City Clerk to determine the sufficiency of a referendum petition filed for the purpose of referring an ordinance to the people for an election. The order was stayed pending this appeal. Two points are argued for reversal. First, that the circuit court was without jurisdiction to enter the order of mandamus. Second, if the circuit court had jurisdiction its decision was clearly erroneous and contrary to the law and the facts. We do not agree with either argument.

On November 12, 1981, the City Council of Russellville, Arkansas enacted ordinance No. 1012 which rezoned certain property within the city. On December 10, 1981, appellees filed an instrument with the city council, in which they sought to refer the above ordinance to the people for a vote. The city clerk then issued a notice of hearing which was scheduled for January 12, 1982. Following the public hearing on the petition the city council and the city clerk, Charles F. Howell, declared the petition for referral of ordinance No. 1012 to be insufficient to the extent that it amounted to nothing and there was nothing which could be done to validate the petition because the time for referral of the ordinance had passed. No time to correct any deficiencies was given to petitioners. Thereafter, a petition was filed in the circuit court for mandamus to compel the city clerk to make a finding as to whether the petition was sufficient and if it were found insufficient, to give petitioners a period of time within which to remedy the deficiencies. After first determining that the city clerk had acted in compliance with Amendment 7 to the Arkansas Constitution, the circuit court entered an order directing the city clerk to comply with Amendment 7 by determining the sufficiency of the referendum petition. Several times the city clerk stated the petition for referendum was insufficient but each time he refused to allow appellees the opportunity to amend, modify or otherwise correct the petition. On June 14, 1982, the circuit court ordered the clerk to give petitioners (appellees) ten days within which to correct or amend the petition. It is from that order that this appeal is taken.

The only issue before this court is the legality of the order of mandamus issued by the circuit court directing the city clerk to comply with Amendment 7 by giving appellees written notice of the insufficiency of the referendum petition and to permit correction or amendment within ten days. Therefore, we will not consider the sufficiency of the referendum petition in the present action. Amendment 7 deals with the sufficiency of such petitions by stating:

> If the Secretary of State, county clerk or city clerk, as the case may be, shall decide any petition to be insufficient, he shall without delay notify the sponsors of such petition, and permit . . . ten days in the instance of a municipal or county petition, for correction or amendment.

The burden of proof in this case is upon those opposing the petition. Although the appellants originally objected to the circuit court's jurisdiction, they subsequently filed numerous requests for affirmative relief and in effect abandoned the objection. After sponsors of an initiative or referendum have been notified by the city clerk that the petition is insufficient they have ten days within which to correct or amend the petition. Any appeal from the decision of the clerk shall be taken to chancery court. However, appellees were not appealing from the decision of the clerk, rather, they were trying to force him to act one way or the other.

Ark. Stat. Ann. § 33-101 (Repl. 1962) gave both circuit and chancery courts jurisdiction to determine petitions for writ of mandamus. This statute has been considered authority for a circuit court to compel the performance of a ministerial duty. *Cox* v. *Wentz,* 231 Ark. 205, 329 S.W.2d 413 (1959). This court has held that chancery courts do not have the power to issue writs of mandamus. *Nethercutt* v. *Pulaski County Special School Dist.,* 248 Ark. 143, 450 S.W.2d 777 (1970). Therefore, the circuit court had jurisdiction to issue a writ of mandamus.

Appellant relies upon *Townsend* v. *McDonald,* 184 Ark. 273, 42 S.W.2d 410 (1931) as authority for upholding the

action taken by the city clerk. In *Townsend* the issue was whether the Arkansas Secretary of State should be required to accept petitions for a referendum on Act 345 of 1931. This court ordered that the petition for mandamus be dismissed. The petition for mandamus in the *Townsend* case was filed directly with the supreme court as provided for in Amendment 7. We considered the petition on its merits and decided that failure to attach a full and correct copy of the measure to be voted upon rendered the petition invalid. In the case before us we do not consider the sufficiency of the petition on its merits. In *Townsend* this court approved the holding in *State ex rel.* v. *Olcott,* 62 Or. 277 (1912). The court in *Olcott* held that if the petition for referendum substantially complied with the requirements of the law then it was sufficient. The Oregon court further held that it was not necessary to have a full and correct copy of the title and text of the measure attached to each sheet of the petition. In the case before us the petitioners seek to have the city clerk inform them of the nature of the deficiencies of their petition and to give them ten days within which to correct or amend. This differs from the relief sought in *Townsend* because there petitioners sought to compel the Arkansas Secretary of State to accept the petitions and certify the matter for an election. Time within which to correct or amend a petition for referendum was not considered or discussed in *Townsend.* Amendment 7 should be liberally construed in order to meet the purposes for which it was adopted. *Armstrong* v. *Sturch,* 235 Ark. 571, 361 S.W.2d 77 (1962). We cannot determine from the record whether any of the petitions had attached to them a copy of ordinance No. 1012. It is not necessary that a full and correct copy of the referred measure be attached to each sheet of the petition. *Leigh* v. *Hall,* 232 Ark. 558, 339 S.W.2d 104 (1960).

We must, therefore, affirm the decision of the lower court in directing the Russellville City Clerk to comply with Amendment 7 of the Arkansas Constitution.

Affirmed.

Jerry STEELE *v.* Patrick MURPHY, Trustee
of Tim Murphy Trust

83-87 650 S.W.2d 573

Supreme Court of Arkansas
Opinion delivered May 16, 1983

Bradley, Coleman & Boling, by: *Jon R. Coleman,* for appellant.

Reid, Burge & Prevalett, by: *Robert L. Coleman,* for appellee.

ROBERT H. DUDLEY, Justice. This case of first impression involves the interpretation of Ark. Stat. Ann. § 50-531 (Supp. 1981), a law significant to the farming community. This law, enacted in 1981 by the General Assembly, provides as follows:

> Termination of oral lease of farm lands. — The owner of farm lands which are leased under an oral agreement may elect not to renew the oral rental or lease agreement for the following calendar year by giving written notice by certified registered mail to the renter or lessee,

> on or before June 30, that the lease or rental agreement will not be renewed for the following calendar year.

Pursuant to this statute, the trial court held that the landlord, appellee, gave sufficient notice to the tenant, appellant, to terminate his tenancy in farm property at the end of 1981. The notice of termination was mailed by the appellee on June 29, 1981 by certified mail, but was not received by appellant, a tenant from year to year on a calendar year term, until July 3, 1981. We affirm. Jurisdiction is in this Court as this case requires the interpretation and construction of an act of the General Assembly. Rule 29 (1) (c).

Before considering whether the notice was timely, we must decide whether the act applies to tenancies from year to year. A comparison of the tenancy from year to year and the oral lease leads us to conclude that the General Assembly intended that this act be applied to tenancies from year to year.

At common law, one of the ways a tenancy from year to year could be distinguished from an oral one year lease was by the requirement of notice to vacate. A tenant holding under an oral one year lease was not entitled to notice of the landlord's decision not to extend the lease for another year. *Sigmon Forest Products, Inc.* v. *Scroggins,* 247 Ark. 493, 446 S.W.2d 198 (1969). However, a tenant from year to year was entitled to six months' notice to vacate. *Gregory* v. *Walker,* 239 Ark. 415, 389 S.W.2d 892 (1965). This distinction leads to three reasons which mandate that the act be applied to tenancies from year to year.

First, this Court has strictly construed the definition of six months' notice in such tenancies. Thus, notice on July 1 has been held insufficient to terminate a tenancy running to December 31. *Gregory,* 239 Ark. at 417, 389 S.W.2d at 893. Obviously by supplying the date of "on or before June 30" the General Assembly gave landlords and tenants a clear, simple and codified method of determining a fixed date for the purpose of giving six months' notice, at least as applied to calendar year tenancies from year to year.

Second, at common law in a tenancy from year to year the landlord alone is required to give notice to vacate. Similarly, the act does not provide for mutuality of notice but provides only for a method of notice by the landlord. This parallel circumstance indicates that the legislative intent was to provide for tenancies from year to year.

Third, oral notice, if timely given, has always been sufficient notice. However, disputes often arise over when oral notice was given. The act provides that the landlord may elect to use this form of written notice. Thus, the legislative intent could well have been to statutorily provide for an optional written method of proving when notice was given.

The appellant asks that we limit our construction of the act to its literal meaning. Clearly, the literal interpretation of the act is that it applies to "lands which are orally leased." One writer in an excellent article opined that the act "requires, in the case of oral agreements, the same notice not to renew or extend as was previously applicable to tenancies from year to year." Cathey, *The Real Estate Installment Sale Contract: Its Drafting, Use, Enforcement and Consequences,* 5 U. Ark. Little Rock L.J. 229, 237-38 (1982). The author of another fine article has written, "The Arkansas legislature has attempted to clarify the notice requirement for oral leases in Act 866 of 1981." Looney, *Legal and Economic Considerations in Drafting Arkansas Farm Leases,* 35 Ark. L. Rev. 395, 426 (1982). We decline to give such a limited interpretation to the statute because the literal interpretation does not give effect to the legislative intent. It is the duty of this Court to give effect to the intent of the General Assembly, even though the true intention, though obvious, has not been expressed by the language employed when given its literal meaning. *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W.2d 279 (1964). We conclude that a proper construction of the act renders it applicable to tenancies from year to year.

The second issue is whether this notice was given in time to terminate the tenancy at the end of 1981. The notice was mailed on June 29 and received on July 3, 1981. At common law this would not have been timely notice for the

year ending in 1981 since the tenant was entitled to receive six months' notice. *See Gregory* v. *Walker, supra.* However, the act does not require that the tenant receive notice on or before June 30. It provides that the landlord give notice to the tenant on or before June 30. In using the word "give," as distinguished from "receive," the General Assembly may well have intended that we be guided by the definitions of these words in the Uniform Commercial Code. Ark. Stat. Ann. § 85-1-201 (26) (Supp. 1981) provides:

> A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course, whether or not such other actually comes to know of it. A person "receives" a notice or notification when
>
> (a) It comes to his attention; or
> (b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

These definitions comport with the definitions of the giving of notice contained in the legal encyclopedias. They agree that where the giving of notice by way of a specified form of mail is prescribed by statute, notice is effected when the written notice is properly addressed and placed in the mail. *See* 66 C.J.S. *Notice* § 18 (3) (1950); 58 Am. Jur. 2d *Notice* § 27 (1971).

Rule 5 (b) of the Arkansas Rules of Civil Procedure is also supportive of an interpretation that notice is effectively given when mailed. ARCP 5 (b) provides that when service is allowed to be made by mail, "Service by mail is presumptively complete upon mailing."

We conclude that the General Assembly did intend to change the common law to the extent that the giving of notice on or before June 30 is sufficient when service by mail of that notice is promptly completed. We recognize that a different issue would be before us if service had not been completed but we reserve judgment on that issue until it is

properly before us. *See, e.g., Escher* v. *Morrison,* 278 N.W.2d 9 (Iowa 1979).

Affirmed.

Leonard E. RIDENHOUR *v.* STATE of Arkansas

CR 83-55 650 S.W.2d 575

Supreme Court of Arkansas
Opinion delivered May 16, 1983

Wayland A. Parker, for appellant.

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

STEELE HAYS, Justice. Leonard Ridenhour, appellant, was charged with violation of our "hot check" law, Ark.

Stat. Ann. § 67-720 (Supp. 1981)[1] and raises issues on appeal that require our interpretation of that statute.

On three separate occasions in February and March of 1982, Ridenhour purchased cattle from the Montgomery County Auction, Inc. He took possession of the cattle and charged the purchases to his account. On three subsequent dates in February and March, he wrote checks for each of the previous purchases. All three checks were returned for insufficient funds. On March 23, 1982, Ridenhour delivered to Montgomery a check for $25,147.77, the total amount of the three smaller checks he had written. This check was also returned for insufficient funds. An information was filed on April 5, 1982, charging Ridenhour with violation of § 67-720 for the $25,147.77 check. The jury found him guilty and fixed his punishment at ninety days imprisonment and a fine of $1,000.00.

Appellant raises two issues on appeal, both of which have merit. He first contends that his motion to dismiss should have been granted, as the check for $25,147.77 was only evidence of a debt for a sale on an open account which would not be a violation of § 67-720. We note first that the original statute, prior to a 1977 amendment, specifically included "pre-existing debts" as a violation. That phrase, however, was deleted by the 1977 amendment. That the pre-existing debt under the circumstances of this case does not come within § 67-720 as it reads today, is bolstered by our decision in *Sharpensteen* v. *State*, 222 Ark. 519, 261 S.W.2d 537 (1953). Under similar facts, the appellant was charged

[1]67-720. Obtaining property with check drawn on insufficient funds. — It shall be unlawful for any person to procure any article or thing of value, or to secure possession of any personal property to which a lien has attached or to make payment of any taxes, licenses or fees, or for any other purpose to make or draw or utter or deliver with intent to defraud. any check, draft or order, for the payment of money, upon any in-state or out-of-state bank, person, firm or corporation, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer has not sufficient funds in, or on deposit with, such bank, person, firm or corporation for the payment of such check, draft or order, in full, and all other checks, drafts or orders upon such funds then outstanding.

under our "hot check" statute (67-717[2]) for checks drawn on out-of-state banks. This statute, like our current § 67-720, does not include pre-existing indebtedness and we found that there was no violation in *Sharpensteen.* The appellant in that case had purchased some chickens in Missouri, which were delivered to him the next day in Arkansas. A few days later the seller came to appellant's place of business in Arkansas and picked up the check for the chickens. The check was drawn on a bank in Oklahoma and returned for insufficient funds. We found that under the wording of that statute, no violation had occurred:

> Obviously, on the facts here, appellants had bought and received the chickens in Missouri three or four days before they delivered their check to Edwards in Arkansas. By delivering this check to Edwards, appellants secured nothing in Arkansas in addition to the chickens which they already had, which had been purchased in Missouri, and there delivered to them a few days before. This sale and delivery in Missouri constituted, in effect, an open account. *Sharpensteen* at 522.

Additionally, our investigation of other decisions reveals that those jurisdictions with similar "hot check" statutes hold generally that payment of a pre-existing debt by a worthless check is not a violation of those statutes. See 59 ALR 2d 1160.

The second contention is that the trial court erred in not granting a directed verdict for lack of evidence that Ridenhour obtained anything of value through his actions, as required by § 67-720. The question went to the jury on whether Ridenhour, by exchanging the one large check for

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[2](Statute in force at time of *Sharpensteen* decision).§ 67-717. Drawing a check or draft on bank outside State with insufficient funds. — It shall be unlawful for any person in this State to secure any goods, wares, and merchandise, credit, or anything of value by means of a check or draft drawn upon any bank or institution outside of the State of Arkansas when said check or draft shall be dishonored or payment refused on account of the giver of such draft or check not having sufficient funds on deposit in said bank to pay said check or draft.

the three smaller ones, had procured something of value. The state offers three ways in which the appellant obtained something of value through this exchange. First, they suggest, that had Montgomery not given up the three smaller checks, the drawee bank would have honored any of the smaller checks *singly,* if there were sufficient funds, whereas after the exchange, Ridenhour was protected from the sellers collecting on any one of them. However, at the time of the exchange — the record shows that there were insufficient funds to cover any one of the three smaller checks — and this was true throughout the remainder of the month of March. Thus, both Montgomery and Ridenhour remained in the same position they had been in prior to the exchange of the three smaller checks for the one larger one.

The state argues that by the exchange of the three checks, Ridenhour gained relief from any threatened legal action. This argument ignores the fact that Montgomery could have sued at any time on the underlying debt, whether it was holding three smaller checks or one larger one.

The state's last point is that Ridenhour testified he had asked Montgomery to hold the check until he could make it good. This testimony was contradicted by Montgomery. Were we to accept Ridenhour's testimony, the state argues that Ridenhour was buying time and thereby gained an extension of credit by having Montgomery hold the check. Again, the state ignores the fact that this would be true whether Ridenhour had asked Montgomery to hold the smaller checks or the large check. Nothing of value was either given or received by the exchange of checks, the parties remained in exactly the same position as they were before the exchange.

Reversed and dismissed.

HICKMAN, J., dissents.

Robert DOUGLAS et al *v.* Florence Albertine JONES

83-63 651 S.W.2d 69

Supreme Court of Arkansas
Opinion delivered May 16, 1983

PER CURIAM. Appellant's motion for belated appeal is granted.

Henry & Mooney, by: *John R. Henry,* for appellants.

No response by appellee.

RICHARD B. ADKISSON, Chief Justice, dissenting. I would deny the appellants' "Request For Late Filing Due to Improper Handling in the U.S. Mail." Appellants' excuse for late filing is merely that their brief mailed in Newport, Arkansas, on April 14, 1983, was not delivered to this court on the filing deadline, April 15, 1983, as they had expected.

If deposit in the mail is to be considered delivery to this court, then I would simply change the rules to say so. The rule change would then apply equally to all parties and attorneys.

Howard SHARP *v.* STATE of Arkansas

650 S.W.2d 565

Supreme Court of Arkansas
Opinion delivered May 16, 1983

Appellant, *pro se.*

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

PER CURIAM. Appellant Howard Sharp was convicted of second degree murder on June 26, 1981 and sentenced to 20 years imprisonment. Judgment was entered on July 9, 1981, and a timely notice of appeal was filed.

Appellant was released on bond pending appeal but eventually committed to prison some eight months later when nothing more was done about the appeal. He has now filed a pro se motion for belated appeal, alleging that his retained counsel Jeptha Evans was ineffective in not pursuing the appeal.

Arkansas Rules of Criminal Procedure 36.9 provides that no motion for belated appeal shall be entertained unless application for belated appeal has been made within 18 months of the date of commitment. Although appellant was convicted in July, 1981, the commitment in his case was not entered until March 19, 1982, thus appellant's motion for belated appeal is timely. It does not, however, show good cause for appellant's failure to communicate with counsel and must, for that reason, be denied.

After the notice of appeal was filed, appellant moved to Louisiana and then Texas. According to Mr. Evans' affidavit, he wrote to appellant on December 7, 1981, asking appellant to forward the money to have the transcript

prepared. He informed appellant that he had obtained an order extending the time for lodging the record on appeal to February 5, 1982. He also enclosed an affidavit of indigency for appellant to complete if he could not afford the cost of the transcript. Appellant did not return the affidavit or otherwise respond. Mr. Evans also wrote several other letters to appellant and left messages by telephone with appellant's sister-in-law and mother in attempts to contact him. Evans contends that on October 30, 1982, nearly nine months after the time for filing the record on appeal had elapsed, he received a letter from appellant. Appellant said that he had not received the affidavit because he "withdrew from everything" and left for Texas. He said he did not return until February, 1982. Evans states that he did not seek to be relieved as counsel because he intended to proceed with the appeal until it became evident that appellant could not be located by letter or telephone.

Appellant offers no explanation in his motion for his failure to contact his attorney while he was in Louisiana and Texas. He specifically states that he was aware of his right to appeal, but attributes his failure to communicate with Mr. Evans to Evans' inability to reach him by telephone or mail. It is apparent that appellant felt no obligation to contact Evans until he was committed to prison in March, 1982.

We have consistently held that the failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Gray* v. *State,* 277 Ark. 442, 642 S.W.2d 306 (1982). We recognize, however, that a convicted defendant may waive his right to appeal, *Gray, supra,* and in appellant's case we find that he did so. See *Munn* v. *State,* 278 Ark. 283, 644 S.W.2d 945 (1982).

Counsel made several attempts to contact appellant to inform him of his right to have the record prepared at public expense. Appellant, however, left the State and did not respond to Evans' telephone calls or letters. There is no doubt that appellant expressed a desire to pursue an appeal once he was imprisoned, but this does not excuse his total failure to act before the time for lodging the record on appeal

had expired. See *Munn, supra; Houston* v. *State,* 263 Ark. 607, 566 S.W.2d 403 (1978).

Motion denied.

Gene MULLENAX *v.* EDWARDS SHEET METAL WORKS, INC.

82-290 650 S.W.2d 582

Supreme Court of Arkansas
Opinion delivered May 23, 1983

William C. McArthur, for appellant.

Homer Tanner, for appellee.

RICHARD B. ADKISSON, Chief Justice. Mid America Video Corporation was organized by appellant, Gene Mullenax, Hubert Smith, and another incorporator in March of 1980. Records from the Secretary of State's office reflect that on November 24, 1980, Mid America's corporate charter was revoked for nonpayment of franchise tax pursuant to Ark. Stat. Ann. § 84-1842 (Repl. 1980). The charter was reinstated on May 28, 1981.

Meanwhile, beginning in August, 1980, and continuing through the period of time Mid America was without a franchise, appellee, Edwards Sheet Metal Works, Inc., manufactured certain satellite antenna component parts for Mid America. This suit arose over nonpayment for these parts as reflected by invoices introduced at trial dated April 1, April 17, and May 15, 1981, in the amount of $21,655.52.

In January of 1982 appellee brought suit against appellant and Smith individually to recover the corporate debt. Relying on *Moore* v. *Rommel,* 233 Ark. 989, 350 S.W.2d 190 (1961) the Pulaski County Circuit Court, sitting without a jury, held that appellant and Smith were personally liable for the corporate debts. Smith did not appeal the trial court's holding, but appellant did. On appeal we affirm.

Appellant first argues that although the Secretary of State's records reflect that Mid America's charter was not reinstated until May 28, 1981, the delinquent franchise taxes were actually paid in December of 1980, and therefore he

should not be personally liable for debts incurred after payment of the tax. However, appellant was unable to produce any documentary evidence at trial to substantiate this contention. Appellant relies upon the testimony of the corporation's accountant who stated that in December of 1980 he instructed the corporation to mail the state a tax report he had prepared, along with an $11.00 check, and that an $11.00 check went through the corporation's bank account. However, there was no evidence as to when the corporation actually mailed in the report and the check or when these items were received by the state, and there was no evidence of when the check cleared the corporation's bank account. Therefore, we find no merit in appellant's first argument.

Appellant next argues that he is not personally liable for the corporate debts of Mid America because there is insufficient evidence from which the trial court could have found that the debt was incurred during the period of time the charter was revoked. We disagree. There was undisputed evidence before the trial court by way of invoices and ledger sheets to the effect that the debts in question were incurred during the time the charter was revoked. Furthermore, argument of counsel before the trial court reveals that all parties accepted this undisputed evidence as dispositive of this issue.

Appellant also argues that the trial court erred in holding him personally liable for the corporate debts because he was not an officer or director of the corporation when they were incurred. However, we are unable to say that the trial court erred in this respect. The record reflects that appellant was president of the corporation and a director from its inception. Appellant testified that he resigned as president on December 31, 1980, but the trial court did not have to accept this testimony as undisputed since appellant is a party to the suit. *Ball* v. *Hail,* 196 Ark. 491, 118 S.W.2d 668 (1938). Appellant testified that "There was a document that Don Greenwell prepared, that I signed that said I resigned, and Hubert was president." However, this document was never introduced at trial; there was also evidence that in March appellant was active in the corporation.

Furthermore, although the trial court left the record open for additional proof on appellant's status in the corporation, none was ever forthcoming. Under these circumstances we cannot say the trial court erred in holding appellant personally liable for the corporate debt.

Affirmed.

Charles Earl JEFFERSON *v.* STATE of Arkansas

CR 83-4 650 S.W.2d 584

Supreme Court of Arkansas
Opinion delivered May 23, 1983

William C. McArthur, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant, aged 25, was convicted of three offenses and sentenced to consecutive terms of 22 years for aggravated robbery and 23 years for attempted rape and to a concurrent term of 11 years for burglary. The appellant does not question the sufficiency of the State's proof that on the evening of November 19, 1981, a masked man, armed with a butcher knife, broke into the home of two elderly sisters and committed the crimes in question. The only argument for reversal is that the identity of the appellant as the intruder was not adequately established.

Viewing the testimony most favorably to the appellee, as we must, we find that the matter of identity was a question of fact for the jury. The two sisters had known Charles Jefferson for as long as ten or twelve years, because his grandmother had lived next door to them in North Little Rock for many years. One of them had seen him two or three days before the evening in question and testified that he was then wearing the same clothes he had on that evening. The other sister had seen him earlier that day. They both recognized him at once as the intruder, though he was wearing a mask or scarf over his face. One said she knew him by his voice, which she had heard frequently, the other by his movements and build. One of them called the police right after the departure of the intruder, who had stayed about 45 minutes. They testified that later that night they told the investigating officers that Charles Jefferson had been the robber. At the trial they were positive in their identification. There were minor uncertainties in the State's proof, such as the exact time the masked man entered the house and whether the two women identified him by name that evening or the next morning. Such uncertainties, however, were matters of credibility to be determined by the jury, whose decision is conclusive. There is ample substantial evidence to support the verdict, which ends our inquiry on appeal.

Affirmed.

Melanie Robinson FULLER *v.* Steve Allen ROBINSON

82-284 650 S.W.2d 585

Supreme Court of Arkansas
Opinion delivered May 23, 1983
[Rehearing denied June 13, 1983.]

Sharp & Morledge, P.A., by: *Fletcher Lewis,* for appellant.

Kinney, Easley & Kinney, for appellee.

FRANK HOLT, Justice. This is a custody dispute between the natural parents of Stephen Jeremy Robinson. This action was brought by Jeremy's mother, the appellant. The only issue presented is whether venue is limited to the Cross County Court or whether the Woodruff County Court may determine custody.

The appellant and the appellee divorced in January 1974 after three years of marriage. Appellant was awarded

custody of their infant daughter Stephanie. They began living together again in August 1974 without remarrying. Jeremy was born on May 20, 1975. It is undisputed that the appellee is the natural father. In May 1977 the appellant and the appellee separated. The appellant moved to Florida, taking Stephanie, of whom she had legal custody, and Jeremy with her. Both parties subsequently married other persons. In May 1981 Jeremy came to Arkansas for his usual summer visit in his father's home in Cross County. At the end of the summer, Jeremy, then six years of age, was enrolled by his father in the first grade in the Wynne public schools. The father filed a petition for guardianship of Jeremy in the probate court of Cross County. On January 14, 1982, the probate court entered a temporary order awarding legal custody to the appellee, Jeremy's acknowledged father, and enjoining the appellant from interfering with custody or removing Jeremy from Arkansas pending a hearing to be held on March 10, 1982. In violation of that order, the appellant removed Jeremy from Arkansas to Florida on February 4, 1982. Appellee went to Florida, where he regained physical custody of Jeremy, returned him to Arkansas, and placed him in school. The Cross County Probate court appointed the appellee, whom he found was Jeremy's "acknowledged natural father," as guardian of the person and estate of Jeremy, holding that the fact that Jeremy is illegitimate is irrelevant to a proceeding to appoint a guardian of his estate and person. The probate court also held that issues of custody, support and visitation should remain with the county court and that Jeremy was a resident of Cross County, Arkansas. There was no appeal from this order.

Appellee and her present husband moved to Woodruff County, Arkansas. Subsequently, on July 28, 1982, as a resident of this county, appellant filed this action there in county court for legal custody. The appellee moved to dismiss for lack of jurisdiction and venue. Appellee also filed an action in Cross County Court for Jeremy's legal custody. The Woodruff County Court held that it had jurisdiction and venue and awarded custody to the appellant's parents, the maternal grandparents of Jeremy. On appeal the circuit court reversed, holding that venue prop-

erly lies in Cross County and not in Woodruff Conty, and dismissed the action. Appeal is taken from that order. The only issue presented on appeal is whether venue lies in Woodruff County Court.

The circuit court of Woodruff County found that Jeremy resided in Cross County and that the probate court of that county had previously so found, there being no appeal from that decision. We cannot set aside this finding of fact by the circuit court unless it is clearly erroneous (clearly against the preponderance of the evidence). ARCP Rule 52 (a). On the record before us, this finding is not clearly erroneous.

The appellant argues that, even if Jeremy is a resident of Cross County, the county court of Woodruff County also had venue in this action. She argues venue in a custody case, as here, is transitory in nature and could be in the county of the residence of the illegitimate child, the county of the mother's residence, or the county of the father's residence. In support of her argument she cites as authority 10 C.J.S. Bastards § 57; Ark. Stat. Ann. § 34-702 (Repl. 1962); Ark. Stat. Ann. § 34-713 (Repl. 1962); Ark. Stat. Ann. § 34-716 (Supp. 1981). Although each of these authorities relates in some way to bastardy proceedings, none of them specifically fixes venue for actions to determine custody of illegitimate children.

A comparison of Ark. Stat. Ann. §§ 34-716 and 34-718 (Supp. 1981), enacted in the same legislative session, demonstrates that the legislature intended to limit venue in a suit for custody of an illegitimate child to the county wherein the child resides. Section 34-716 provides:

> SUIT BY FATHER TO DETERMINE PATERNITY OF ILLEGITIMATE CHILD. — Any man alleging to be the father of an illegitimate child may petition the County Court *wherein the mother resides or wherein the child resides* for a determination of the paternity of the illegitimate child. The Court may determine the paternity of the child and may order the father to make periodic payments for support of the child. [Acts 1981, No. 664, § 1, p. ___]. (Italics supplied.)

In contrast, § 34-718 provides:

> CUSTODY OF ILLEGITIMATE CHILD. — (a) A father, provided he has established paternity in a court of competent jurisdiction, *or a mother* of an illegitimate child, may petition the county court *wherein the child resides* for custody of the child.... [Acts 1981, No. 665, § 1, p. ___]. (Italics supplied.)

The fact that the legislature provided for venue in two counties in § 34-716, which governs suits brought by a father to determine paternity, but only one county in § 34-718, which is the sole statute fixing venue in suits for custody of illegitimate children, demonstrates that § 34-718 was intended to limit venue in custody actions to the county wherein the child resides. Consequently, as the trial court held, Cross County, not Woodruff County, is the proper venue for an action to determine custody of Jeremy, whether brought by the father, provided he has established paternity, or the mother, as here.

Affirmed.

Charles D. RAGLAND, Commissioner of Revenues, State of Arkansas *v.* QUALITY SCHOOL PLAN, INC.

82-295 651 S.W.2d 447

Supreme Court of Arkansas
Opinion delivered May 23, 1983
[Rehearing denied June 27, 1983.]

Kelly S. Jennings, for appellant.

Friday, Eldredge & Clark, by: *A. Wyckliff Nisbet, Jr.,* for appellee.

JOHN I. PURTLE, Justice. The Commissioner of Revenues for the State of Arkansas brings this appeal from a

decree of the Pulaski County Chancery Court wherein it was held that appellee did not owe the assessment for use tax. The commissioner contends the trial court erred in finding the appellee, hereinafter referred to as QSP, was not a "vendor" and did not make a "sale" within the meaning of the Arkansas Compensating Use Tax Act. We agree with the commissioner.

The facts are undisputed. The appellee, QSP, represented about 100 publishers of magazines. Appellee's agents went to various schools within the State of Arkansas and recruited students to sell magazines. There was always a sponsor who controlled the students and received the orders or subscriptions. Checks were made payable to the school and the school retained 40% of each order, forwarding the balance to a clearing house designated by appellee. All materials for soliciting and ordering were furnished by appellee. The audit period in question was July 1, 1975 through June 30, 1978. The amount collected for magazine subscriptions during the audit period was $733,415.10. A tax in the amount of $22,002.45 was assessed and a penalty of $2,981.69 was imposed against appellee. These sums were paid by appellee under protest. Suit for recovery was filed and on September 10, 1982, the chancellor held that a refund was due because there had been no "sale" by appellee within the meaning of Ark. Stat. Ann. § 84-3104 (f) (Repl. 1980) nor was QSP a "vendor" as defined by Ark. Stat. Ann. § 84-3104 (d). The court also held that magazine subscriptions were "tangible personal property" as defined in Ark. Stat. Ann. § 84-3104 (k).

We first consider whether appellee was a "vendor" within the meaning of the act. The first consideration is the statute [Ark. Stat. Ann. § 84-3104 (d)] which reads:

> The term "vendor" means and includes every person engaged in making sales of tangible personal property, by mail order, by advertising, by agent; or peddling tangible personal property, soliciting or taking orders for sales of same for storage, use or consumption in this State; and all salesmen, solicitors, hawkers, representatives, consignees, peddlers or canvassers as agents

> of the dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them. Irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, principals or employers, they must be so regarded as vendors, and the dealers, distributors, consignors, supervisors, principals or employers must be regarded as vendors for purposes of this Act.

This definition is quite inclusive. A sale cannot be made in Arkansas without someone being the vendor. However, appellee strongly insists that the students made the sales and the publishers accepted the money for the various magazines thereby eliminating the appellee as the vendor. It insists that the parties (students in this case) selling the tangible personal property are vendors or in the alternative the publishers are the vendors. Appellee contends it occupies the position of advisor or perhaps independent contractor, but denies it is a vendor within the meaning of Ark. Stat. Ann. § 84-3104 (d).

We do not find that we have previously construed this portion of this particular statute in reference to the situation before us. However, the Alabama Court of Appeals issued an opinion which seems to be on all fours with the one before us. *Quality School Plan, Inc.* v. *State of Alabama,* 53 Ala. App. 418, cert. den. 293 Ala. 771 (1974). The Alabama Use Tax Act was very similar to the Arkansas law. We find the Alabama case to be persuasive. There it was found that the students selling subscriptions were salesmen or agents. In the present case it was agreed to by the parties and subsequently held by the court, that magazine subscriptions were items of tangible personal property. Someone was the vendor and we think that of all the candidates the appellee best fits the statutory description of a vendor.

Next we consider the matter of a "sale" within the terms of the Arkansas Compensating Use Tax Act. We agree with appellant and appellee that there have been sales of items of tangible personal property, i.e., magazine subscriptions.

Since all agree that a sale within the meaning of the act has been made we must decide who made the sale. In order to have a better understanding of the problem it is necessary to cite Ark. Stat. Ann. § 84-3104 (f).

> The term "sale" means any transfer, barter or change of the title or ownership of tangible personal property; or the right to use, store or consume the same, for a consideration paid or to be paid, in installments or otherwise, and includes any transaction whether called leases, rentals, bailments, loans, conditional sales, or otherwise, and notwithstanding that the title or possession of such property, or both, is retained for security. For the purpose of this Act the place of delivery of tangible personal property to the purchaser, user, storer or consumer shall be deemed to be the place of sale, whether such delivery be by the vendor or by common carriers, private contractors, mails, express, agents, salesmen, solicitors, hawkers, representatives, consignees, peddlers, canvassers, or otherwise.

It is obvious that the foregoing definition includes almost any transfer of ownership to tangible personal property. Again we refer to *Quality School Plan, Inc.* v. *State of Alabama, supra.* In the Alabama case as well as the case before us, QSP had two employees in the state who would go to various schools and encourage the sale of magazine subscriptions. QSP furnished all promotional literature, order forms and reporting forms. Whatever instructions were furnished to the schools came from QSP and its employees. The Alabama court stated: "Under these facts the conclusion is inescapable that QSP sold magazine subscriptions through student salesmen." Considering the facts of the instant case we think our conclusion must be that the appellee, through its agents, made sales of tangible personal property within the State of Arkansas.

We agree with the finding of the chancellor that a magazine subscription is "tangible personal property" within the meaning of Ark. Stat. Ann. § 84-3104 (k). This appears to have been conceded by the appellee on the third page of its brief where it is stated: "It is unquestionable that

an item of personal property (i.e., a magazine) has been sold within the meaning of the Act. The parties do not disagree on this point." From the facts previously stated we are of the opnion that the chancellor was not erroneous in making this determination. A magazine is obviously tangible and the sale was made by the students when they collected the price of the subscription.

We agree with appellee that this court adheres to the principle that in applying a tax statute it must be construed most strongly against the taxing power. *Gaddy* v. *DLM, Inc.,* 271 Ark. 311, 609 S.W.2d 6 (1980). When we are construing an exemption we construe it most strongly against the party seeking to come within the exemption. *S. H. & J. Drilling Corp.* v. *Qualls,* 268 Ark. 71, 593 S.W.2d 178 (1980).

We think the weight of the evidence in this case supports the conclusion that the appellee is the vendor and that a sale of tangible personal property was made each time a student sold a subscription to a magazine. Therefore, the case will be reversed and remanded with directions to hold for the commissioner in levying and collecting this tax.

Reversed and remanded.

Mr. & Mrs. Milton HALFORD *v.* SOUTHERN CAPITAL CORPORATION and Walter E. HUTCHINSON, III

83-17 650 S.W.2d 580

Supreme Court of Arkansas
Opinion delivered May 23, 1983

Barron, Coleman & Barket, P.A., by: *Randy Coleman*, for appellants.

Mitchell, Williams, Selig, Jackson & Tucker, by: *W. Christopher Barrier*, for appellees.

JOHN I. PURTLE, Justice. The Pulaski County Chancery Court granted appellee a judgment against Mr. and Mrs. Milton Halford, appellants, in the total sum of $8,732.88. The judgment arose from a suit between these parties and others (not parties on appeal) involving debts of a defunct corporation whose note the parties had secured by a guaranty agreement. The chancellor included in the decree attorney's fees and interest at the rate provided for in the note of 15 3/4% until judgment and at the same rate after judgment until paid. On appeal the appellants argue the trial court erred in awarding prejudgment and postjudgment interest and in awarding attorney's fees to appellee.

Appellees and appellants, along with other parties not involved in this appeal, entered into an enterprise which eventually became insolvent. The corporation, Little Rock Auto Painters, Inc., owed many debts among which were debts owed to the parties to this action. In the beginning the corporation was formed for the purpose of painting automobiles. It was a corporation which had to borrow its initial capital and to do so the appellants and appellees, among others, guaranteed a note to a local bank. The place of business burned and the proceeds of the insurance policy were applied to the company's outstanding note to the bank, which was eventually reduced to $17,436.06. Interest on the note was 15 3/4% per annum. The bank called upon appellees, the only obligors with assets assigned to guarantee the note, to pay off the balance of the note. The note to the bank was paid off by appellees on February 13, 1980. The bank assigned the note to appellees, without recourse.

On April 9, 1980, suit was filed in Pulaski County Chancery Court by appellees against the appellants and other guarantors on the note which had an outstanding balance of $17,436.06, for, among other things, contribution of their proportionate share of the indebtedness to the bank. In the final analysis the trial court granted appellees judgment against each of the appellants individually in the amount of $2,906.01 plus interest and attorney's fees in the amount of $1,460.43. Each judgment would accrue interest at the rate of $1.25 per day until paid. From this judgment the appellants appeal.

We agree with the chancellor that the case of *Hazel* v. *Sharum,* 182 Ark. 557, 32 S.W.2d 315 (1930) correctly states the law in this case. Hazel and Sharum were officers of a bank and, along with others, executed a promissory note. Hazel and another co-maker subsequently paid about half the note. Sharum died and his heirs, at the urging of the bank (payee of the note) paid the balance of the note for which they took an assignment of the note from the bank. The heirs, as assignees of the note, brought suit in chancery court praying for recovery of the amount paid to retire the note. Judgment was awarded in favor of Sharum's heirs. The judgment was to accrue interest at the rate of 7% per annum.

Although the question before the court in *Hazel, supra,* was whether the claims were barred by the statute of limitations, the court reviewed the law on the subject of contribution by joint makers when one of them paid a promissory note upon which others were jointly liable. The *Hazel* case held that an obligation created by obligors jointly liable on a promissory note, one of whom subsequently paid the entire obligation, entitled the payor to contribution by the others on an implied obligation. The court stated:

> Here the appellees, having paid the whole amount of the debt for which all were jointly liable, were entitled to maintain an action for contribution against the other joint makers of the note, *not on the note,* but on the contract which the law implies, an obligation worked out by courts of equity in order to do exact justice between the parties. (Emphasis supplied)

The *Hazel* court went on to hold that no cause of action between those jointly liable arises until some of them pay the common debt whereupon a three year statute of limitations commences to run on the implied contract of contribution.

We think *Hazel* v. *Sharum, supra,* is factually very similar to the case before us. The complaint in the present case sought "contribution and their proportionate share of the original indebtedness to Commercial National Bank." The chancellor was correct in holding that appellants were liable for their individual proportionate share of the amount

paid by the appellee to extinguish the joint indebtedness on the note. However, it appears the appellees were awarded interest at 15 3/4% between the time of payment of the note by them (on February 13, 1980) until judgment was entered and at the same rate afterwards. This was error as the suit was not upon the note but upon an implied obligation which arose when the joint liability to the bank (on the note) was extinguished. The chancellor also erred in awarding attorney's fees to the appellees. The settled law in Arkansas is that attorney's fees shall not be allowed except as provided for by statute. *Brady* v. *Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981). The only statute which could conceivably come into play in the present situation is Ark. Stat. Ann. § 68-910 (Repl. 1979), which allows attorney's fees specifically incorporated into a promissory note. Since the present case involves contribution on the note and is not a suit to enforce the note itself, this statute is not applicable. Attorney's fees, therefore, will not be allowed.

The liability being upon an implied contract, the prejudgment interest will be 6% and interest after judgment 10%. *Lovell* v. *Marianna Federal S. & L. Ass'n.*, 267 Ark. 164, 589 S.W.2d 597 (1979). Constitution of Arkansas, Art. 19, sec. 13.

The case is remanded to the trial court for the purpose of correcting the judgments to comply with this opinion.

Remanded.

HAYS, J., not participating.

Roy Edward HALL *v.* STATE of Arkansas

CR 83-54 650 S.W.2d 587

Supreme Court of Arkansas
Opinion delivered May 23, 1983

William H. Craig, for appellant.

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

JOHN I. PURTLE, Justice. Appellant's motion to vacate sentence under A.R.Cr.P., Rule 37, alleging a denial of his right to a speedy trial and ineffective assistance of counsel was denied without a hearing by the court. On appeal the

appellant argues the court erred in failing to vacate the sentence or in the alternative that appellant is entitled to an evidentiary hearing. We agree that he was entitled to a hearing based upon the allegations of his motion.

The facts of the case establish that the Oak Forest Drug Store was robbed by an individual armed with a sawed off shotgun on December 16, 1980. About a week later, apparently on December 23, 1980, the appellant was picked up when a sawed off shotgun was found in his possession. Witnesses identified the appellant from a lineup and his fingerprints were identified on a piece of tape found at the scene. Apparently some type of arraignment or hearing was held on December 24, 1980 and the result was that appellant's parole was revoked. He was returned to the Arkansas Department of Corrections where he has been incarcerated since that date. On January 28, 1981, an information was filed charging appellant with the aggravated robbery of Oak Forest Drug Store. A bench warrant was delivered to the Pulaski County Sheriff's office. The warrant was dated by the Circuit Clerk on February 2, 1981 but was stamped received by the sheriff's office on January 3, 1981. In any event the warrant was not served upon the appellant until December 23, 1981, according to the return by the Pulaski County Sheriff's office.

Appellant was arraigned on January 21, 1982. At that time the information had been filed one year, lacking one week. On March 24, 1982, he withdrew his not guilty plea and entered a plea of guilty. The public defender's office represented appellant at the time of the entry of the guilty plea. Shortly after being returned to Cummins he filed the present motion which was denied without a hearing.

The allegations contained in the appellant's verified petition state he was confined in the facilities of the Arkansas Department of Correction from December 24, 1980 until he pled guilty on March 24, 1982. The information was clearly filed on January 28, 1981. If these allegations are true the appellant is entitled to be free unless there are excludable periods of time as provided by Rule 28.3. It is not entirely clear that the sheriff's office held the warrant for 11 months

before serving it. In any event the time commences to run, without notice to the defendant, from the date of the filing of the information, unless the defendant is already in custody on the same offense or an offense based upon the same conduct, in which case time is computed from the date of the arrest.

Rule 28.1 (b) provides that if a defendant is incarcerated in prison in this state he shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding authorized delays as allowed in Rule 28.3.

We agree that entry of a guilty plea waives the requirements of the speedy trial rule. A.R.Cr.P., Rule 30.2, *Clark* v. *State,* 274 Ark. 81, 621 S.W.2d 857 (1981). However, appellant alleged ineffective assistance of counsel. We have set forth the presumptions and proof required to determine whether counsel was ineffective in the case of *Blackmon* v. *State,* 274 Ark. 202, 632 S.W.2d 184 (1981). Our rules for a speedy trial are an effort to comply with the requirements of our state and federal constitutions and they are not to be considered as loopholes or havens for criminals. If our criminal justice system is to succeed, it must pull together as a team. Therefore, we remand this case to the trial court for the purpose of a hearing on the allegation of ineffective assistance of defense counsel at the time the guilty plea was entered.

Remanded.

Gary YENT *v.* STATE of Arkansas

650 S.W.2d 577

Supreme Court of Arkansas
Opinion delivered May 23, 1983

E. E. Maglothin, Jr., for appellant.

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

PER CURIAM. The appellant has filed a motion for a rule to require the Clerk to file a record that was tendered too late. The judgment of conviction was entered on March 8, 1982. Proceedings on a motion for new trial were not terminated until the motion was denied on September 1. The trial court, at the request of counsel, entered orders purporting to extend the time for filing the record to March 31, 1983, when it was tendered.

Under Appellate Procedure Rule 5 (b) and its predecessor, Act 555 of 1953, § 20, the trial court cannot extend the time for filing the record to a date more than 7 months after

the entry of the judgment, although this court may do so for compelling reasons, such as unavoidable casualty. *Pierce* v. *Pierce,* 238 Ark. 46, 377 S.W.2d 868 (1964); *Stebbins & Roberts* v. *Rogers,* 223 Ark. 809, 268 S.W.2d 871 (1954); *West* v. *Smith,* 224 Ark. 651, 278 S.W.2d 126 (1955). Here counsel made the mistake of obtaining extensions of time in the trial court, past the 7-month deadline, instead of filing a partial record and seeking an extension in this court.

It has been suggested that the 7-month limitation was superseded or extended by Act 123 of 1963 and its successor, Appellate Procedural Rule 4, which provide for extensions of time in connection with post-judgment motions, such as a motion for new trial. The extension, however, is *only* for the filing of the notice of appeal, not for lodging the record in the appellate court.

Unlike our Appellate Procedural Rule 4, Federal Appellate Procedural Rule 4 provides in its second paragraph that the running of the time for filing a notice of appeal is terminated as to all parties by a timely post-judgment motion and that "the full time for appeal . . . commences to run and is to be computed from the entry" of the order granting or denying the post-judgment motion. Our Civil Procedure Revision Committee, which drafted our present procedural rules, expressly rejected the plan embodied in the federal rule, stating in its Reporter's Note to our Appellate Procedural Rule 4:

> 2. Section (b) does not follow the second paragraph of Rule 4 of the Federal Rules of Appellate Procedure. It was believed that the federal rule permits excessive delay with respect to post-judgment motions that might be filed but not acted upon promptly. Consequently, Sections (b), (c) and (d) preserve the procedure that was prescribed by Act 123 of 1963.

It cannot be doubted that the federal rule does permit excessive delay, because the full time for the appellate process begins to run anew upon the filing of a post-judgment motion, and several such motions might be filed successively. The opportunities for intentional delay are

innumerable. By contrast, our Rule 4 provides a simple and readily understandable procedure, by which the trial court cannot extend the time for filing the record beyond seven months after the entry of the judgment. During the 20 years our procedure has been in force this is apparently the first instance in which post-judgment proceedings have consumed most of the seven months. Even so, counsel had a simple remedy in this court.

In accordance with our per curiam order of February 5, 1979, 265 Ark. 964, the motion for a rule on the Clerk will be granted only if counsel assumes full responsibility for the error or shows other good cause for the delay.

For the present, the motion is denied.

ADKISSON, C.J., concurs.

PURTLE, J., dissents.

RICHARD B. ADKISSON, Chief Justice, concurring. I concur in the majority's conclusion that the motion for rule on the clerk should be denied because the record was not filed in this court on appeal within seven months from the date the judgment was entered. However, I cannot agree with the precedent set by the majority which holds that Rule 36.22, A.R.Cr.P., and Rule 4, Rules of Appellate Procedure, do not extend the effective date of the judgment for purposes of appeal.

Rule 5, Rules of Appellate Procedure, provides that the trial court cannot extend the time for filing the record on appeal for more than seven months after entry of the judgment.

Rule 4 (a), Rules of Appellate Procedure, provides that notice of appeal shall be filed within 30 days from the entry of the judgment. However, under Rule 4 (c) the time for filing notice of appeal can be extended almost indefinitely when certain post-trial motions are pending.

In interpreting Rule 5, the majority has failed to take into account Rule 4 (c). Because of this today's decision

results in an anomaly. Rule 5 can now require that the record on appeal be filed in this court before Rule 4 (c) requires a notice of appeal to be filed in the trial court.

The following dates are significant to an understanding of the case:

March 8, 1982	Judgment of conviction was filed of record.
April 5, 1982	Motion for new trial was filed by appellant.
May 5, 1982	Motion for new trial denied per Rule 4 (c), Rules of Appellate Procedure.
September 1, 1982	Motion for new trial denied by court order.
September 28, 1982	Notice of appeal filed.
March 21, 1983	Appellant tendered record to supreme court clerk.

I would deny the motion for rule on the clerk because the record on appeal was not filed within seven months from the *effective* date of the judgment. My difference with the majority is the effective date of the judgment. The majority states that the effective date of the judgment is when it was first entered on March 8, 1982. I believe the effective date of the judgment is as extended by Rule 36.22, A.R.Cr.P., and Rule 4, Rules of Appellate Procedure. In this case the effective date of the judgment was 30 days after the motion for new trial was filed since there is no indication *in the record* that appellant requested the court to take the matter under advisement or to set a definite time for a hearing on the motion as is required by our decision in *Coking Coal, Inc., et al.* v. *Arkoma Coal Corp.*, 278 Ark. 446, 646 S.W.2d 12 (1983):

> Under Rule 4 (c) the party filing a motion for new trial must present the motion to the court within 30 days,

> and if the matter cannot be heard within the 30 days the movant must, within those 30 days, request the court to take the matter under advisement or to set a definite date for a hearing. If the court does neither, the motion is deemed to be denied at the expiration of 30 days after its filing . . . Under Rule 4 (d), if the motion is denied by the court or is deemed to have been disposed of, a party desiring to appeal has 10 days from the entry of the order or from the date of the presumed disposition of the motion to file notice of appeal. . . .

It should be noted that in criminal cases the time for filing a notice of appeal does not expire until 30 days after a motion for new trial is considered denied as compared to ten days for other cases as per Rule 4 (d). *See* Rule 36.22, A.R.Cr.P., which provides: "[T]he time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications [for a new trial]."

No consideration on appeal has been given to the affidavit filed by the appellant's attorney in support of his motion for rule on the clerk. This affidavit attempts to establish that the attorney requested the court to set a hearing on the motion for new trial within 30 days after its filing and that the trial court took this motion under advisement. By filing this affidavit appellant's attorney has attempted to fall within the rule set out by this court in *Coking Coal, Inc., supra.* However, the matter contained in the affidavit must be established by the record made in the trial court, not by an affidavit filed for the first time in this court.

JOHN I. PURTLE, Justice, dissenting. I would grant the motion for a rule on the clerk because I think it was timely tendered. ARAP, Rule 4 (c), gives petitioner the right to file this record when it speaks to the issue of motions being filed after entry of judgment. Rule 4 (c) states that time for appeal does not commence to run until all motions are disposed of by denial or by granting. In this case the trial judge clearly had the motion under consideration until September 1, 1982. I would, therefore, grant the rule on the clerk.

Thelma MARTIN et al *v.* FIRST SECURITY BANK, Personal Representative, et al

83-42 651 S.W.2d 70

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Hughes & Hughes, by: *Thomas M. Hughes, III,* for appellants.

Boyett, Morgan & Millar, P.A., by: *Mike Millar,* for appellees.

GEORGE ROSE SMITH, Justice. On August 21, 1981, Frances Quattlebaum went to the Citizens Bank in Beebe and bought two 182-day certificates of deposit, one payable to herself or Thelma Martin and the other to herself or Norma English. Neither certificate made any reference to survivorship, nor was there a delivery of either certificate to its alternative payee before Mrs. Quattlebaum's death on October 10, 1981. First Security Bank, as personal representative of her estate, brought this suit for a judgment declaring the estate to be entitled to the proceeds of the two certificates. The issuing bank interpleaded the money. The alternative payees claimed the funds, but the trial court

declared the estate to be entitled to payment of the certificates. Our jurisdiction is under Rule 29 (1) (c).

The trial court was right. Here the language of the certificates made no reference to survivorship. Even when there is such a reference, the statute requires that the purchaser of the certificate sign a writing stating her intention that the funds be paid to the alternative payee upon the purchaser's death. *Corning Bank* v. *Rice,* 278 Ark. 295, 645 S.W.2d 675 (1983); *McDonald* v. *Treat,* 268 Ark. 52, 593 S.W.2d 462 (1980); *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969).

Here Mrs. Quattlebaum signed nothing in the transactions except an acknowledgment of her receipt of a copy of a printed notice from the issuing bank, explaining that certain penalties would be imposed for early withdrawals of the money, with an exception in case of the purchaser's death. There was, however, no language of survivorship either in the certificate or in the printed notice, which merely referred to a withdrawal after the purchaser's death without indicating who would be entitled to make the withdrawal.

The appellants also rely on Act 843 of 1983, which provides in Section 1 (i) that terms such as "designate in writing" shall not be construed to require the depositor or purchaser to affix his signature to an instrument. That repeal of the earlier law, however, is not merely procedural and therefore retroactive, as the appellants argue. To the contrary, we have noted that a survivorship deposit is sometimes referred to as a "Poor Man's Will." *Lovell* v. *Marianna Fed. S. & L. Assn.,* 264 Ark. 99, 568 S.W.2d 38 (1978). The requirement that a written will be signed by the testator is not a procedural formality but a safeguard essential to the substantive validity of the instrument. The same considerations apply to the earlier requirement that the purchaser of a certificate of deposit designate his intention by a signed writing. The 1983 statute cannot apply to this case.

Affirmed.

Nancy R. SCHULTE et al v. BENTON SAVINGS AND LOAN ASSOCIATION

83-74 651 S.W.2d 71

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Charles Phillip Boyd, Jr. and *Eugene J. Mazzanti,* for appellants.

Greg B. Brown, for appellee.

FRANK HOLT, Justice. The issue in this case involves the enforceability of a "due on sale" clause in a mortgage where the mortgagee is a state chartered savings and loan association. The case is certified to us by the Court of Appeals pursuant to the Rules of the Supreme Court and Court of Appeals, Rule 29 (1) (c) and (4) (d).

In 1977, the appellant Ballard Construction Company executed a promissory note payable to the appellee and secured by a mortgage on commercial real property. Included in the mortgage contract was the following due on sale clause:

> (j) Acceleration. The maturity of the principal indebtedness secured hereby may be accelerated in any of the following events: . . . .

(7) If the mortgagor or assignee sells or conveys (or contracts to sell or convey) all or any part of the mortgaged property without the written consent of the holder of said note.

In 1981, appellant Ballard Construction Company sold the mortgaged real estate to the appellant Schulte without the written consent of the appellee. The appellee elected to accelerate the maturity of the indebtedness. The appellant Schulte refused the appellee's demand that she pay the full indebtedness within 30 days. However, she tendered into the registry of the court the regular monthly installments, which appellee refused to accept, pursuant to the terms of the promissory note. The appellee declared the note to be in default and brought this action to collect the full balance of the note plus attorneys' fees. The trial court granted summary judgment in favor of the appellee, holding that the appellants were liable to the appellee for the $82,285.58 balance including $2,500 as being a reasonable attorneys' fee for which the note provided. Hence this appeal.

Appellants argue that the default is based upon a technical provision in the mortgage absent any showing that the security is impaired by the prohibited sale. They cite *Tucker* v. *Pulaski Federal Savings & Loan,* 252 Ark. 849, 481 S.W.2d 725 (1972). There, we held that a due on sale clause, such as the one presented here, could not be enforced unless the mortgagee reasonably believed its security was impaired by the sale. See also, *Seay* v. *Davis,* 246 Ark. 201, 438 S.W.2d 479 (1969), supplemental opinion on rehearing, 246 Ark. 627, 438 S.W.2d 479 (1969); and *Rawhide Farms* v. *Darby,* 267 Ark. 776, 589 S.W.2d 210 (Ark. App. 1979). However, in 1976 the Federal Home Loan Bank Board issued a regulation, 12 C.F.R. § 545.8-3 (f) (1982), permitting federally chartered savings and loans to enforce due on sale clauses without a showing that the security is impaired by the sale. In *Independence Federal Savings & Loan Association* v. *Davis,* 278 Ark. 387, 646 S.W.2d 336 (1983), we held that the FHLB regulation pre-empted state law on this issue, citing *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta,* ___ U.S. ___, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982). Here the

appellee is a state chartered savings and loan association, not a federal savings and loan.

Our legislature enacted Act 242 in 1969 (Ark. Stat. Ann. § 67-1858 (4) and (5) [Repl. 1980]), the constitutionality of which is not questioned, which provides in pertinent part, with respect to the Board governing state chartered savings and loan associations:

> ADDITIONAL POWERS OF ASSOCIATIONS. — Irrespective of any limitations contained in this Act [§§ 67-1801 — 67-1862] the Board may adopt rules and regulations authorizing or empowering any association chartered or operating under the provisions of said Act 227 of 1963, as amended, to:
>
> . . . . .
>
> (4) Adopt any business practice, procedure, method or system authorized for a Federal Association doing business in this State; and
> (5) Make any loan or investment that a Federal Association doing business in this state is authorized to make; provided, in the absence of a general rule or regulation adopted by the Board the Supervisor may authorize an Association to make any loan or investment that a Federal Association doing business in this State is authorized to make.

The Emergency Clause provides:

> It has been found and determined that Federal Associations doing business in this State have and will have an unfair competitive advantage over associations chartered by this State and that it is imperative to immediately remove such unfair competitive advantage. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health, safety and welfare, shall take effect and be in force from the date of its passage and approval . . . .

The Savings and Loan Association Board promulgated in 1972 regulations which provide in pertinent part:

Rule III

> Pursuant to Act 242 of the General Assembly of the State of Arkansas for 1969 [Ark. Stat. Ann. § 67-1801 et seq.] the Savings and Loan Association Board hereby adopts the following regulation:
>
> (1) State Chartered Savings and Loan Associations after April 25, 1972, have the power to: . . .
> (c) Adopt any business practice, procedure, method or system authorized for a Federal Association doing business in this State;
> (d) Make any loan or investment that a Federal Association doing business in this State is authorized to make; provided, in the absence of a general rule or regulation adopted by the Board the Supervisor may authorize an Association to make any loan or investment that a Federal Association doing business in this State is authorized to make; and . . .
> (3) Provided, that it was the clear intent of the General Assembly of the State of Arkansas in adopting Act 242 of 1969 that Federal Savings and Loan Associations doing business in this State should not have an unfair competitive advantage over State chartered associations and in order to implement this intent during interim periods of the quarterly meetings of the Arkansas Savings and Loan Association Board in the event Federal associations are granted powers after April 25, 1972, in addition to those existing or before that date, State chartered savings and loan associations shall have the same powers, unless within a period of ninety (90) days after the effective date of said Federal authorization, the Board at a public hearing shall disallow such powers.

In addition, Rule III — A (1) (a) gives to state chartered savings and loan associations:

> (3) The power to offer any form of mortgage which now may be offered by federal savings and loan associations.

> (4) The power to offer any form of mortgage which may hereafter be authorized for federal savings and loan associations under any rule, regulation or law which may hereafter be adopted, unless within a period of thirty (30) days after the effective date of such authorization, the Arkansas Savings and Loan Association Board at a public hearing shall disallow such powers.

The recited statute and rules clearly place state savings and loan associations on the same footing as federally chartered associations doing business in this State. Since we held in *Independence Federal Savings & Loan Association* v. *Davis, supra,* that federally chartered associations may enforce due on sale clauses in cases without the requirement of showing the security is impaired, it follows that state associations are duly empowered to do the same.

The appellants attempt to avoid the clear import of § 67-1858 and the Arkansas Savings and Loan Association Board's rules by the argument that, since *Rawhide Farms* v. *Darby, supra,* was decided after the FHLB adopted the 1976 regulations, *Rawhide* requires a holding here that the FHLB rule is inapplicable to state institutions. Suffice it to say that the statute and rules relied upon here were not presented to the Court of Appeals in *Rawhide,* so *Rawhide* cannot be a precedent as to their interpretation and applicability.

Since we affirm the trial court on the legal issue that the rule that governs federally chartered associations in Arkansas has been made applicable to state chartered associations by § 67-1858 and the Arkansas Savings and Loan Association Board, we must affirm the summary judgment. There is no genuine issue as to any material fact and the appellee is entitled to judgment as a matter of law. ARCP, Rule 56 (c).

The appellants also argue that the trial court erred in granting attorneys' fees to the appellee. Ark. Stat. Ann. § 68-910 (Repl. 1979) states that a provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent [10%] of the amount of the principal due,

plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity. Here, the relevant portion of the promissory note provides as follows:

> If at any time there shall be default in the payment of any monthly installment aforesaid, or any part thereof for a period of thirty days, then thereafter the interest on the entire unpaid principal indebtedness aforesaid shall, at the election of the payee herein without notice be at the rate of ten per cent per annum until paid (in lieu of the rate first above specified). And it is agreed that failure to pay any one of said installments when due or any part thereof that all installments shall immediately come due and payable.
>
> If, after default, in the discretion of the holder thereof, it becomes necessary to place this note and obligation in the hands of an attorney for collection or institution of legal proceedings, the undersigned will be obligated to pay an additional sum as an attorney's fee in an amount equal to ten per cent of the unpaid principal, plus accrued interest, as provided by law.

It is a familiar rule of construction that the terms of a contract will be construed against the party drafting it, and when there is a doubt as to the meaning of some provision, the doubt is resolved against the party who prepared the contract. *Leslie* v. *Bell,* 73 Ark. 338, 84 S.W. 491 (1904); and *Allen-West Commission Co.* v. *People's Bank,* 74 Ark. 41, 84 S.W. 1041 (1905). Here, the quoted portion of the note, *supra,* appears to define "default" in terms of failure to pay a monthly installment when due and attorneys' fees are provided for only in case of "default". The note does not provide for attorneys' fees in an action to collect on the note in event of acceleration based on a due on sale clause. The appellant continued making the monthly payments by depositing them into the registry of the court. In the circumstances, we hold she was not in "default" within the meaning of the attorneys' fee provision of the note. Accordingly, the chancellor erred by awarding attorneys' fees, and to that extent his decree is modified.

Affirmed as modified.

Rachel D. FREEMAN *v.* George ANDERSON and ANDERSON'S EXXON

83-80 651 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered May 31, 1983
[Rehearing denied June 27, 1983.*]

*ADKISSON, C.J., and PURTLE, J., would grant rehearing.

Morgan E. Welch, for appellant.

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

FRANK HOLT, Justice. This case arises from an automobile accident in which the appellee George Anderson forced another vehicle across the center line and into the path of the appellant's oncoming vehicle. The appellee did not stop at the scene of the accident. In her pleadings the appellant requested, in addition to compensatory damages, punitive damages in the amount of $100,000, alleging the appellee's fleeing the scene showed a willful and wanton disregard for her welfare. At trial, the appellees stated that they would admit liability conditioned upon the court's ruling that punitive damages were not recoverable. The trial court ruled that punitive damages are not recoverable for incidents occurring after the collision that had no proximate causation and that references to the appellee's leaving the scene of the accident or the cause of the accident would be inadmissible. The jury returned a verdict of $500 for compensatory damages in favor of the appellant. Subsequently, the appellant moved for a new trial pursuant to ARCP Rule 59. The trial court denied the motion. Hence this appeal, which is certified to us by the Court of Appeals pursuant to Rules of the Supreme Court and Court of Appeals, Rule 29 (1) (o).

The appellant first asserts that the court erred in not granting a new trial inasmuch as the jury's verdict was inadequate and contrary to the preponderance of the evidence, the law and instructions submitted to the jury by the court. The medical bills, which were stipulated to be

reasonable, introduced by the appellant amounted to $490. In addition there were three estimates of the vehicular damage — one for $150, one for $479.61, and one for $731.23. Even though the appellees stipulated that the medical bills were reasonable charges for the services rendered, they denied that the medical expenses incurred by the appellant were proximately caused by the accident in question. The appellant did not seek medical attention until almost eight months after the accident, which her treating physician stated was unusual if her back troubles were caused by the accident. Furthermore, the physician also testified that the back ailment for which appellant sought treatment had existed prior to the accident. He had treated her two to three years before the accident. Hence, the jury could have found and apparently did find that the medical expenses incurred by the appellant were not proximately caused by the accident in question. In addition to the medical expenses and the vehicular damage, the appellant sought recovery for pain and suffering, which obviously was not proven in a precise amount. It appears that the jury awarded the appellant recovery based on one of the two smaller estimates of vehicular damage plus a small amount for pain and suffering. In *Taylor* v. *Boswell,* 272 Ark. 354, 614 S.W.2d 505 (1981), we said:

> Civil Procedure Rule 59 has superseded our former statute with respect to new trials on account of the smallness of the verdict. Ark. Stat. Ann. § 27-1902 (Repl. 1962). Rule 59 merely provides that a new trial may be granted for 'error in the assessment of the amount of recovery, whether too large or too small.' Our former rule was that when the verdict was for a substantial amount, as this one is, the trial judge's denial of a new trial for inadequacy of the award would not be reversed unless there was other error or the evidence definitely established a pecuniary loss in excess of the verdict. *Bittle* v. *Smith,* 254 Ark. 123, 491 S.W.2d 815 (1973). We need not determine to just what extent our law has been changed by Rule 59, because the appellant would not be entitled to a reversal even under the superseded statute and the former case law.

To the same effect see *Waterfield* v. *Quimby,* 277 Ark. 472, 644 S.W.2d 241 (1982). Here, we cannot say there was error in the jury's assessment of the amount of recovery, nor can we say the award of damages was nominal.

The appellant next contends that the court erred in allowing Officer Steven Young, at the appellees' request, to return to the stand and testify after his release from the witness rule and in the interruption of appellant's order of proof. Young was the investigating officer at the accident and he was called to testify by the appellant. On direct examination he testified that he assigned $150 as estimated damages to the appellant's vehicle. After testifying, Young contacted the appellees and appellees' attorney to inform them that he had considerable qualifications in the area of automobile body repair and that he was disturbed that no one asked his qualifications when he gave his estimate of the damage to appellant's vehicle. He denied having talked with anyone else concerning the lawsuit following his testimony. During cross-examination of the appellant, the appellees moved the court to allow Young to return to the stand to tell the jury of his qualifications, which was allowed. The appellant argues the court's action in this regard was an abuse of the discretion which is granted the court in regulating the mode and order of interrogation and presentation of proof by Ark. Stat. Ann. § 28-1001, Rule 611 (Repl. 1979) and Ark. Stat. Ann. § 28-103 (Repl. 1979). Rule 611 (a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

This is an area in which the law necessarily vests considerable discretion in the trial court. *Parnell* v. *State,* 207 Ark. 644, 182 S.W.2d 206 (1944); *Smith* v. *State,* 222 Ark. 650, 262 S.W.2d 272 (1953); *Parker* v. *State,* 252 Ark. 1242, 482 S.W.2d 822 (1972); 6 Wigmore, Evidence § 1867 (Chadbourn

Rev. 1976); and 2 Louisell and Mueller, Federal Evidence § 334 (1979). We find no abuse of discretion here.

Finally, appellant insists that the trial court erred in excluding evidence that the defendant fled the scene of the accident. She argues that this evidence was relevant to show a willful and wanton state of mind on his part and, therefore, would justify an award of punitive damages. The appellant cites authority for the admission of evidence of hostile actions subsequent to the injury to prove malice at the time of the injury, as well as authority for the admission of evidence that the defendant refused to assist the injured plaintiff after an accident and induced others to refuse to assist him. *Pogue* v. *Rosegrant,* 98 S.W.2d 528 (Mo. 1936). Here, the appellant's proffer of the excluded testimony contained nothing tending to show any of these elements on the part of the appellee. The proffered testimony merely stated that appellees' truck changed lanes and caused another vehicle going the same direction, to the left rear, to swerve across the center line into the path of appellant's vehicle, after which the appellee did not stop.

In order to support an award of punitive damages, the evidence must indicate the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice might be inferred. Negligence alone, however gross, is not a sufficient basis to justify the award of punitive damages. *Dalrymple* v. *Fields,* 276 Ark. 185, 633 S.W.2d 362 (1982); *Hodges* v. *Smith,* 175 Ark. 101, 298 S.W. 1023 (1927). In *St. Louis, I. M. & S. Ry. Co.* v. *Dysart,* 89 Ark. 261, 116 S.W. 224 (1919), we defined the prerequisites to an award of punitive damages as follows:

> The terms 'wilfulness, or conscious indifference to consequences from which malice may be inferred,' as used in the decisions of this court, means such conduct in the face of discovered peril. In other words, in order to superadd this element of damages by way of punishment, *it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the conse-*

> *quences,* from which malice may be inferred. (Italics supplied.)

According to AMI 2217, before a jury can impose punitive damages the evidence must show that the defendant "knew or ought to have known, in the light of surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct [with malice or] in reckless disregard of the consequences from which malice may be inferred." Here, nothing in the proffered testimony indicated that the appellee knew or had reason to believe that his conduct would likely cause injury. There was nothing that would indicate "*conscious* indifference."

In *Schlosberg* v. *Doup,* 187 Ark. 931, 63 S.W.2d 337 (1933), we held that the failure of a driver to comply with the law requiring him to give his name, license number, etc. and render assistance to the operator or persons injured in the other car had no bearing on the cause of the collision, and, therefore, the trial court properly refused to give an instruction on that matter. The Supreme Court of Mississippi, in a fact situation somewhat similar to the case at bar, held that the fact that the driver causing an accident drove away from the scene does not require an instruction on punitive damages. *Continental Southern Lines, Inc.* v. *Lum,* 254 Miss. 655, 182 So.2d 228 (1966).

We hold, under the facts of this case, that the court correctly refused to admit evidence that the appellee left the scene of the accident as a basis for an award of punitive damages.

Affirmed.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. The trial court erred in excluding evidence that appellant fled the scene of the accident. This is a relevant fact regarding the accident which the jury should have been allowed to consider in assessing fault and fixing damages. People who

flee the scene of an accident they have caused usually have a good reason for doing so. Under the majority opinion, a tortfeasor may be able to suppress pertinent facts regarding his condition by simply fleeing the scene.

PURTLE, J., joins in this dissent.

DARRELL HICKMAN, Justice, dissenting. I dissent because I think the trial court abused its discretion in allowing the police officer to come back into court and testify for the appellees. Ark. Stat. Ann. § 28-1001, Rule 615 (Repl. 1979), makes the exclusion of witnesses mandatory and if that rule is to mean anything, it should not be easily avoided as it was in this case to the prejudice of the appellant.

PURTLE, J., joins in this dissent.

Joyce T. FERGUSON et al *v.* Jake BRICK et al

82-288 652 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 31, 1983
[Rehearing denied July 5, 1983.]

McHenry, Skipper & Barns, by: *Merl O. Barns,* for appellants.

John Walker and *Samuel Turner, Jr.,* for appellees.

DARRELL HICKMAN, Justice. This is a case about an election but it is not a suit to void an election because of irregularities. It is a suit after an election by a losing candidate seeking to declare an election statute void and thereby attempting to prevent the winner from serving.

The statute was declared unconstitutional by the circuit court but no relief was granted, the trial court finding essentially that the suit was brought too late. We agree and affirm the judgment.

In issue is the mayoral election of West Memphis, a first class city located in Crittenden County. It was held November 2, 1982, and there were six candidates. A total of 7,636 votes were cast. Leo Chitman received the most votes, 2,130, and Joyce Ferguson, the incumbent mayor, was next with 2,069 votes. No candidate received a majority of the votes cast. The election commission did not intend to, and did not, schedule a run-off election between Chitman and Ferguson. Chitman was certified the winner on November 8th.

The reason no run-off was scheduled is because the General Assembly passed Act 175 of 1977 declaring that run-offs in elections for mayors of cities of the first class having mayor/council form of government would only apply to cities having a population between 57,000 and 61,000 population. This Act amended the existing law which provided that in all first class cities with mayor/council form of government a run-off election must be held

two weeks from the day of the election if no candidate receives a majority of votes.

Another suit challenging Act 175 was filed two days after the election and Ferguson could have joined in that suit. She knew of the suit but counsel suggests she declined to join after being told she was not a necessary party. The trial judge, after offering a continuance in order to permit her joinder, dismissed the suit since she was not a party.

This suit was filed late on the day a run-off election would have been held under the old law, after Chitman had been certified. Ultimately the plaintiffs were Ferguson, an eighteen-year-old voter, another candidate in the race, and his wife. They appealed from the trial court's adverse ruling and argue since Act 175 is unconstitutional, Chitman cannot be qualified for the mayor's office; therefore, Ferguson, the incumbent mayor, still holds office under the theory announced in *Justice* v. *Campbell,* 241 Ark. 802, 410 S.W.2d 601 (1967).

We agree with the trial court's decision that Act 175 is local legislation in violation of ARK. CONST., amend. XIV. Act 175 is flagrantly local, intended to only apply to two out of numerous first class cities. *Knoop* v. *City of Little Rock,* 277 Ark. 13, 638 S.W.2d 670 (1982). And we agree Ferguson waited too late. We do not favor suits after elections by candidates seeking to void an election they would not contest if they had won. We have said many times that some matters that are mandatory before an election are merely directory after an election. *Henley* v. *Goggin,* 241 Ark. 348, 407 S.W.2d 732 (1966); *Henderson* v. *Gladish,* 198 Ark. 217, 128 S.W.2d 257 (1939); Cf. *Gay* v. *Booker,* 251 Ark. 565, 473 S.W.2d 441 (1971). Sometimes the public interest demands the contest cease. In *Johnson* v. *Darnell,* 220 Ark. 625, 249 S.W.2d 5 (1952), we held that an official was estopped to challenge the constitutionality of a statute under which he claimed benefits. In *Searcy County* v. *Stephenson,* 244 Ark. 54, 424 S.W.2d 369 (1968), we held that a candidate was estopped after an election from seeking to recover an illegal filing fee because he could have easily challenged the fee before the election. Ferguson, or any of the other

candidates, could have challenged this Act before the election.

In fact, Ferguson was elected two years before under the same Act. Since she received about 70% of the vote in that election, she did not complain about the law. But that merely reinforces the point that a candidate ought to challenge such an act before the votes are counted.

Affirmed.

THE MILLERS CASUALTY INSURANCE COMPANY OF TEXAS *v.* James M. FAURIA

83-22 651 S.W.2d 80

Supreme Court of Arkansas
Opinion delivered May 31, 1983
[Rehearing denied June 27, 1983.]

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

James R. Pate, for respondent.

DARRELL HICKMAN, Justice. We granted review of a Court of Appeals decision in this case to determine whether the court exceeded its jurisdiction in changing the liability

of a party that did not appeal from the trial court's decision. We decide the Court of Appeals did exceed its authority and affirm the trial court's decision.

On August 25, 1976, Fauria, the appellee, then twenty-three years old, went to Caudle-Brittenum-Standridge Agency seeking automobile insurance in the amount of $100,000 per person and $300,000 per occurrence. The agency issued him a binder in that amount with the appellant, the Millers Casualty Insurance Company, to be effective until September 13, 1976.

On August 31, 1976, Millers contacted the agency employee with whom Fauria had dealt, Carolyn Huffman. Millers informed Mrs. Huffman that it could not provide coverage for Fauria with the limits requested because of his age. Mrs. Huffman contacted Fauria; he went to the agency on August 31st and signed an application for coverage with Equity Mutual Insurance Company. The application was for coverage in the amount of $100,000/$300,000, and, according to the evidence, was considered to be a binder until the application was accepted or rejected by Equity. On September 1, 1976, Mrs. Huffman got a memo from Millers confirming the prior telephone call that Fauria would only be covered by Millers' binder until September 13th.

Fauria's application to Equity was sent to Equity's general agent, Lewis & Norwood. Mrs. Huffman had failed to check Equity's manual when preparing Fauria's application and, therefore, did not see that Equity's underwriting standards absolutely prohibit coverage for drivers under twenty-five years of age in excess of $25,000 per person and $50,000 per occurrence. Lewis & Norwood crossed out the higher limits on the application, filled in the maximum amount Equity allowed, $25,000/$50,000, and sent the application back to Mrs. Huffman on August 31st or September 1, 1976. The application was accompanied by a memo which explained the changes on the application. Mrs. Huffman returned the memo to Lewis & Norwood on September 2nd with the notation that the lower limits were acceptable. She tried unsuccessfully to contact Fauria to tell him about the change.

On September 6, 1976, Fauria was involved in an automobile accident with Carmat and Juanita Crites, in which Mrs. Crites was injured. Fauria called Mrs. Huffman and she informed him that his limits had been lowered. On September 19, 1976, the Criteses filed suit against Fauria for $300,000. Fauria subsequently filed this action for a declaratory judgment in chancery court seeking a determination of the amount of his automobile liability insurance coverage and the responsibility of the defendants for that coverage. The named defendants were Caudle-Brittenum-Standridge Agency, Millers, Lewis & Norwood, and Equity.

The chancellor found that at the time of the accident Fauria was covered by binders with both Millers and Equity in the amounts of $100,000/$300,000. He found further that Caudle-Brittenum-Standridge Agency was liable to Equity for any amount in excess of $25,000 which Equity might be found to owe. Lewis & Norwood was exonerated.

All the defendants filed notices of appeal with the Court of Appeals, but Equity and Caudle-Brittenum-Standridge Agency later dismissed their appeals and only Millers perfected an appeal. The Court of Appeals, in an unpublished opinion, affirmed the chancellor in all respects but one. It ruled that the chancellor's finding that Equity's coverage was for $100,000/$300,000 was clearly against the preponderance of the evidence and, therefore, modified Equity's liability to $25,000/$50,000. The Court of Appeals was without jurisdiction to modify the judgment against Equity because the judgment against Equity had become final when Equity failed to appeal. *A. S. Barboro Co.* v. *James,* 205 Ark. 53, 168 S.W.2d 202 (1943). *See also Burks Motors, Inc.* v. *International Harvester Co.,* 250 Ark. 641, 466 S.W.2d 945 (1971). In other respects we affirm the Court of Appeals decision, finding no reason to disturb the trial court's disposition of the issues raised by Millers on appeal.

Affirmed in part.

Reversed in part.

Stacy KECK & Mike KECK *v.* AMERICAN EMPLOYMENT AGENCY, INC.

83-75 652 S.W.2d 2

Supreme Court of Arkansas
Opinion delivered May 31, 1983

[redacted]

McMath Law Firm, P.A., for appellants.

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

DARRELL HICKMAN, Justice. Mrs. Keck, the appellant, sued the American Employment Agency, the appellee, for damages alleging that the agency was negligent in directing her to a prospective employer who abducted and raped her. At the conclusion of the appellants' case, the trial court directed a verdict in favor of the agency, finding no substantial evidence to support the claim of negligence. We reverse and remand.

Stacy Keck, the appellant, sought employment through the American Employment Agency, agreed to pay a fee, and was referred to Gregory Devon Joiner for employment. Joiner, pretending to be an employer who was going to open a motorcycle repair shop, hired Mrs. Keck on Friday, July 13, 1979. She was to go to work Monday, but Joiner called and asked her to come to his office near 65th Street in Little Rock, on Saturday, July 14. There was nothing in the room except a telephone, ashtray, and a television set. She was hired to do routine office work, but was asked that day to sand a board to be used for a sign. Joiner cut a rope in pieces, telling her the rope would be used to spell out the name of the business. Instead he tied her up with the rope and forced her to

perform oral sex on him after he had tried to have intercourse with her. He took her to a nearby wooded area, ostensibly to wait for a friend, and then forced her to walk over twently miles along a railroad track to Benton, Arkansas. They arrived in Benton Sunday morning, having walked most of the night. He held her in a motel room and raped her again, twice. He released her Thursday. Joiner was convicted of rape and sentenced to imprisonment.

Stacy and her husband, Mike Keck, sued the employment agency for damages, alleging that the agency was negligent in three ways: Failure to investigate the background of Joiner, failing to ascertain whether Joiner was involved in a legitimate business activity, and failure to warn Mrs. Keck that no background check had been completed on Joiner before offering him as an employer. The trial court found no substantial evidence of negligence.

We review the trial court's direction of a verdict for the agency by examining the evidence in a light most favorable to the losing party. *Lindsey* v. *Watts,* 273 Ark. 478, 621 S.W.2d 679 (1981); *Miller* v. *Tipton,* 272 Ark. 1, 611 S.W.2d 764 (1981). The evidence must be given all reasonable inferences and conclusions that would work in favor of the losing parties, the Kecks in this case. *Dan Cowling and Associates, Inc.* v. *Board of Education of Clinton School District #1,* 273 Ark. 214, 618 S.W.2d 158 (1981). Generally if there is any conflict in the evidence, or we find the evidence is not in dispute, but is in such a state that fair minded people might have different conclusions, then a jury question is presented, and a directed verdict will be overturned. *Moore Ford Co.* v. *Smith,* 270 Ark. 340, 604 S.W.2d 943 (1980).

The questions presented are fundamental ones in the law of negligence: What duty, if any, did the employment agency owe to Stacy Keck; was that duty breached; could the agency have reasonably foreseen such a breach would cause the injury that Mrs. Keck suffered; and, did the negligent act cause or was it a substantial factor in the cause of the injury? There is the additional question of whether the actions of Joiner were an intervening cause; i.e., was the agency bound

to protect Mrs. Keck against such actions, and could it have foreseen the violence inflicted?

The question of what duty is owed is always a question of law and never one for the jury. W. PROSSER, LAW OF TORTS, § 45; *Keller* v. *White,* 173 Ark. 885, 293 S.W. 1017 (1927): *Missouri Pacific Railroad Co.* v. *Harelson,* 238 Ark. 452, 382 S.W.2d 900 (1964). The questions of foreseeability and causation may be ones of fact, depending on the case. W. PROSSER, *supra; See Larson Machine, Inc.* v. *Wallace,* 268 Ark. 192, 600 S.W.2d 1 (1980); *See Brinkley Car Works & Manufacturing Co.* v. *Cooper,* 60 Ark. 545, 31 S.W. 154 (1895). Usually, however, proximate causation is a question for the jury. *Larson Machine, Inc.* v. *Wallace, supra.* The trial court ruled that there was no substantial evidence of negligence and that ruling requires us to answer all the questions we have posed. There is no doubt that the agency owed Mrs. Keck some duty; indeed, it is conceded that the agency was under a duty to exercise ordinary care in its relationship with Mrs. Keck. But the appellee was able to convince the trial court, and argues on appeal, that its duty was satisfied when it took an application blank from Joiner, and when he, in fact, said he was an employer. We disagree with that assessment for several reasons, but mainly on the facts in this particular case.

First, there is an Arkansas statute that requires that employment agencies must have a "bona fide job order" before they refer any person for a job interview. Ark. Stat. Ann. § 81-1023. While this statute may have been enacted to protect the public from fraudulent practices, it states at least the duty every employment agency has regarding its customers. And the facts in this case certainly raise a question of whether the agency used ordinary care in accepting this application by Joiner as "bona fide," and whether the agency should have delved further into his background, or warned Mrs. Keck it was not verifying Joiner in any way because Mrs. Keck had a right to be naive in some respects and accept at face value an "employer" recommended to her.

Joiner merely called the agency and an order was filled out. The job counselor, Mrs. Jones, who was acquainted

with Mrs. Keck, called her on Friday and asked her to come right in. Mrs. Keck asked if she could come in Monday, and was told "No, he's got to have somebody today," and "He's willing to pay half the fee." The fee was $300.00 in this case. Mrs. Keck said the counselor was enthusiastic about the job possibility, thinking that Mrs. Keck would like the job. Joiner was called and asked to come in that same time, and when he showed up his appearance, according to Mrs. Jones, was "bad." Mrs. Keck said Mrs. Crowell, another counselor, told her that she was shocked at the way Joiner was dressed. He had on blue jeans and a T-shirt with the word "bullshirt" on it, had long hair and a beard, and was evidently unkempt. Mrs. Jones testified that he looked "bad" and that she and Mrs. Crowell told Mrs. Keck, "Hey, don't rush into this. Go home and think it over." Mrs. Jones said, "We [she and Mrs. Crowell] encouraged her, wait, go over there Monday, think it over the weekend." This is entirely inconsistent with Mrs. Keck's statement that she was encouraged to take the job and received no warning or advice whatsoever for caution.

The employment agency made no check at all on Joiner, and insists it owed no duty to do so. No references of any kind were asked for. If it had it would have learned Joiner did not have an office or repair shop when he called; he later rented an office Friday, one hour after he had talked to Mrs. Keck, in a one-story building containing a row of several offices, which was just a room, certainly not suitable for a motorcycle repair shop. A check could have shown that Joiner was living in what was described by an investigating officer as a "flop house;" a dirty run down house where Joiner lived with four others. In summary, the agency did nothing except produce Joiner and accepted at face value his claim of being an "employer." It insists that was the extent of its duty.

If the agency could not have foreseen any risk in referring Mrs. Keck to Joiner, it was not negligent because negligence cannot be predicated on a failure to anticipate the unforeseen. As Prosser puts the question:

[It] is one of negligence and the extent of obligation:

> whether the defendant's responsibility extends to such interventions, which are foreign to the risk he has created. It is best stated as a problem of duty to protect the plaintiff [Mrs. Keck] against such an intervening cause. A decision that the defendant's [agency] conduct is not the 'proximate cause' of the result means only that he has not been negligent at all, or that his negligence, if any, does not cover such a risk. The element of shifting responsibility frequently enters. PROSSER, *supra* § 44.

Under the circumstances we cannot say as a matter of law the agency fulfilled its duty. An agency exercising ordinary care would have been put on notice something was suspicious about Joiner and his search for an immediate female employee. Indeed, Mrs. Jones' testimony supports this, when she says she cautioned Mrs. Keck to think it over and not go over until Monday. And twice she said that she was concerned about Mrs. Keck because of Joiner's appearance. Mrs. Jones testified that she had Joiner wait in Mrs. Crowell's office, rather than the reception area, because of his appearance. In fact she admitted that she had hidden Joiner in Mrs. Crowell's office.

One is ordinarily not liable for the acts of another unless a special relationship exists between the two such as master/servant or parent/child. *H. L. Wilson Lumber Co.* v. *Koen,* 202 Ark. 576, 151 S.W.2d 681 (1941); *Watts* v. *Safeway Cab & Storage Co.,* 193 Ark. 413, 100 S.W.2d 965 (1937); *See St. Louis & San Francisco Railroad Co.* v. *McFall,* 75 Ark. 30, 86 S.W. 824 (1905).

We believe that a cause of action for negligence against the employment agency was properly stated and was based on the agency's duty of care which arose out of its contractual relationship with Stacy Keck, its ability to foresee some danger to her, and because it had some degree of control over the employers it made available. This control could have been exercised by making further checks on Joiner. *See Duarte* v. *State,* 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978). The employment agency created its relationship with Mrs. Keck by offering its services and

thereby put itself in the position of owing a duty to her; and that duty in this case went beyond merely producing a man who claimed to be an employer.

The Restatement of Torts recognizes by two rules that simply because a third person commits a crime, that does not always exonerate one who created the situation which allowed the crime to occur. RESTATEMENT (SECOND) OF TORTS § 448 reads:

> Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence.
>
> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.* (Emphasis added.)

RESTATEMENT (SECOND) OF TORTS § 449 reads:

> Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent.
>
> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Specifically, where a victim of a rape can show that a defendant who owed some duty to the victim, breached that duty, and could foresee that the breach might result in injury to the victim, and that breach was a significant factor in a rape, then a jury question of negligence exists. In other words, such cases should not be automatically dismissed. In

O'Hara v. *Western Seven Trees Corp. Intercoast,* 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977), a woman was raped in her apartment and she sued the landlord and rental agent for failing to take reasonable steps to protect her. The trial court sustained the defendant's demurrer and dismissed the action. On appeal, the case was reversed holding that the plaintiff had a cause of action. *See* also *Holley* v. *Mt. Zion Terrace Apts.,* 382 So.2d 98 (Fla. App. 1980).

In *Butler* v. *Acme Markets, Inc.,* 177 N.J. Super. 279, 426 A.2d 521 (1981), *aff'd* 89 N.J. 270, 445 A.2d 1141 (1982), a woman who was assaulted in a supermarket parking lot, sued the store, and received a jury verdict, but the trial judge granted the defendant's motion for a judgment notwithstanding the verdict. On appeal, the judge's action was reversed, the court finding that liability for criminal attacks may be imposed where the harm is foreseeable and a reasonable person would have taken precautions against it.

In *Duarte* v. *State, supra,* a student was raped in a university residence hall and sued the university. The university's demurrer was sustained. On appeal the court reversed, holding that a cause of action was stated based on the duty of the university to anticipate the danger.

Of course, the Restatement of Torts and the cases cited do not demand a finding that the agency's action in this case was negligence which was a significant cause of the rape. But what those authorities do indicate is that such situations can state a cause of action and may present a question for the jury.

A jury question is presented . . . "In any case where there might be reasonable difference of opinions as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with regard to it, or the normal character of an intervening cause. W. PROSSER, *supra,* p. 290. This description fits exactly the facts in this case.

We are convinced that reasonable minds could disagree about whether the agency in this case should have acted differently, and whether it might have foreseen some pos-

sible injury to Mrs. Keck from this unkempt person who said he was an employer. We cannot say, as a matter of law, that reasonable minds could not find that the agency personnel could have foreseen some harm would result to her. Certainly the agency owed Mrs. Keck some duty to either check on Joiner further, warn her that no check had been made, or reject him as an employer. This is borne out by testimony by employees of the agency. Mrs. Jones claims she told Mrs. Keck she had better check the location and everything out. This is clearly an attempt by the agency to shift the burden it owed to Mrs. Keck.

Nor can we say, as a matter of law, that the agency's possible negligence was not a substantial factor in causing Mrs. Keck's injuries. We live in a time of locked doors, and other precautions that must be taken against the threat of rape. Rape is an all too common occurrence.

Whether Mrs. Keck was negligent was, of course, a jury question as well. *St. Louis-Southwestern Railway Co.* v. *Pennington,* 261 Ark. 650, 553 S.W.2d 436 (1961).

The appellant offered a deposition of an employee of another employment agency that Joiner applied to and they refused to list him as an employer because he sounded "fishy."

It is unclear why the deposition of the other agency was excluded. The briefs state that it was because of relevancy but they fail to abstract the portions of the record where such a ruling was made. The record reflects that after an argument pertaining to whether the deposition was admissible due to Mrs. Beane's unavailability, the court ruled that it was admissible. Mrs. Keck had introduced evidence that she had subpoenaed Mrs. Beane before trial. Then the employment agency made a relevancy objection and the court said that he would have to read the deposition. The briefs indicate that no further mention is made of the deposition until prior to the trial judge's ruling that there was no substantial evidence of negligence, when the judge said, "Let's go ahead and proffer the deposition and have it marked for evidence."

We infer from that, as the briefs contend, that the trial court excluded the deposition because of relevance. Whether the deposition is admissible is dependent on Ark. Stat. Ann. § 28-1001, Rules 401 and 403 (Repl. 1979). We find that the testimony in the deposition is relevant evidence in that it is evidence of what another employment agency did in a like situation. Before admitting the deposition, however, the trial judge should caution the jury that it should consider the testimony only as evidence of what may be reasonable conduct and not as evidence of the legal standard of conduct. *See* 2 Wigmore, EVIDENCE § 261 (3d ed. 1940). Initially, of course, the court must determine the admissibility of the deposition under Ark. Stat. Ann. § 28-348 (d) (Repl. 19079).

Reversed and remanded.

A. Y. McDONALD MANUFACTURING COMPANY
v. Earnest SHACKELFORD

83-95 652 S.W.2d 8

Supreme Court of Arkansas
Opinion delivered May 31, 1983
[Rehearing denied July 5, 1983.]

Smith & Smith, by: *Raymond C. Smith,* for appellant.

Matthew T. Horan; and *Putman, Gallman & Dickson,* by: *E. E. Maglothin,* for appellee.

DARRELL HICKMAN, Justice. The question is whether it is usury, in violation of the Arkansas Constitution, for a creditor to charge a monthly rate of interest on an open account which exceeds 10% per annum on a monthly basis but would not exceed 10% if figured on an annual basis. The trial court held that it was usury and we affirm the judgment.

McDonald Manufacturing is a Missouri firm that sold goods to Shackelford, an Arkansas plumbing and heating contractor. McDonald sold the goods on an open account and this transaction began in 1978. In 1979, when the account became delinquent, McDonald began adding a "penalty" to each monthly bill and did this for four months. In July the overdue amount was $7,889.02 and the extra charge was $118.34; in August a $171.89 penalty was added to the overdue amount of $11,459.24; in September the amount due was $14,725.34 and the penalty was $220.80; in October, the last time a penalty was charged to Shackelford, the penalty was $330.73 on a principal amount of $13,229.11. Those charges amounted to 1.5% or 18% per year from July through September. In October the charge amounted to interest of 30% per annum.

McDonald filed suit and Shackelford defended on the basis of usury, which, if proved, would void the debt both as to principal and interest. ARK. CONST., art. 19 § 13.

The trial court heard the case sitting as a jury and the facts are essentially undisputed. Beginning in October of

1979, McDonald's monthly bill to its customers, noted at the bottom: "Past due invoices subject to 1-1/2% (ANNUAL RATE of 18%) service charge per month." No penalty charges were made until the account had been delinquent for some time. Then, according to McDonald's credit manager, a penalty was added to encourage Shackelford to pay the account. The credit manager said he was especially aware of Arkansas's severe penalty for usury and therefore manually calculated the charge so it would not exceed 10% per annum. But, no doubt, this employee was figuring on an annual basis what the interest would be but the charge was made on a monthly basis.

First, we agree with the trial court's conclusion the penalty was interest, and that is not seriously disputed. *See Arkansas Savings & Loan Assn.* v. *Mack Trucks of Arkansas,* 263 Ark. 264, 566 S.W.2d 128 (1978); *Bunn* v. *Weyerhauser,* 268 Ark. 445, 598 S.W.2d 54 (1980).

In *Brooks* v. *Burgess,* 228 Ark. 150, 306 S.W.2d 104 (1957), we held the debtor need not agree to a usurious rate of interest in order for the charge to be void; it is enough that the rate is charged. In *Cagle* v. *Boyle Mortgage Co.,* 261 Ark. 437, 549 S.W.2d 474 (1974), we held that it is not necessary for the interest to have been actually collected to violate the constitution because the violation is in the charge. *Superior Improvement Co.* v. *Mastic Corp.,* 270 Ark. 471, 604 S.W.2d 950 (1980), held that interest charged on a monthly basis violates the constitution even though over 10% would not be collected if the debt was considered on an annual basis. The reason for this is obvious: The debt in such a case is not one payable in a year. It is due monthly. So a creditor cannot charge over 10% monthly on an open account and then hope to stop short later, before the end of the year, and actually collect less than 10% of the sum figured on an annual basis.

In *Parks* v. *E. N. Beard Hardwood Lumber, Inc.,* 263 Ark. 501, 565 S.W.2d 615 (1978), we dealt with interest charged on an open account and found no usury. But the amount charged monthly was less than 10% per annum.

Affirmed.

Willie Ray MACKEY *v.* STATE of Arkansas

CR 82-120 651 S.W.2d 82

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Campbell & Campbell, by: *James C. Campbell,* for appellant.

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

JOHN I. PURTLE, Justice. This appeal from the Garland County Circuit Court arises from appellant's conviction of first degree murder wherein he received a life sentence and a fine of $15,000. Six points for reversal are argued and will be set out separately in the opinion below. We do not find that any prejudicial error occurred in the appellant's trial.

Appellant was charged with capital murder in furtherance of the crimes of robbery and kidnapping, in violation of Ark. Stat. Ann. § 41-1501 (Repl. 1977). Vladimir Vejrosta was murdered on January 20, 1981. His body was discovered in the trunk of his car at the Dallas-Fort Worth airport on

April 10, 1981. An autopsy revealed he died as a result of two gunshot wounds to the top of his head. The victim also had evidence of blunt trauma to his rib muscles which injury occurred prior to his death.

Appellant's involvement commenced in late 1980 when he and his wife, Judy Mackey, entered into negotiations with the deceased to sell him some gold coins. Various witnesses established that the coin deal was to be consummated on January 20, 1981, at which time Vejrosta was to give appellant's wife a check for $15,000 in return for the coins. The appellant and/or his wife cashed the check at a used car lot where appellant used $6,500 to purchase a Corvette. The dealer testified appellant had been trying to deal for the vehicle over a period of several weeks and had said he was waiting for a check to clear. Officers of a local bank testified they had required the deceased to deposit his check from a Nebraska bank in a Hot Springs bank until it cleared. On January 20, 1981 the bank allowed Vejrosta to draw on the Nebraska check and established a checking account for Vejrosta who in turn wrote a $15,000 check payable to appellant's wife. This was the last day Vejrosta was seen alive.

The investigation was long and complicated. Appellant became a suspect and was picked up for questioning on May 18, 1981, in Crescent City, California and three days later was arrested for interstate flight to avoid prosecution. On May 22, 1981, he informed the California authorities that he would waive extradition hearings and return to Arkansas. An Arkansas parole officer picked appellant up on June 29, 1981 and returned him to the Garland County jail on July 2, 1981. The information was filed on July 14, 1981 and a hearing was held the next day. On that day appellant was held to be a parole violator and it was found that he should be returned to the Arkansas Department of Corrections. However, it appears that he remained in the Garland County jail up until his trial was completed on May 21, 1982.

On August 6, 1981, the information was amended to also charge appellant's wife, Judy Mackey, with capital

murder. She was arrested, made bond, fled the state and has not been heard from since.

Testimony at the trial was to the effect that the deceased either bought or attempted to buy gold coins from appellant and his wife. There was uncontradicted evidence that the victim gave them a check for $15,000 on the day he was murdered. Other testimony was to the effect that appellant's brother, Carl Mackey (who pled guilty to the crime of hindering apprehension), helped appellant and his wife dispose of decedent's body. Carl was the state's chief witness; he testified that he went to appellant's home on the evening of January 20, 1981, helped wrap the body of the victim and transport it to the Dallas-Fort Worth airport. Carl was paid $500 for driving the victim's vehicle, with the body in the trunk, to the airport. He testified that appellant and Judy Mackey both told him they had killed a man whom they had set up on a deal to purchase nonexistent gold coins.

It was appellant's contention that his wife killed Vejrosta while appellant was visiting his parents in the early afternoon. He further contended that she later told him about the killing and he helped dispose of the corpse in order to keep from having his parole revoked for being present with his wife after she killed Vejrosta. These matters were told to the jury in the opening statement by appellant's attorney. The jury was instructed that Carl was an accomplice and that his testimony alone was not sufficient to convict the appellant. The jury convicted appellant of murder in the first degree, sentenced him to life and fined him $15,000.

I

The appellant argues he was denied a speedy trial as required by A.R.Cr.P., Rule 28 and the federal and state constitutions. Our Rule 28 was adopted for the purpose of enforcing the constitutional provisions requiring a speedy trial. Rule 28.1 (a) requires a person held in jail on an offense to be tried within nine months or released on his own recognizance. Rule 28.1 (b) requires a person being held in prison in this state to be tried within twelve months,

excluding periods of necessary delay, or if this provision is not complied with to be granted an absolute discharge as to the offense charged.

Appellant was first arrested on May 21, 1981. His trial commenced on May 18, 1982 and concluded on May 21, 1982. The record reveals he was arrested for parole violation and as a fugitive avoiding prosecution. He was questioned about the murder while he was under arrest in California but he was not charged. The information was not filed until July 14, 1981. Since his parole was revoked and he still had time to serve, it can be concluded that he was being held in prison within this state for conviction of another crime. No doubt he was held in the Garland County jail for the convenience of his attorney and the state. He was not being held in jail solely on the pending charge for the nine months, but even if he were, he would have only been entitled to release on his own recognizance. A.R.Cr.P., Rule 28.1 (a). He was subject to release from the former sentence on March 28, 1982. Under the circumstances he was held on the present charge for less than two months. Therefore, if all time claimed to be excluded by the state is eliminated he is still not entitled to relief pursuant to Rule 28.

II

Appellant also makes the argument that there was not sufficient independent evidence to corroborate the accomplice's testimony. We agree with appellant's statement of the law that such other evidence is insufficient if it merely shows that the offense was committed and the circumstances thereof. Ark. Stat. Ann. § 43-2116 (Repl. 1977). The corroborating evidence must be of a substantial nature which tends to some degree to connect the defendant with the commission of the crime. *King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973). Some of the independent evidence tending to connect the appellant with the crime was: he was in possession of and assisted in cashing the decedent's check on the day it was issued; he was dealing with the victim for the sale of gold coins with a value of $15,000 which coins were not seen by others with the exception of a few coins which were tested; he purchased a car with part of the

proceeds of the victim's check; he admitted helping dispose of the body to avoid anyone being apprehended; and he traveled to California shortly after the murder. The evidence, other than the accomplice's testimony, is substantial and tends to connect the appellant with the crime. It was, therefore, proper to allow the jury to consider the totality of the evidence, including the accomplice's testimony.

III

It is also argued that the trial court erred in refusing to allow a witness to testify that he had sold a .22 revolver to Judy Mackey and another one to the deceased. We think this evidence should have been admitted pursuant to Arkansas Uniform Rules of Evidence, Rule 401. However, the error cannot be considered prejudicial because the same evidence was introduced by other witnesses and was properly before the jury for its consideration. Geryaldine Ivan and Jack Mackey both testified that the victim had a handgun in his possession at the time the transaction between the Mackeys and the victim took place. Dorothy Mackey testified that she had seen Judy Mackey with a .22 handgun on many occasions. Therefore, the proffered testimony would have been cumulative in nature.

IV

It is argued that the trial court erred in refusing to order subpoenas for out of state government employed witnesses. These witnesses had performed certain tests which had been negative or at least inconclusive in connecting appellant to the crime. We think the trial court erred in refusing to issue the subpoenas. However, the error is rendered harmless by events which occurred at the trial. During appellant's opening and closing statements the jury was told that all of these tests were run and produced no evidence incriminating the appellant. Additionally, detective Don Adams stated none of the test reports were returned to him. The detective's testimony, coupled with appellant's opening statement and closing argument makes it obvious that the jury knew the test results were negative. This is the same testimony the witnesses sought by appellant would have presented. The

state attempted to prevent the negative test results from being presented to the jury. Had any of these tests been positive the state would have offered the results into evidence. The very purpose of the tests was to obtain relevant evidence connecting appellant to the murder of Vejrosta. To hold the negative test results inadmissible would be tantamount to holding that such evidence is admissible only if it points to a defendant's guilt. The results of such tests are admissible pursuant to Rule 402.

It is true that Ark. Stat. Ann. § 43-2001 (Repl. 1977) provides for unlimited out of state witnesses in capital felony cases. However, this statute must be read in conjunction with Ark. Stat. Ann. § 43-2006 (Repl. 1977) which provides that such witnesses must be material. We have interpreted these statutes by declaring such right not to be absolute but, rather, resting within the sound discretion of the trial judge. *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). We have also held that the right to have out of state witnesses in capital felony cases means material witnesses. *Henry* v. *State,* 278 Ark. 478, 647 S.W.2d 419 (1983). Under the circumstances contained in this case we do not find the error to be prejudicial.

V

Did the trial court err in permitting a witness to offer hearsay testimony? We think it did not. The hearsay testimony was that the deceased told a friend, "Well, if grandma is a man, I'll leave." The statement involved a proposed meeting between the deceased and the appellant's wife in the matter of negotiating for the sale and purchase of the coins. Uniform Rules of Evidence, Rule 803 reads in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) . . . A statement of the declarant's then existing state of mind, emotion, . . . plan, motive, design, mental feeling . . .

The state was allowed to introduce the statement for the purpose of showing the victim's state of mind. However, during closing arguments the state said "grandma" was the defendant, thereby showing that the appellant planned to meet with the deceased on the date of his death. Although the state misused the statement in closing argument it was nevertheless proper for the purpose for which the court allowed its introduction. We have held that evidence of the state of mind of the victim, prior to a murder, was admissible. *State* v. *Abernathy,* 265 Ark. 218, 577 S.W.2d 591 (1979). *See also United States* v. *Calvert,* 523 F.2d 895 (8th Cir. 1975).

VI

Appellant's final argument is that the trial court erred in limiting the testimony of a witness for the defense. The testimony was offered for the purpose of attacking the credibility of Judy Mackey, the appellant's wife and apparent accomplice, who was not present at appellant's trial. The proffered testimony portrayed Judy Mackey as an unfaithful and lying wife and said she was involved in prostitution. It also contended she had acted in the same manner with several of her former husbands. Uniform Rules of Evidence, Rule 608 states:

> . . . The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) . . .specific instances of the conduct of a witness . . . may . . . if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness . . .

In interpreting Rule 608 we have adopted a three-fold test of

admissibility: 1) the question must be asked in good faith, 2) the probative value must outweigh its prejudicial effect, and 3) the prior conduct must relate to the witness' truthfulness. *Cameron* v. *State,* 272 Ark. 282, 613 S.W.2d 593 (1981). We specifically held that it was error to ask about instances of conduct which were not probative of veracity. *Divanovich* v. *State,* 271 Ark. 104, 607 S.W.2d 383 (1980).

The elicited testimony was proffered during direct testimony of a witness for the defense. Rule 608 (a) allows credibility evidence only after the witness' character for truthfulness has been attacked. Section (b) allows such testimony only on cross-examination. In any event the trial court did not err in this matter because Rule 608 applies to examination of witnesses and Judy Mackey was not a witness in this case.

We have reviewed the record for all objections made by the appellant and find no adverse rulings to him which were prejudicial.

Affirmed.

LEIGH WINHAM, INC. and Leigh WINHAM, Individually *v.* REYNOLDS INSURANCE AGENCY et al

82-305 651 S.W.2d 74

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Friday, Eldredge & Clark, by: *Michael G. Thompson* and *Timothy O. Dudley,* for appellants.

Davidson, Horne, Hollingsworth, Arnold & Grobmyer, P.A., by: *Allan W. Horne* and *Virginia R. Williams,* Rule XII Law Student, for appellees.

Laser, Sharp & Huckabay, P.A., for appellee National American Insurance Company of New York.

ROBERT H. DUDLEY, Justice. Appellants, Leigh Winham, Inc., an interstate trucking company, and Leigh Winham, individually, filed suit alleging that appellees, Reynolds Insurance Agency, Inc. and National American Insurance Company of New York, wrongfully denied insurance coverage and refused to pay a valid claim. Appellants in the alternative pleaded that appellee Reynolds Insurance Agency negligently failed to acquire the insurance. The trial court granted summary judgment in favor of both appellees. We affirm. Jurisdiction is in this Court pursuant to Rule 29 (1) (o).

A summary judgment is granted if there is no genuine issue as to any material fact that would preclude judgment in favor of the moving party as a matter of law. ARCP Rule 56 (c). A summary judgment is an extreme remedy; consequently, any proof submitted with the motion must be

viewed most favorably to the party resisting the motion and any doubts and inferences must be resolved against the moving party. *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981).

The facts, construed against the movants for summary judgment, are as follows. Appellant Leigh Winham, a California resident, and appellant Leight Winham, Inc., a California corporation, leased six trucking units to B. J. McAdams, Inc., an interstate hauler with offices in North Little Rock. An employee of McAdams suggested that appellants purchase their insurance through appellee Reynolds, a Little Rock agency. In late December of 1978, appellant Leigh Winham contacted John Reynolds, the principal of appellee Reynolds Agency, by telephone. The two did not know each other and had had no prior business dealings. Winham inquired about insurance, and Reynolds stated that he would calculate the premium and call him back. On January 2, 1979, Winham again contacted Reynolds and, according to Winham, Reynolds told him the total amount of the full year's premium, the extent of coverage, and the cost of the first installment on the premium. Winham stated that he informed Reynolds that he had to have coverage immediately and Reynolds told him that the insurance coverage would "be bound effective the day of the postmark." Winham mailed a check drawn on the corporate account to Reynolds on January 3, 1979. Upon receiving the check Reynolds had his bank contact the payor bank and, in so doing, discovered that appellant had insufficient funds in its account to clear the check. Reynolds then deposited the check in his own bank. On January 16, Winham was given notice by his back that his corporation's check would not clear. On January 20 Winham learned that one of his trucks had been involved in an accident. He called Reynolds to inform him of the claim and to tell him the check would be returned for insufficient funds. Winham asked Reynolds to redeposit the check. Reynolds was hesitant and Winham wired him the money which Reynolds refused to accept. Winham again phoned and stated that, "[Reynolds] told me that he was going to have to check with the insurance company to see when they wanted the insurance, when they wanted it dated, the date of the policy.

And I said, You mean you haven't bound my coverage? And he said well, he's got to check with them to see when they want the date of the policy dated. And then in the course of that week he also asked me, he said something about he was going to have to get a signed application, would I allow [an employee of McAdams] to sign the application for me."

In late January, 1979, Winham was informed that the claim was denied. In May 1979, Winham settled the claim against the tortfeasor who caused the accident.

The appellees moved for summary judgment on two grounds: (1) no insurance coverage was ever in force since appellants' check was dishonored; and (2) even if insurance was in force, the release admittedly given by appellants in settling their claim was a breach of the subrogation clause of the policy.

Appellants first contend that prepayment of the premium is not a condition precedent to coverage. However, our general rule is that "payment of the premium is ordinarily a condition necessary to the operation of a policy of insurance, and usually a provision to that effect is made in the policy." *Home Fire Ins. Co. of Okla.* v. *Stancell,* 94 Ark. 578, 127 S.W.966 (1910). Of course, we have exceptions to our general rule. For example, we recognize that effective oral binders are often issued prior to payment of the premium. *See* Ark. Stat. Ann. § 66-3219 (Repl. 1980); *Home Ins. Co.* v. *Moyer,* 252 Ark. 51, 477 S.W.2d 193 (1972). Also, policies are often sold on credit. *King* v. *Cox,* 63 Ark. 204, 37 S.W. 877 (1896); *Mann* v. *Charter Oak Fire Ins. Co.,* 196 F. Supp. 604, 609 (E.D. Ark. 1961).

The trial judge, after viewing the facts most favorably to the appellants, found that there was no dispute of a material fact and that all of the material facts were in favor of appellees' contention that Reynolds, the insurance agent, did not waive the ordinary condition precedent of payment of the premium by stating that "the insurance would be effective the day of the postmark," and then accepting the check.

The appellants contend that, even though the fact of Reynolds' statement and acceptance of the check is undisputed, reasonable men may reach different conclusions from those facts and so summary judgment was not proper. Summary judgment should be denied if under the evidence reasonable men might reach different conclusions from undisputed facts. *Runyon* v. *Reid,* 510 P.2d 943 (Okla. 1973); *Lang* v. *Cruz,* 74 N.M. 473, 394 P.2d 988 (1964).

Reynolds' statement establishes that there was no intention to extend credit to appellant Winham, an unfamiliar person. Had an intent to extend credit existed, Reynolds would have put a binder for insurance in effect immediately after the telephone conversation rather than when the check was mailed. *See Home Ins. Co.* v. *Moyers,* 252 Ark. 51, 477 S.W.2d 193 (1972). Therefore, it was not error for the trial court to grant summary judgment on the basis that prepayment of the premium was a condition precedent to coverage.

Appellants next contend that even if prepayment of the premium was a condition precedent, the summary judgment was improper because the issue of whether the appellees accepted the plaintiff's check as absolute payment was a question of fact. Appellants are correct that the resolution of this issue involves a question of intent. However, "[t]he law is well settled that receiving a check as payment for an insurance policy is conditional and will not prevent a forfeiture of the policy for non-payment of the premium. Of course, if the insurance company's acts indicate that receipt of the check is payment then such will justify a finding that the insurance company is bound." *Jones* v. *American Pioneer Life Ins. Co.,* 255 Ark. 474, 500 S.W.2d 748 (1973), *citing National Life Co.* v. *Brennecke,* 195 Ark. 1088, 115 S.W.2d 855 (1938); *see also, Security Benefit Association* v. *Punch,* 173 Ark. 572, 292 S.W. 994 (1927); *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, 257 S.W. 753 (1924). In this case, however, none of the insurance company's acts indicate that Reynolds intended to receive appellants' worthless check unconditionally as payment in order to bind the insurance company.

Nevertheless, appellants argue that the actions of Reynolds might enable reasonable men to reach a different conclusion. They contend that Reynolds, in addition to stating that coverage would be effective when the check was mailed, deposited the check even after he knew it would not clear appellants' bank. According to appellants this indicates an intent to accept late payment of the check. Then, they argue, even after the return of the check Reynolds did not deny that there was coverage. Reynolds stated he would have to check with the company to see when it wanted the policy dated. After the check had been returned, Reynolds asked if an employee of B. J. McAdams could sign an application. Finally, appellants argue that after the accident Reynolds told appellants they had no liabilty for the accident as it was caused by the tortfeasor.

Together, these actions would not lead to the conclusion that there was an intention to extend credit to appellant Winham, an unfamiliar person. Presentment of appellants' check to the payor bank was necessary to establish a dishonor of the check. In addition, the appellants might have placed funds in the account during the interval between the phone call and presentment for payment and the check then could have been good on its initial presentment. Therefore, presentment for payment is not inconsistent with a refusal to extend credit. The failure to expressly deny that appellants had coverage could not lead reasonable men to conclude that Reynolds intended to extend coverage under the facts of this case. Similarly, the fact that Reynolds stated that he would have to check with the company to see when the policy would be dated and Reynolds asking if an employee of B. J. McAdams could sign an application could not be found by reasonable men to relate back to the original mailing date, because these actions were in response to Winham's later assurances on January 20, 21 and 23 that he would wire the premium payment. We find no indication in Reynolds' statements of an intent to accept liability for appellants' insurance coverage. Since reasonable men could not reach different conclusions from the undisputed facts of this case, we agree that the appellees were entitled to a judgment as a matter of law.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. My first disagreement with the majority opinion is that portion which reads, in regard to summary judgment, "However, here reasonable men could not reach different conclusions."

I also disagree with that portion of the opinion which stated, "the law is well settled that receiving a check as payment for an insurance policy is conditional and will not prevent a forfeiture of the policy for non-payment of the premium." In the business world insurance is bought and sold over the telephone in many instances. An agent is authorized to give a telephone binder which immediately binds the insuring company. In such a case failure to pay the premium would not automatically cancel the binder.

There is a difference of opinion between the appellant and appellee as to whether a binder was issued in the case before us. This is clearly a controversy requiring the resources of the judicial system. If, as testified, the agent agreed by telephone to bind the company at the time a check was placed in the mail then there's certainly a question of fact. What has happened in the present case is that the trial court and a majority of this court have decided the facts adversely to the appellant without giving him an opportunity to present his argument to a jury. A valid controversy deserves its day in court. To deny such is to pull the rug out from under appellants' cause. I cannot say that appellants would prevail in a full blown trial, but they are certainly entitled to make use of the system set up by our Constitution and the Arkansas General Assembly. I would, therefore, remand for a trial on the disputed issued in this case.

LITTLE ROCK MUNICIPAL WATER WORKS
v. Charles D. RAGLAND, Commissioner of Revenues

83-6 651 S.W.2d 78

Supreme Court of Arkansas
Opinion delivered May 31, 1983

John C. Lessel of *Mitchell, Williams, Selig, Jackson & Tucker,* for appellant.

Timothy J. Leathers, Joseph V. Svoboda, Wayne Zakrzewski, Kelly S. Jennings, John H. Theis, Ann Fuchs, Michael D. Munn, by: *Joe Morphew,* for appellee.

ROBERT H. DUDLEY, Justice. The issue in this case is whether the Gross Receipts Tax, Ark. Stat. Ann. § 84-1901, et seq. (Repl. 1980), applies to a sale when that sale is billed but the account is not collected.

Appellant, Little Rock Municipal Water Works, is a municipally owned and operated water works system. Appellee, the Commissioner of Revenues, levies a three percent tax upon the gross receipts derived from sales of water by appellant. Between October 1, 1976 and September 30, 1979, appellant did not include within its computation of gross receipts amounts it billed but had not collected for water service furnished to residents of the City of Little Rock and surrounding communities. Appellant was assessed a $2,130.38 deficiency in gross receipts tax and a "negligence penalty" by appellee. The trial court upheld the appellee's assessment and the imposition of the negligence penalty. We affirm. Jurisdiction is in this Court pursuant to Rule 29 (1) (a) and (c) and Ark. Stat. Ann. § 84-4721 (b) (Repl. 1980).

We find no merit in appellant's argument that "gross receipts" include only amounts actually collected. Ark. Stat. Ann. § 84-1903 states, "There is hereby levied an excise tax of three percentum (3%) upon the gross receipts . . . derived from all sales . . . ." Ark. Stat. Ann. § 84-1902 (d) defines gross receipts as follows:

> Gross Receipt — Gross Proceeds: The term "gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction therefrom on account of the cost of the properties sold, labor service performed, interest paid, losses or any expenses whatsoever.

Appellant contends that the Gross Receipts Tax is not a sales tax and that the statute requires appellant to pay the tax only on amounts actually collected. It argues that "derive" is defined as taking or receiving, especially from a specified source, and that something must be received in order to

constitute a "gross receipt." However, we have repeatedly held that the present Gross Receipts Tax Act, Act 386 of 1941, is a sales tax act. *Cook* v. *Sears-Roebuck & Co.*, 212 Ark. 308, 206 S.W.2d 20 (1947); *U-Drive-Em Service Co.* v. *Hardin*, 205 Ark. 501, 169 S.W.2d 584 (1943). Ark. Stat. Ann. § 84-1902 (d) defines "gross receipt" as the "total of consideration for the sale," the consideration bargained or contracted for, not the amount actually paid to the seller. Furthermore, in *Cook* v. *Southwest Hotels, Inc.*, 213 Ark. 140, 142, 209 S.W.2d 469, 471 (1948), we stated as follows:

> Although the word "derived" as used in Act 386 has a general meaning, we do not agree with appellee that the Commissioner would be compelled to withhold his demand for payment until a tax had actually been collected by the retailer. It is sufficient if the taxpayer *should* have done so.

Thus, the Gross Receipts Tax is due when the contract is entered into. *Accord, Gardner-White Co.* v. *Dunckel*, 296 Mich. 225, 295 N.W. 624 (1941).

In addition, Ark. Stat. Ann. § 84-1902 (d) precludes any deduction from the Gross Receipts Tax for "losses." Because uncollected accounts are clearly "losses" in the context of this statute, they cannot be excluded in computing the tax. *Accord, Olympic Motors, Inc.* v. *McCroskey*, 15 Wash.2d 665, 132 P.2d 355 (1942).

Appellant next contends that the application of the Gross Receipts Tax to amounts billed but not collected results in a taking of its property in violation of due process and Art. 16 § 5 of the Arkansas Constitution. Appellant stipulated that it collects a deposit from each customer prior to the initiation of service, and it concedes that the amount of the deposit exceeds any tax assessed. Therefore, appellant has failed to show that any of its property is taken in payment of the Gross Receipts Tax for amounts billed but not collected. Accordingly, we do not reach these issues.

Finally appellant contends that the assessment of a ten percent negligence penalty under Ark. Stat. Ann. § 84-4741

(c) was erroneous. Appellant reasons that because both parties stipulated that appellant did not fail to pay the Gross Receipts Tax due to intentional disregard of the statutes involved and because there was no proof of negligence other than the fact of nonpayment, the penalty cannot be applied.

Ark. Stat. Ann. § 84-4741 (Supp. 1980) provides as follows:

> If any part of a deficiency in taxes is *determined to be* due to negligence or intentional disregard of rules and regulations promulgated under the authority of this Act or any State tax law, then the Commissioner shall add a penalty of ten percent (10%) of the total amount of the deficiency, in addition to any interest provided by law. [Emphasis added.]

The emphasized language was added to former law by Act 914 of 1981, section 6. However, the amended statute was not effective at the time of the deficiency assessment and it is not applicable. *See Ragland, Comm'r.* v. *Miller Trane Service Agency,* 274 Ark. 227, 623 S.W.2d 520 (1981). Although the current penalty provision, Ark. Stat. Ann. § 84-4741 (c) (Supp. 1980), may require a factual determination of negligence or intentional disregard of the Gross Receipts Act or of appellee's regulations, we held that the former statute imposed an automatic penalty in *Great Lakes Chemical Corp.* v. *Wooten,* 266 Ark. 511, 587 S.W.2d 220 (1979). Therefore, the assessment of the ten percent negligence penalty in this case was proper.

Affirmed.

Herbert Chester MATTHEWS *v.* Michael E. RODGERS

83-71 651 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered May 31, 1983

James C. Cole, for appellant.

Richard S. Muse and *Sam L. Anderson, Sr.,* for appellee.

ROBERT H. DUDLEY, Justice. This appeal raises questions about an alleged implied bias of the trial judge and his award of compensatory and punitive damages to the victim of an intentional tort. We affirm the judgment. Jurisdiction over this tort case is in this Court pursuant to Rule 29 (1) (o).

The case was tried before the court sitting as a jury. The facts surrounding the intentional tort are in dispute but the testimony may be summarized as follows. The appellee, plaintiff Michael Rodgers, testified that on June 30, 1979, he, his wife, and a friend, John Martin Smith, were unarmed and in their parked vehicle at a Dallas County gravel pit. The appellant, defendant Herbert Matthews, armed with a shotgun, walked up to appellee and stated that he was going to kill him. As the appellant got closer the appellee jumped out of his vehicle and the appellant fired a .20 gauge shotgun directly into appellee's abdomen. The appellee's wife and John Martin Smith testified to the same sequence of events. This version was corroborated in part by the testimony of the two deputy sheriffs who investigated the mayhem.

The appellant's account of the event was that the appellee grabbed the shotgun causing it to fire and injure himself.

The trial judge awarded $39,500 in compensatory damages and $67,000 in punitive damages.

The appellant first contends the judgment should be set aside because of an implied prejudice on the part of the trial judge. He does not contend the trial judge was intentionally dishonest or that he was even aware of his bias but that, as a matter of law, bias must be implied.

The implied bias is alleged to exist because of three factors: (1) the trial judge coerced appellant into agreeing to a trial by the court; (2) the judgment was imprinted on paper with the name and address of the appellee's attorneys in the margin; and (3) the opposing counsel served as a pallbearer at the funeral of the judge's father. The arguments are without merit.

In this case the judge was not disqualified on constitutional or statutory grounds. *See* Ark. Const. art. VII, § 20; Ark. Stat. Ann. § 22-113 (Repl. 1962).

The fact that a judge may have, or develop during the trial, an opinion, or a bias or prejudice does not make the trial judge so biased and prejudiced as to require his disqualification in further proceedings. *Walker* v. *State,* 241 Ark. 300, 408 S.W.2d 905 (1966). Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Narisi* v. *Narisi,* 229 Ark. 1059, 320 S.W.2d 757 (1959). The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. We find no Arkansas case where a trial judge has stated that he was without prejudice and could hear a case and, without more, we reversed that decision. Thus, absent some objective demonstration of prejudice, it is a communication of bias which will cause us to reverse a judge's decision on disqualification. In this case there was no objective showing of prejudice.

Appellant first contends that he was coerced into a trial by the court. This argument is based on a mimeographed form of pretrial order which requires the attorney who is to conduct the trial to appear at pretrial with the authority to enter binding stipulations, including authority to waive jury trial. Not one word of spoken coercion is alleged to have occurred and appellant did not waive a jury until over four months after the pretrial order. On two occasions after the pretrial conference but before the trial the parties appeared in court and nothing was said about a jury trial. The argument is without merit.

Appellant next argues bias was shown because the judgment was typed on paper which had the name and address of appellee's attorney printed on the margin. Again, we find no merit in the argument. Frequently trial judges request the attorney for the prevailing party to prepare the precedent. The appellant does not contend that such a practice is prejudicial but contends that it leaves an impression of prejudice with the client. We understand how a judgment typed on paper with the attorney's name printed

in the margin might leave an unintended impression upon a layman and we encourage the trial judges to request the prevailing attorney to prepare the precedent on plain paper. However, we do not find that type of implied bias which would cause us to reverse the case.

The next argument with regard to bias is more difficult. This case was tried on February 23 and 24, 1982. On March 24, the trial court commenced his memorandum of decision and completed it on March 26. Five days later, on March 31, 1982, the father of the trial judge died. The mortuary which made the funeral arrangements asked the judge if he wanted any attorneys to serve as pallbearers. He responded affirmatively and the funeral director suggested that at least two attorneys be named. The judge considered both of the attorneys involved in this case but named only one, the appellee's attorney. The funeral home then contacted the attorney who served as a pallbearer on April 3. On April 5, the memorandum of opinion was filed and on April 9 the judgment was entered. Thus, appellee's attorney served as pallbearer eight days after the decision had been made but two days before it was communicated to the parties.

In *Farley* v. *Jester,* 257 Ark. 686, 692, 520 S.W.2d 200 (1975), we stated:

> However, court proceedings must not only be fair and impartial — they must also appear to be fair and impartial. This factor is mentioned in a Comment found in 71 Michigan Law Review 538, entitled, "Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455", as follows:
>
> > "Another factor to be considered in a judge's decision to disqualify is the contention that the appearance of impartiality is as important, if not more so, than actual impartiality. In 1952, Justice Frankfurter explained his disqualification in a case by stating that 'justice should reasonably appear to be disinterested as well as be so in fact.' The Supreme Court gave support to this view in the due process

> context when in *Murchison* Justice Black wrote for the Court:
>
> > [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'
>
> More recently the Court set aside an arbitration award and stated that '(a)ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.'"
>
> Likewise, in the Code of Judicial Conduct, prepared by the Special Committee on Standards of Judicial Conduct of the American Bar Association, and adopted by this court by *Per Curiam* Order of November 5, 1973, the Commentary to Canon 2 points out that not only must a judge avoid all impropriety, but he must avoid also any appearance of impropriety.

In each of the three cases in recent years where we held that a trial judge should have disqualified there was a bias and a communication of that bias. *Jordon* v. *State,* 274 Ark. 572, 626 S.W.2d 947 (1982); *Bolden* v. *State,* 262 Ark. 718, 561 S.W.2d 281 (1978); *Farley* v. *Jester,* supra.

The fundamental issue we must consider here is whether the judge, by the act of allowing appellee's attorney to serve as a pallbearer, gave an appearance of impropriety and communicated an impartiality which might "reasonably be questioned." *See* Code of Judicial Conduct Canon 2 (B), Canon 3 (C).

In this State trial judges often know most, if not all, of the attorneys who practice before them. They may have attended the same schools, churches, or belong to the same civic clubs. Most are members of the same bar association. Given these circumstances it probably is not unusual for an attorney to be asked to serve as a pallbearer for the funeral of a member of a judge's family and similarly judges are often honored to serve as pallbearers for the funeral of a member of an attorney's family. These friendships within the bench

and bar do not, of themselves, cause prejudice. The public and the clients are aware of their mutual acquaintances and friendships. In this particular case appellant's attorney was also considered for service as a pallbearer. At the hearing on the motion for new trial the trial judge explained to the appellant:

> THE COURT: Well, I would like the record to reflect that when the funeral arrangements were made for my father, I'm the one who made them, and because my mother was simply not able to do so, when Mr. Hale at Caruth inquired about pallbearers, I asked him if it were necessary and he said, "Well, it would look better." I said, "Okay." Then he said, "Do you have any names?" So, I gave him a list of names and I started to give him Mr. Cole's [appellant's attorney] name but I didn't think I could get him from Malvern over here [to Hot Springs]. But, nevertheless, I just simply gave a list of names and they did the calling. I told him if he needed any additional names to give me a call, and that's the way it was. I don't think . . .

Given this background, and the appellant's awareness of the circumstances, we do not find a communication of partiality which might reasonably be questioned.

Appellant next argues that there is insufficient evidence to support the award of $39,500 compensatory damages. He does not contest the finding of fault. Appellee was shot at point blank range with number four shot from a .20 gauge shotgun. The wound was on the right side and lower portion of the abdomen and required an immediate surgical opening. This exploratory laparotomy was for a determination of the damage and treatment. It required two incisions. The first was between six and seven inches in length and extended above and below the navel. The second was into the wound itself, which was six to eight inches, for extensive debridement of damaged tissue. The wound was then irrigated. The scar was closed with metal skin staples. Multiple pellets remain in the abdominal wall and most will remain there for the life of appellee although, over a period of years, some will work their way out. The doctor who

treated appellee testified that appellee's abdomen would remain tender and anything which rubs against the abdominal wall would bother him. Future plastic surgery or skin grafts might be required for scar revision at a cost of $500 to $2,000. The scar tissue will be subject to sunburn. In addition, he testified there would be a permanent partial disability and a permanent scarring. He did not estimate the disability as a percentage. The appellee testified that he could no longer lift heavy objects and that his abdomen was tender and frequently hurt. It was three to four months before he was able to return to his business and he could then only partially perform his duties. His medical expenses amounted to $2,699.01.

We have said that precedents are of scant value in appeals of this kind. *Dyer* v. *Payne,* 246 Ark. 92, 436 S.W.2d 818 (1969). In each case we must study the proof, viewing it most favorably to the appellee, and decide the difficult question of whether the verdict is so great as to shock our consicence or to demonstrate passion or prejudice on the part of the trier of fact. *St. Louis Southwestern Ry. Co.* v. *Pennington,* 261 Ark. 650, 679, 553 S.W.2d 436, 451 (1977). Here only one of the elements of damage is measurable with exact certainty. The past medical expense in the amount of $2,699.01 was proven. That was a valid element of damage. *Williams* v. *Gates,* 275 Ark. 381, 630 S.W.2d 34 (1982). Future medical expenses do not require the same degree of certainty as past medical expenses. *Williams, supra.* The doctor testified that the appellee might need future medical procedures. The appellee testified he still had pain in the area. This was sufficient for the court to consider this element of damages. *Williams, supra.* The plaintiff proved a permanent injury as a result of the intentional shooting. This too constitutes a separate element of damages. *Adkins* v. *Kelley,* 244 Ark. 199, 424 S.W.2d 373 (1968). The appellee was self-employed and did not prove with any degree of certainty a loss of profits, either past or future. However, he did prove a loss of earning capacity and the trial judge could validly consider this element of damage. *Cates* v. *Brown,* 278 Ark. 242, 645 S.W.2d 658 (1983); Woods, *Earnings and Earning Capacity as Elements of Damage in Personal Injury Litigation,* 18 Ark. L. Rev. 304 (1965). The appellee has

suffered disfigurement and has scars. These are elements of damage separate and apart from mere embarrassment and the mental anguish they may cause. *Adkins,* at 206, 424 S.W.2d at 376, *citing Volentine* v. *Wyatt,* 164 Ark. 172, 261 S.W.2d 308 (1924). Finally, the appellee has proven the element of pain, suffering and mental anguish. He is entitled to a recovery for this element in the past as well as that reasonably certain to be experienced in the future. *St. Louis Southwestern Ry. Co.* v. *Pennington, supra.* The award is unquestionably liberal, but when we take into account all of the elements of damage we are unable to say that the amount of the award, $39,500, is so great that it shocks the conscience of this Court.

The final point is the most difficult, that is, whether the award of punitive damages was excessive. For many years, our law has been that punitive damages may be imposed when the defendant acted with malice. *Barlow* v. *Lowder,* 35 Ark. 492 (1880). Clearly malice was present and punitive damages were proper in this case. There is no fixed standard for the measurement of punitive damages. *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972). They constitute a penalty and must be sufficient not only to deter similar conduct on the part of the same tortfeasor but they must be sufficient to deter any others who might engage in similar conduct. *Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96 (1961). They may amount to somewhat of a windfall to the plaintiff. *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W.2d 613 (1960). The amount of actual damages sustained by a plaintiff is but one criterion for the assessment of punitive damages. *Ray Dodge, Inc., supra.* Evidence of the defendant's financial wealth is a proper element to be considered in the computation of punitive damages. *Holmes* at 352, 352 S.W.2d 96 at 99. The amount of punitive damages in this case was not based solely upon the actual damages. An affirmance must be based upon the appellant's wealth. Testimony elicited at trial was that appellant and his wife owned, prior to the tort, as tenants by the entireties 250.3 acres of land having a value of $167,000. Appellant admitted that after the tort action he conveyed his interest to his son for about $10. The appellant admitted that he owned a truck and tractor worth $10,000 to $12,000. He admitted

that after the suit was filed he gave $12,000 derived from the sale of his cattle to his son. He admitted that he gave his son another $5,000 but his wife testified that the gift was $9,000. These admissions amount to $10,000 to $12,000 in his own name and $184,000 to $189,000 in his and his wife's names. Appellant and his wife also owned common stock in the F. W. Woolworth Company and appellant receives $190.12 per month from a balance due, in an unknown amount, on a house sale. Appellant, in addition to the above items, receives $918.00 per month in civil service retirement benefits.

We have examined in detail the appellant's financial worth, and when we consider it in relation to the intentional tort he committed and the need to prevent him or others from repeating such an act, we cannot say that the amount of the award is so great that it shocks the conscience of this Court. Nor are we convinced that the award was motivated by passion or prejudice. In our best judgment the decision of the trial court must be upheld.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. This is in many respects a very tragic case. The majority's opinion today does nothing but magnify the tragedy. My conscience will not allow me to join the majority opinion which, in my opinion, is as unreasonable and unfair as the judgment of the trial court. I realize it is our custom to state only the facts supporting the verdict when we affirm the judgment of a trial court. However, we are not required to ignore the other facts altogether.

The parties to this action had been feuding for quite some time prior to this incident. By all reports there had been a series of unpleasantries exchanged. The appellee, a younger man than appellant, lived in Hot Springs and the appellant lived in Bradley County. On the date of the incident the appellee, his wife and a friend were in Bradley County, about 11 o'clock p.m. and very near appellant's

house. The pretext of being in the vicinity of appellant's house that night was that appellee had to relieve himself and thought it would be all right to do so in a gravel pit across the road from appellant's house. Appellant entered the gravel pit to investigate and discovered it was the appellee and wife and friend. It was undisputed that appellant was in possession of a shotgun. Appellee and his witnesses stated the appellant threatened to kill him and ordered the others to stand back. Appellant argues appellee attacked him and the gun fired during the tussle. He also stated he was severely injured by having his own shotgun broken over his head. Appellee was shot at such an angle that no pellets entered the abdominal cavity but instead lodged in tissue in the outer abdominal area. The appellant was knocked unconscious by a blow to the head. The appellee alleged he threw the shotgun to the ground and broke it before beating hell out of appellant. The results of the incident were that appellant spent more time in the hospital and incurred more medical expenses than did the appellee. Appellee, after severely beating appellant, rode in a car to the Hot Springs hospital while appellant had to be transported in an ambulance. The only permanent results of appellee's injuries is a scar on his lower abdomen where the doctors opened him up to see if he had internal injuries, which he did not. Without taking sides, it is all but impossible to glean from the record which man was truly the initial aggressor. In the end, it was definitely appellee who was the victor, not that it makes any difference, but rather to show that it was not a typical case which would justify an inordinate amount of compensatory and punitive damages.

The trial court awarded appellee $39,500 compensatory plus $67,000 punitive damages. The combined judgments exceed appellant's total net worth by far. This judgment would take away appellant's home, all of his lifetime savings and still remain unsatisfied. It is my belief that a judgment in a case like this should be based upon the total circumstances and certainly contributory negligence should have reduced this judgment. Appellee's total medical expenses were less than $3,000, and his pain and suffering did not seem to be extraordinary. The medical expenses and

other circumstances simply do not justify an award of this magnitude.

I must also disagree with the majority opinion that there are no grounds to disqualify a judge who is biased or prejudiced. A judge who is biased or prejudiced should never sit in judgment of a case. Our whole system is predicated upon trials being conducted by judges who are fair and impartial. To hold otherwise would be an act of destruction to the system. I am in agreement with that portion of the opinion which states we would need some objective manifestation of prejudice or bias before we would hold a judge should not preside over a case. I also agree that there was no evidence of prejudice or bias on the part of the trial judge in this case. My disagreement with him is solely on the amount of the judgment.

If affirmance of the punitive damage award depends upon the appellant's wealth, as the majority writes, then this judgment should be reduced by at least fifty percent. His interest in the farm is only contingent and that item represents the bulk of the wealth attributed to him by the trial court and by this court. His actual net worth is less than $25,000. It certainly would be unjust as well as cruel to force appellant's wife, who was not a party to this suit, to sell their farm in order to get money to satisfy this judgment. If financial worth is an element to be considered in the matter of punitive damages there must be a remittitur in this case. It seems to me that the appellee's conduct contributing to this unfortunate affair should be considered. He was obviously looking for trouble or he would not have traveled from his home in Garland County, where the suit was brought, to Bradley County, the home of appellant, to relieve himself in a gravel pit near the residence of a man with whom he had been at odds for sometime past. The severe and near fatal beating he imposed upon appellant is evidence of why he was in Bradley County. I cannot join in rewarding him for picking a fight wherein he was injured.

My conscience is shocked at the amount of the awards. I disagree with the best judgment of the majority. It is my best judgment that a remittitur should be entered.

Jim DuPREE et al *v.* ALMA SCHOOL DISTRICT
NO. 30 of Crawford County et al

82-175 651 S.W.2d 90

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Friday, Eldredge & Clark, by: *George Pike, Jr.,* for appellants Little Rock School District and North Little Rock School District.

Seay & Bristow, by: *Bill W. Bristow,* for appellants Clover Bend School District et al.

Dailey, West, Core, Coffman & Canfield, by: *Ben Core; Stephen L. Spitz;* and *Long & Silverstein,* by: *David Long,* for appellees.

Pryor, Robinson & Barry, by: *H. Clay Robinson,* for *amicus curiae,* the Fort Smith School District.

Cearley, Mitchell & Roachell, for *amicus curiae,* the Arkansas Education Association.

STEELE HAYS, Justice. The issue presented on appeal is the constitutionality of the current statutory method of financing public schools in Arkansas under Act 1100 of 1979, the Minimum Foundation Program and vocational funding under § 7 of Act 1004 of 1975 (authorized under Act 363 of 1967). Appellees, eleven school districts[1], brought this class action suit against appellants, Jim DuPree and other members of the Arkansas State Board of Education (also

[1]Alma, Mulberry, Van Buren, Conway, Lake Hamilton, Sheridan, Paris, Cabot, Bryant, Greenwood, Mansfield.

joined by other districts[2]), charging that the present system violates the state constitution's guarantee of equal protection (Art. II, §§ 2, 3, 18[3]) and its requirement that the state provide a general, suitable and efficient system of education (Art. XIV § 2[4]). The appellees' basic contention is the great disparity in funds available for education to school districts throughout the state is due primarily to the fact that the major determinative of revenue for school districts is the local tax base, a basis unrelated to the educational needs of any given district; that the curent state financing system is inadequate to rectify the inequalities inherent in a financing system based on widely varying local tax bases, and actually widens the gap between the property poor and property wealthy districts in providing educational opportunities. The trial court found the present system to be in violation of

[2]Jim DuPree, et al; Clover Bend School District No. 12 of Lawrence County, individually and as a Representative of All School Districts Requiring Minimum Foundation Program Aid Funds to Provide their Students a Minimum Level of Education, Little Rock School District, North Little Rock School District.

[3]§ 3. Equality before the law. — The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

§ 2. Freedom and independence. — All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights the governments are instituted among men, deriving their just powers from the consent of the governed.

§ 18. Privileges and immunities — Equality. — The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

[4]§ 1. Free school system. — Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

the constitutional provisions in question, which decision we affirm. We will first comment on the trial court's finding and then address the points raised on appeal.

The funding for Arkansas schools comes from three sources: state revenues provide 51.6%, local revenues 38.1%, and federal revenues 10.3%. The majority of state aid is distributed under the Minimum Foundation Program (MFP). In 1978-79 MFP constituted 77.1% of all state aid. Act 1100 of 1979, the current MFP program, is similar to prior MFP programs and consists of two major elements: base aid and equalization aid. The base aid program originated under the Minimum School Budget Law of 1951. The formula was based on a calculation of teacher and student population per district. The base aid program contained a "hold-harmless" provision which guaranteed that no district would receive less aid in any year than it received the previous year. As a result, a district with declining enrollment would over the years get continually higher aid per pupil. While Act 1100 eliminates the district "hold-harmless" provision, it still contains a pupil "hold-harmless" provision which has no bearing on educational needs or property wealth; the base aid year is permanently held at the 1978-79 level, and the inequities resuting from thirty years of the district "hold-harmless" provision are being carried forward without compensating adjustments.

The funds remaining after allocation for base aid are distributed under "equalization aid". Under this section of the act, *half* of the remaining funds are distributed under a flat grant on a per pupil basis. Districts receive the same amount of aid under this provision irrespective of local property wealth and revenue raised. The remaining funds under the equalization provision are then distributed under a formula directed at equalizing the disparity between the poor and wealthy districts. Of the total allocated under this program in 1979-80, this accounted for only 6.8% of MFP aid.

The other area of contention is the distribution of funds for vocational education. In order for a school district to institute a program of vocational education approved for

state funding, it must first establish a program with local funds. The state will consider funding a portion of the program only if the program is already operational. Obviously, this requirement works to the advantage of the wealthier school districts which can raise the funds and to the disadvantage of the poorer districts which lack the resources for such programs.

Against this backdrop of funding is the undisputed evidence that there are sharp disparities among school districts in the expenditures per pupil and the education opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment. In dollar terms the highest and lowest revenues per pupil in 1978-79 respectively were $2,378 and $873. Disregarding the extremes, the difference at the 95th and 5th percentiles was $1,576 and $937. It is also undisputed that there is a substantial variation in property wealth among districts. The distribution of property wealth, measured as equalized assessed valuation per pupil in average daily attendance (ADA) in 1978-79, ranged from $73,773 to $1,853. These wealth disparities are prevalent among both large and small districts. As the system is currently operating, the major determinative of local revenues is district property wealth and the amount a school district can raise is directly related to its property wealth.

The range in revenues among school districts in Arkansas is not limited to the extremes. There are a substantial number of children affected by the revenue disparities. In 1978-79, only 7% of the pupils resided in school districts with over $1,500 per pupil in state-local revenues, while over 21% resided in districts with less than $1000 in state-local revenues, and 55% of the districts were below the state mean. This great disparity among the districts' property wealth and the current state funding system as it is now applied does not equalize the educational revenues available to the school districts, but only widens the gap.

The appellants devote little attention to the constitutional provisions in question, but contend that there is no requirement of uniformity of educational opportunities

throughout the state, that the constitution only requires that all children receive a "general, suitable and efficient" education. Appellants point to cases from other jurisdictions finding no violation of equal protection clauses under similar funding systems, decisions based primarily on the legitimate state interest of promoting local control. See *Board of Education* v. *Nyquist,* 453 N.Y.S.2d 643 (1982); *McDaniel* v. *Thomas,* 248 Ga. 632, 285 S.E.2d 156 (1981). The arguments are not persuasive.

Most cases finding similar state financing systems unconstitutional have found their state's equal protection clause to be applicable and to require equal educational opportunities. See *Washakie County School District No. One* v. *Herschler,* 606 P.2d 310 (Wyo. 1980); *Pauley* v. *Kelly,* 255 S.E.2d 859 (W. Va. 1979); *Serrano* v. *Priest,* 557 P.2d 929 (Cal. 1976); *Horton* v. *Meskill,* 376 A.2d 359 (Conn. 1976). In at least one jurisdiction, the court found its constitution demanded an equal education opportunity based solely on an education clause similar to ours. *Robinson* v. *Cahill,* 303 A.2d 273 (N.J. 1973).

There is no sound basis for holding the equal protection clause inapplicable to the facts in this case. The constitutional mandate for a general, suitable and efficient education in no way precludes us from applying the equal protection clause to the present financing system, in fact under the interpretations of such cases as *Robinson, supra,* that clause only reinforces the decision that the equal protection clause applies.

We can find no legitimate state purpose to support the system. It bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district. The trial court found the educational opportunity of the children in this state should not be controlled by the forfuitous circumstance of residence, and we concur in that view. Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.

Those jurisdictions finding no equal protection viola-

tion in a system based on district wealth generally uphold the system of funding by finding a legitimate state purpose in maintaining local control. We find, however, two fallacies in this reasoning. First, to alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced. Second, as pointed out in *Serrano, supra,* at 948, "The notion of local control was a 'cruel illusion' for the poor districts due to limitations placed upon them by the system itself. . . . Far from being necessary to promote local fiscal choice, the present system actually deprives the less wealthy districts of the option." Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district.

We come to this conclusion in part because we believe the right to equal educational opportunity is basic to our society. "It is the very essence and foundation of a civilized culture; it is the cohesive element that binds the fabric of our society together." *Horton* at 377, Bogdanski, J. conc. Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights. The opening phrase to our constitutional mandate for a public school system underscores the truth of the principle.

> Intelligence and virtue being the safeguards of liberty and bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . . (Art. 14 § 1)

The appellants' arguments are wide of the mark in this case. They concede the disparities that exist among the school districts, but they offer no legitimate state purpose to support it. Rather, their attack comes from an oblique standpoint. They assert that the constitution only requires a suitable, effective education and that the appellees have failed to prove that is not true in their districts. The evidence offered may have shown that the appellee districts offered the bare rudiments of educational opportunities, but we are

in genuine doubt that they were proved to be suitable and efficient. However, even were the complaining districts shown to meet the bare requirements of educational offerings, that is not what the constitution demands. For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity. "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action." *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 70 (1972). Marshall, J., dissenting.

Appellants also submit that the reason appellees are lacking in funds is not that they are property poor but that they under assessed. The individual school districts, however, have only limited control over the assessment procedure. The assessment is done on a county wide basis and all school boards in the county are represented on the county equalization boards as a minority. Appellants' argument is additionally weakened by the evidence presented that *all* counties are presently under assessed and that there are instances where appellee and appellant districts are in the same county and consequently are subject to the same assessment practices.

Appellants contend that once the appellee districts are properly assessed at the mandated level (per *Public Service Commission* v. *Pulaski County Equalization Board,* 266 Ark. 64, 582 S.W.2d 942 [1979]) they will have sufficient revenues to provide a suitable education. However, the trial court found otherwise and the evidence does not convince us to the contrary. Too, it misses the main issue. When all counties are assessed at the proper level, the gap will still exist between the poor and wealthy districts and the mandate of the constitution will remain unfulfilled. The appellants' amicus brief presents a similar point, arguing that the trial court's ruling was premature and a decision should be deferred until reassessment is completed. This argument ignores the trial court's findings, which we find convincing, that reassessment will not improve the plight of the property poor districts. The argument also ignores the fact that

regardless of the result of reassessment, the fatal flaw in the distribution method under the present system would still exist.

Appellants point out that the appellee districts are not voting the same level of millage as the appellant districts. The record shows otherwise, however, and the average millage of the appellee districts is equal to and in some cases higher than that of the appellant districts. Appellants contend that the income level of appellee districts is higher and they would need to raise their millage level considerably to put them at the same "pain threshold" as that of the appellant districts. Appellants also point to Amendment 40[5] of the constitution which they claim requires all districts to levy taxes for needed funds before the district can request additional aid from the state. The appellees, they claim, have not first met this burden.

Appellants' claim that the complaining districts are all of higher income levels is unsustained except for general allegations and unsupported by any statistical proof. We

[5]No. 40, Article 14 § 3, Amendment No. 11 Amended. § 1. Poll tax —School district tax — Budget — Approval of tax rate by electors. — The General Assembly shall provide for the support of common schools by general law, including an annual per capita tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years; and school districts are hereby authorized to levy by a vote of the qualified electors respectively thereof an annual tax for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness, the amount of such tax to be determined in the following manner:

The Board of Directors of each school district shall prepare, approve and make public not less than sixty (60) days in advance of the annual school election a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness. If a majority of the qualified voters in said school district voting in the annual school election shall approve the rate of tax so proposed by the Board of Directors, then the tax at the rate so approved shall be collected as provided by law. In the event a majority of said qualified electors voting in said annual school election shall disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding annual school election.

Provided, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied.

would also have to assume that this was the case with *all* property poor districts throughout the state and such speculation has no place in this issue. The same argument was addressed in *Serrano, supra.* That court responded that the constitutional provision that "specifically authorizes local districts to levy school taxes, in no way implies that that section authorizes a system in violation of the requirements of equal protection." *Serrano* at 955. We find that reasoning disposes of the issue.

We have discussed the two major problems faced in financing our state's educational system. The first is the obvious disparity in property wealth among districts. That wealth is what primarily dictates the amount of revenue each district receives and the quality of education in that district. The second problem is the manner in which the state determines how the state funds are distributed, and as we have said, the current system is not a rational one. The end result is a violation of the mandates of our constitution. Ultimately, the responsibility for maintaining a general, suitable and efficient school system falls upon the state. "Whether the state acts directly or imposes the role upon the local government, the end product must be what the constitution commands. [When a district falls short of the constitutional requirements], whatever the reasons for the violation, the obligation is the state's to rectify it. If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation." *Robinson, supra,* at 295 and cited with approval in *Pauley, supra* at 873. *Serrano* in addressing the same problem notes also the limits of judicial interpretation on this issue. The comments are worth repeating:

> The dispositive answer to the above arguments is simply that this court is not now engaged in — nor is it about to undertake — the "search for tax equity" which defendants prefigure. As defendants themselves recognize, it is the Legislature which by virtue of institutional competency as well as constitutional function is assigned that difficult and perilous quest. Our task is much more narrowly defined: it is to determine whether

> the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws insofar as it denies equal educational opportunity to the public school students of this state. If we determine that no such error occurred, we must affirm the trial court's judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function. *Serrano* at 946.

The trial judge was assigned specially to this case. He heard thirty-nine witnesses and reviewed 287 exhibits resulting in over 7400 pages of transcript. His conclusions of fact and law were extensive and detailed, and obvious time and study went into the final decision. We will not overturn the decision below unless we find it clearly erroneous. (ARCP 52). After our own review of the trial court's findings, the arguments presented by both sides and the decisions of other jurisdictions, we conclude that the findings are not clearly erroneous and, accordingly, the decree is affirmed.

Appellees' motion to tax costs against appellants pursuant to Rule 9 (e) is denied. We concede the abstract is abbreviated, to say the least, but this is an exceptional case, involving issues and concepts of the broadest possible scope, and we are satisfied appellants have made a good faith effort to give an adequate, if concise, abridgement of the record.

ADKISSON, C.J., dissents.

HICKMAN and PURTLE, JJ., concur.

DUDLEY, J., concurs to the extent that the majority opinion finds a violation of Article XIV, § 1 of the Arkansas Constitution.

DARRELL HICKMAN, Justice, concurring. I wholeheartedly agree with the majority. I concur only to add some thoughts that ought to be expressed. This is a case which we could have easily decided the other way with good legal justification. But there are equally good legal reasons for our

decision. In addition the subject matter almost compels us to act because public education is one of the most important services provided by state government. Education is too important a right or privilege for any authority in state government to ignore when it is in dangerous straits and the legal means exist to address the problem. We have before us a problem that the other branches of government have either been unable or unwilling to resolve and part of the answer lies easily within the realm of our authority. Their failure to act is understandable in view of the complexity of the problem and the pressure that comes to bear on the largest expenditure of state funds.

A disparity exists in the dispensation of state funds to local school districts that cannot be justified by any solid constitutional principle. Equality is always the rule in constitutiona law, not the exception, and it is a principle repeatedly contained in our Constitution, specifically in the equal protection clause, ARK. CONST, art. 2 § 3; the privileges and immunities clause, ARK. CONST. art. 2 § 18; and even in ARK. CONST. amend. XIV, which prohibits local and special legislation.

Equality is, of course, mostly an ideal or goal, and hardly ever a reality in government. Reasons are always given for not requiring equality but they are usually no more than excuses, and I do not hesitate to point out that if the Arkansas legislature approaches its new task with anything less than the goal of equality in dispensing state funds, it risks repeating the same mistakes that brought about this situation. To be specific, I cannot justify, on this record, any formula of distribution except on a per pupil basis. If there are not enough funds, using such a formula, to insure each student a decent educational opportunity, then the answer lies elsewhere and not in the unequal distribution of funds.

The large and small districts alike argue that it takes more money to provide an education because of their size. I am very doubtful that is the case for larger districts, and the small districts may find the answer to their problem lies in consolidation or merger. Small districts may have to concede

that they cannot continue to provide a suitable education for their students under such a formula. The large districts have three alternatives: Either change the composition of their district, seek extra funds locally, or more aid for all schools. I do not say any formula, except one based on a per pupil basis, would fail legal examiation; but it would certainly have a more difficult time surviving legal scrutiny. The evidence to justify any distribution, other than a per pupil basis, should be both clear and convincing.

There is no doubt in my judgment that the formula must take into consideration the value of local property available for taxes. I think the majority has said this, but it needs to be made plain, that the disparity that exists, exists partly because of the difference in local taxes that are available. To be specific, a school district that is fortunate enough to have a nuclear energy plant in its district has more tax dollars available than a rural school district that has no taxable local industry. But the children of each district should have the same educational opportunity. That means the wealthier district cannot receive the same state aid the poor district does. A proper formula will consider this disparity. While the state-wide assessment we ordered in *Arkansas Public Service Commission* v. *Pulaski County Board of Equalization,* 266 Ark. 64, 582 S.W.2d 942 (1979), will not cure all the inequities that exist, it will certainly provide a basis for addressing the problem. Furthermore, those counties that refuse in the future to properly and lawfully assess their taxable property should be legally accountable to the school districts located in counties that do conscientiously assess property, because it is common knowledge some counties simply refuse or neglect to properly assess property.

We have only the question of the state money before us, but the problem has many facets and the peripheral and collateral questions are staggering. They cannot be ignored by us or the legislature in addressing the question. Local school districts cannot assume their borders will or should remain static forever. Consolidation or merger, or even reducing the size of a district should not be unthinkable.

The legislature will have the same difficulties in setting a new formula as it has had in dealing with the one rejected. Some school districts will want special consideration, whether they are small, medium, large, from an urban or rural area. If the funds are distributed equally, some districts may lose funds. This immediately raises the question of what kind of education should be provided. The appellants point to The Quality Education Act of 1969 (Ark. Stat. Ann. §§ 80-4601 — 4615) which is supposed to insure that the children of Arkansas receive a quality education. The Act is, of course, meaningless so far as quality is concerned. Any school district that can only comply with that Act is probably not offering its students a decent education opportunity as required by ARK. CONST. art. 14, § 1. The Act was probably passed so that small districts would not have to consolidate. In addition to the problems and questions to be resolved, if these were not enough, there looms in the shadows ARK. CONST. amend. 59 passed in 1980. It deprived school districts of valuably needed tax dollars by granting specific tax favors to certain property owners and freezing to an extent tax revenue. Its validity has never been challenged in court.

It is my respectful judgment that this court had no intention of intervening in a legislative or executive matter. Nor do we intend to supervise their work and if the General Assembly takes this opportunity to correct years of habit and starts afresh providing a truly equal formula for dispensing state aid, then there will be no need for this court to speak on this matter again. We are not a wealthy state but we have the means to provide to every student, both at the secondary and higher level, a decent opportunity for an education. But our assets cannot be squandered by political decisions or unnecessary compromise.

JOHN I. PURTLE, Justice, concurring. I concur with the majority with the exception that I insist that the right to a free public education is fundamental. Article 14, sec. 1 of the Arkansas Constitution of 1874 clearly mandates the state to provide a free school system to safeguard liberty and provide a bulwark for free and good government. Not to hold that such an education is fundamental is to chip away at the

underlying foundation and, indeed, the cornerstone of our present democratic way of life.

It further seems to me we ought to suggest some type of alternate plan to the one which has been struck down. One simple solution would be to require each district to levy and collect a certain millage on all property assessed at 20% of market value. The state would then distribute its money on a per capita basis, taking into consideration certain weighted allowances for special situations such as a handicapped program, to be applied to all districts alike.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority point to the fact that there is a great disparity in property wealth among the districts as being part of the problem with our school financing, but it is undisputed that Amendment 40 contemplates that school financing will be on a local level. The implication of the majority opinion is that our law, Ark. Stat. Ann. § 80-401 (Repl. 1980) and following, which allows the incorporation of certain property rich school districts to the exclusion of other property poor districts is unconstitutional. Although at this time there may be a disparity in wealth among districts, it is not known to what extent that disparity will exist after the state has completed the court mandated reassessment as per *Public Service Commission* v. *Pulaski County Equalization Board,* 266 Ark. 64, 582 S.W.2d 942 (1979). Once reassessment is complete, the disparity may not be so great as the majority indicates. For that reason, I would not make a premature decision of such magnitude until all the facts necessary to the decision are established.

Moreover, it is worth noting that of the thirteen courts that have reviewed state school financing systems similar to ours, only four have found such systems to be unconstitutional. *Washakie Co. School Dist. No. One* v. *Herschler,* 606 P.2d 310 (Wyo. 1980); *Serrano* v. *Priest,* 135 Cal. Rptr. 345, 557 P.2d 929 (1977); *Horton* v. *Meskill,* 172 Conn. 615, 376 A.2d 359 (1977); *Milliken* v. *Green,* 389 Mich. 1, 203 N.W.2d 457 (1972). The weight of authority clearly points toward upholding our system. *San Antonio Independent Sch. Dist.*

v. *Rodriquez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16, reh'g denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L.Ed.2d 418 (1973); *Lujan* v. *Colorado State Bd. of Educ.,* 649 P.2d 1005 (Colo. 1982); *Bd. of Educ. of City Sch. Dist., etc.* v. *Walter,* 58 Ohio St.2d 368, 390 N.E.2d 813 (1979); *McDaniel* v. *Thomas,* 248 Ga. 632, 285 S.E.2d 156 (1981); *Olsen* v. *State,* 276 Or. 9, 554 P.2d 139 (1976); *Thompson* v. *Engelking,* 96 Idaho 793, 537 P.2d 635 (1975); *Northshore Sch. Dist. No. 417* v. *Kinnear,* 84 Wash.2d 685, 530 P.2d 178 (1974); *Shofstall* v. *Hollins,* 110 Ariz. 88, 515 P.2d 590 (1973).

Felix D'AVIGNON *v.* ARKANSAS RACING COMMISSION et al

82-99 651 S.W.2d 87

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Rubens & Rubens, by: *Kent J. Rubens,* for appellant.

Byron Freeland of *Mitchell, Williams & Selig,* for appellees.

THOMAS M. BRAMHALL, Special Justice. Felix D'Avignon appeals from a judgment affirming a decision of the Arkansas Racing Commission suspending his trainer's license for sixty (60) days. On June 19, 1975, Stylish Kim, a dog trained by D'Avignon, placed first in the fourth race at Southland Greyhound Park in West Memphis, Arkansas. Following the race a routine urine sample was taken and

sent to a laboratory for analysis. The Commission's chemist reported that the analysis revealed the presence of caffiene and/or analog or derivative thereof in violation of Rule 1233 of the Rules and Regulations Governing Greyhound Racing in Arkansas. Rule 1233 is as follows:

> The trainer shall be responsible for and be the absolute insurer of the condition of an entry he enters regardless of the acts of third parties.
>
> Should the chemical analysis of any sample indicate the presence of a drug, the trainer of the entry shall be suspended for sixty (60) days, or more, or shall be ruled off. In addition, any other person shown to have had the care or attendance of the entry shall be suspended for sixty (60) days, or more, or shall be ruled off. Further, the owner of such entry shall not participate in the purse distribution.

Prior to the race, Stylish Kim was placed in a lock-out kennel pursuant to Rule 3104 of the Rules and Regulations Governing Greyhound Racing in Arkansas, which provides:

> Immediately after being weighed in (prepost weight) the greyhounds shall be placed in lock-out kennels under the supervision of the Paddock Judge, and no owner or other person excepting the Paddock Judge, State Veterinarian, Kennel Master, Scale Clerk, Lead-outs under the supervision of the Paddock Judge, Presiding Judge or Commission's representatives shall be allowed in or near the lock-out kennels.

Although trainers and owners are not permitted in the lock-out kennels there are two closed-circuit television cameras positioned in such a manner so that the entire lock-out room can be observed by watching one of two sets of monitors. These monitors are located in the State Veterinarian's office and the area of the weigh in scales so trainers and owners may observe their dogs.

After a hearing, D'Avignon was suspended for sixty (60)

days and on appeal he contends that Rule 1233, the absolute insurer rule, is unconstitutional by its own provisions and in its application in conjunction with Rule 3104. We will first address the issue of the constitutionality of Rule 1233.

The refusal to impose individual liability for an act which one would not reasonably or ordinarily foresee as causing harm is a basic precept ingrained in our system of jurisprudence. However, the courts have long recognized that the imposition of liability without fault may be appropriate for the general welfare or protection of the public and such sanctions do not violate the due process clauses of the State and Federal Constitutions so long as they bear a reasonable relationship toward accomplishing the desired result. There are many instances in which the United States Supreme Court has approved the application of strict liability and this court is of the opinion that this rule of law is well enough established to allow this court to forego a discussion of the particular cases. See *Sandstrom* v. *California Horse Racing Bd.*, 31 Cal.2d 401, 189 P.2d 17, 20-21, *cert. denied,* 355 U.S. 814 (1948), see cases cited; *Maryland Racing Comm.* v. *McGee,* 212 Md. 69, 128 A.2d 419, 424 (1947), see cases cited. This court has recognized the power of the Arkansas Racing Commission to:

> Take such other action, not inconsistent with law, as it may deem necessary or desirable to supervise and regulate, and effectively control *in the public interest,* Greyhound Racing in the State of Arkansas.

Arkansas Racing Comm. v. *Hot Springs Kennel Club, Inc.,* 232 Ark. 504, 339 S.W.2d 126 (1960).

We feel the enterprises of horse and dog racing are especially susceptible to fraud and deceit because of the parimutuel wagering. It is apparent that detection of the adulteration of an entrant prior to payment to the winning betters is not feasible and it is imperative that society be afforded as much protection as possible to prevent abuses. For these reasons, we find the absolute insurer (Rule 1233) a constitutional and valid exercise of the police power of this state.

D'Avignon next contends that the absolute insurer rule (Rule 1233) is unconstitutional because of its application in conjunction with the lock-out rule (Rule 1304). He argues that the imposition of a rule of strict liability is predicated on the concept that the one on whom such a burden is placed has control of the instrumentality causing the harm and that this control places him in the best position to prevent harm or injury. The vicious dog is in the control of the owner — the locomotive that starts a fire on the railroad right-of-way is maintained by and in the control of the railroad — the one using a dangerous substance such as explosives for blasting can prevent injury by exercising a high degree of care — the merchant who processes food is in the best position to prevent its adulteration. Counsel for Appellant makes a persuasive argument that Appellant has been deprived of his control of Stylish Kim because of the lock-out rule. No cases from any jurisdictions have ruled on the constitutionality of the absolute insurer rule in conjunction with a lock-out rule.

Several reasons have been given for the lock-out rule. Testimony was offered at the hearing that this rule eliminates the need for a prerace weigh in. Under this rule all of the dogs that are entered in the twelve races to be held that evening are weighed in at approximately 6:00 p.m. After they are weighed the dogs are delivered to race officials for placement in cages in the lock-out room which is monitored by closed-circuit television cameras. The room contains as many as 96 dogs before the first race is run. Stylish Kim was placed in the cage designated as "4 — 4" representing the fourth dog in the fourth race. The cages for each race are together to make the dogs more readily available and for ease in handling the animals prior to each race. There are usually three attendants in the lock-out room at all times. Immediately prior to a race, the dogs entered are taken to a "prerace walk area" for waste elimination purposes and they are then paraded to a reviewing stand allowing spectators to see the animals. The lock-out room is air conditioned and provides a better environment than a cage in a truck in the parking lot. In summer the heat in the parking area would have an effect on the performance of a dog in a race.

A major benefit of the lock-out rule is the elimination for the need for the dogs to be weighed immediately prior to a race. The dogs must be within two pounds of a given weight when they are entered for the race and if they were taken back to their cage in the trucks in the parking area they would have to be weighed again prior to the race. Since the dogs are turned over to the track officials immediately after the entry weigh in, they do not have the opportunity to eat and the prerace weigh in is unnecessary.

In the oral argument of this case other benefits of the lock-out rule were given such as the prevention of a trainer or owner from using various measures to excite an animal to increase his performance. The condition and treatment of the dog is certainly a concern of the Commission.

Counsel for appellant has made an excellent presentation of his position that the lock-out rule causes an unconstitutional application of the absolute insurer rule but this court is of the opinion that appellant *has the opportunity* to observe his animals while they are in the lock-out room if he so desires. D'Avignon testified that he was too busy to stand at the closed-circuit television monitors and constantly watch his animals. He said that he had to pick up dogs after they had raced to return them to his truck while his other entrants remained in the lock-out room. This court recognizes that without the lock-out room D'Avignon would have to leave some of his animals in his truck to take other entrants to a prerace weigh in so in any event his dogs would be left unobserved unless he has an assistant.

Nowhere in the record of this case can be found any testimony or evidence that D'Avignon complained that the manner in which the lock-out room was constructed or equipped does not afford a proper opportunity to observe the animals and protect them from abuse or adulteration. Even more noticeable is the absence of any evidence in this record that the design of the lock-out room or equipment in fact does not afford the opportunity to guard the animals against abuse or tampering. Although physical control of Stylish Kim was relinquished by D'Avignon when the dog

was placed in the lock-out room, Appellant's argument of lack of control falls short under the evidence in this case. Since there are two television cameras located inside the lock-out room and two sets of monitors on which a trainer or owner can view the lock-out room and since there is no evidence in the record reflecting inadequacies in the design of the lock-out room which might deprive D'Avignon from properly observing his animal, this court is of the opinion that trainers and owners still maintain a sufficient degree of control for the observation and protection of their animals.

From the foregoing considerations it follows that the evidence in this case is not such as to warrant a finding by this court that the application of the lock-out rule in conjunction with the absolute insurer rule is unconstitutional.

Affirmed.

HAYS, J., not participating.

William FARMER *v.* William F. EVERETT, Director of Labor, and ALLRIGHT PARKING, INC.

83-100 651 S.W.2d 99

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Marilyn Rauch, Central Arkansas Legal Services, Inc., for petitioner.

Bruce H. Bokony, for respondents.

PER CURIAM. The Court of Appeals affirmed the Board of Review's denial of unemployment benefits to petitioner, Farmer. *Farmer* v. *Everett,* 8 Ark. App. 23, 648 S.W.2d 513 (1983). We granted the petitioner's petition to review that affirmance on May 2, 1983. After carefully studying the issues presented and the record, we are of the view that the petition was imprudently granted. Consequently, we dismiss the petition. As we have said, a denial of a petition for review does not imply approval or disapproval of the decision. *Wilson* v. *City of Pine Bluff,* 278 Ark. 65, 643 S.W.2d 569 (1982); *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979); *Masingill* v. *State,* 278 Ark. 641, 648 S.W.2d 62 (1983).

Petition dismissed.

Johnny Lee NELSON *v.* STATE of Arkansas

651 S.W.2d 98

Supreme Court of Arkansas
Opinion delivered May 31, 1983

Appellant, *pro se.*

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

PER CURIAM. Johnny Lee Nelson was convicted of burglary and misdemeanor theft of property on March 12, 1982. He alleges in his motion for belated appeal that retained counsel Edwin Keaton filed a notice of appeal but did not pursue the appeal after that point. He states that he tried to contact counsel but could not reach him. He asks that Keaton be relieved as counsel, but he does not request appointment of other counsel.

When appellant filed this motion, a copy of it was sent to Mr. Keaton with the request that he respond to the motion by affidavit. He has not done so; therefore, we have no choice but to accept appellant's claim that counsel abandoned his client despite the fact that appellant wanted to continue the appeal.

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 Keaton 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,* 279 Ark. 430, 652 S.W.2d 35 (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 reasons for the request, 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 to 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).

In light of his failure to follow the procedure prescribed for withdrawal from a case, Keaton remains the attorney of record. See *Surridge* v. *State,* 276 Ark. 596, 637 S.W.2d 597 (1982). He is therefore responsible for the duties imposed on him by the rules, statutes and opinions of this Court. We decline to grant appellant's request that Mr. Keaton be relieved as counsel. As retained counsel, Mr. Keaton shall be required to either properly petition this court for permission to withdraw within thirty days or file within thirty days a motion for rule on the clerk asking for permission to file the record on appeal. Failure to act will be considered a serious breach of professional duty.

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

Motion granted.

James W. POWELL *v.* Wade BISHOP et al

83-20 652 S.W.2d 9

Supreme Court of Arkansas
Opinion delivered June 6, 1983
[Rehearing denied July 5, 1983.]

Lisle & Watkins, for appellant.

William Jackson Butt II of *Davis, Cox & Wright,* for appellees.

RICHARD B. ADKISSON, Chief Justice. Appellee, Wade Bishop, and other property owners filed a petition to create the Appleby Road Street Improvement District with the city clerk of Fayetteville, Arkansas, pursuant to Ark. Stat. Ann.

§ 20-108 (Supp. 1981). The Fayetteville Planning Commission determined that the proposed improvement district was in keeping with the city's master street plan, and the proposal was then submitted to the Fayetteville Board of Directors. The Board determined that the petition contained the requisite number of signatures of owners of a majority of the assessed value of real property within the proposed district but that the petition excluded certain property which would receive a substantial benefit from the proposed district; therefore, the Board adopted Ordinance No. 2830 denying the petition for creation of the district.

Thirty-five days later appellee petitioned the circuit court for a writ of mandamus, praying that the Fayetteville Board of Directors be required to adopt an ordinance establishing the Appleby Road Street Improvement District in accordance with the original petition to create said district. Shortly thereafter, appellant, James W. Powell, intervened, alleging that he was a property owner within the proposed district whose interests would be adversely affected and that his interest was different from the existing parties.

The Washington County Circuit Court held a hearing on whether the Board properly denied the creation of the district. Attorneys representing appellees, the city, and appellant were all present. The court ruled that the city should have created the proposed district and issued the writ of mandamus. Appellant brought this appeal, alleging that mandamus is not the proper procedure to compel the creation of the district.

We first note that at the hearing before the trial court it was undisputed that mandamus was the proper remedy. Both the trial judge and the attorney for the city orally agreed that mandamus was proper, without objection by appellant. Although appellant objected to mandamus after the hearing, he in effect agreed at the hearing that mandamus was the proper procedure, thereby waiving his right to make an objection at a later time. *See* ARCiv.P Rule 46. Under these circumstances we affirm the trial court's issuance of mandamus, but take this opportunity to correct a widely held misconception that mandamus is a proper

method by which to review a city's decision regarding the creation of an improvement district which arose as a result of our decision in *Little Rock* v. *Boullioun,* 171 Ark. 245, 284 S.W. 745 (1926).

In *Boullioun* the city voted not to annex property to an improvement district and the trial court issued a writ of mandamus to compel the city to do so. This court affirmed the trial court's holding that the city should have annexed the property, but we did not address the issue of whether mandamus was the appropriate remedy since it was not before us. However, we now decide that mandamus is not a proper method to review a city's decision regarding the creation of an improvement district because Ark. Stat. Ann. § 20-108 (Supp. 1981) provides for an adequate remedy by way of an appeal to chancery court. *See Wells* v. *Purcell,* 267 Ark. 456, 592 S.W.2d 100 (1979).

Affirmed.

Walter R. PADGETT and Carol Sue PADGETT *v.* Peggy A. Haston *v.* BANK OF EUREKA SPRINGS, Eureka Springs, Arkansas

83-55 651 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered June 6, 1983

Epley. Epley & Castleberry, Ltd., by: *Alan D. Epley,* for appellants.

Coxsey & Coxsey, by: *Kent Coxsey,* for appellee and cross-appellant.

R. H. Mills, for cross-appellee.

FRANK HOLT, Justice. In 1969 appellant Walter Padgett and appellee Peggy Haston, who were then married and residing in Louisiana, purchased Arkansas realty which is

the subject of this partition action. The purchase price of $3,500 was paid from their joint account. They acquired title as tenants by the entirety. In March 1976 Walter and Peggy sold their Louisiana home and divided equally the net proceeds of $14,000. Peggy bought a mobile home in Louisiana with her share. Walter moved to the Arkansas property and contracted for the construction of a house thereon. He expended $5,000 of his share of the proceeds from the sale of the Louisisna home. In addition he borrowed $20,000 from the Bank of Eureka Springs. The construction contract was executed in the names of "Walter R. Padgett and Peggy Padgett, husband and wife" and was signed by both parties. Similarly, the mortgage in favor of the Bank of Eureka Springs, cross-appellee, to secure the $20,000 note was executed in the names of "Walter R. Padgett and Peggy Padgett, husband and wife" and was signed by both parties.

In January 1978 Walter commenced an action for divorce. He alleged there were no property rights to be adjudicated. Eleven days later Peggy's Louisiana attorney wrote Walter's attorney stating that she wished to make a property settlement without the necessity of formal legal proceedings. She then entered an appearance and waived process, allowing an entry of a divorce decree without further notice to her. In March, 1978, the chancellor granted Walter a divorce, giving him custody of the parties' seventeen year old son. The chancellor made a finding there were no property rights to be adjudicated.

In September 1979 Walter married Carol Sue Padgett. Several months later Walter and Carol Sue executed two notes to the Bank of Eureka Springs. One note was in the amount of $14,911 which was the balance remaining on the original $20,000 note. The second note was in the amount of $10,000. Walter and Carol Sue also executed a mortgage in favor of the bank in the amount of $24,911, securing both notes with the property which is sought to be partitioned in this action.

In October 1980 Walter and Carol Sue Padgett were divorced. In December 1980 Walter and Peggy's son moved

from the premises in question at the request of Walter. This action for partition was commenced by Peggy in February 1981. The defenses of unjust enrichment, estoppel, laches, and homestead rights were interposed. The chancellor granted the partition. He held that the tenancy by the entirety was automatically dissolved into a tenancy in common by the 1978 divorce decree. He found that the doctrine of laches prevented Peggy from sharing in the increased value of the premises attributable to $10,364.71 improvements made subsequent to the divorce between Walter and Peggy. He ordered the property sold at public auction and the proceeds divided in the following priority: cost of the sale, Commissioner's fee and legal costs incurred in this action, including an attorney's fee of 6% of the sale proceeds to Peggy's attorney; $13,116.46 principal and accrued interest on the $14,911 note to the Bank of Eureka Springs; $10,364.67 to Walter R. Padgett, subject first to the lien of $5,000 and all accrued interest on the $10,000 note in favor of the Bank of Eureka Springs; $1,795.54 to Walter R. Padgett, the difference in the amount of principal owed the Bank of Eureka Springs, Eureka Springs, Arkansas, on June 26, 1980 and on April 14, 1982, date of trial; one-half of the remaining balance to be distributed to Peggy Haston; the remaining one-half to Walter Padgett. Walter's portions are subject to federal tax liens. Five points are raised on appeal and three on cross-appeal.

The appellants first argue that the doctrines of estoppel and laches preclude the appellee from claiming any interest in the property in question. This argument is based on the premise that the appellee allowed appellant Walter Padgett to construct a dwelling on the property, thereby greatly increasing its value, without asserting her claim to it until three years after the divorce and five years after the separation. They also contend that the appellee should have asserted her property rights in the divorce action. In *Foote's Dixie Dandy* v. *McHenry, Adm'r,* 270 Ark. 816, 607 S.W.2d 323 (1980), we reiterated the doctrine of estoppel as follows:

> Four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the

> party asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Here, the dwelling was constructed in 1976 and the value of the property was thereby enhanced when the appellant Walter Padgett first moved to the Carroll County property. If Walter relied on Peggy's conduct to his injury at any time, this would have been the time at which the reliance took place. The evidence clearly shows, however, that, at this time, both Peggy and Walter understood that Peggy shared in the ownership of the property. She had joined in signing the mortgage on the property, at the request of Walter, as well as signing the contract for the construction of the dwelling. We cannot say that Peggy acted in such a manner as to give Walter the right to believe that she was asserting no interest in the property, nor can we say that Walter was ignorant of the critical fact that she had and claimed an interest in it.

In order to apply the doctrine of laches, it must be shown that there was an unreasonable delay in asserting some right and because of the delay the party claiming the protection of laches changed his position to his detriment so as to make it inequitable to enforce the asserted right. *Hendrix* v. *Hendrix,* 256 Ark. 289, 506 S.W.2d 848 (1974); and *Williams* v. *Grayson,* 224 Ark. 207, 273 S.W.2d 844 (1954). Again, the change of position occurred in 1976 when the dwelling was built. The appellant, Walter Padgett, did not change his position again with respect to the property until after the divorce in 1978, when he expended $10,364.67 to improve the house. Thus, Peggy's delay between 1976 and 1978 in asserting her claim did not injure Walter. We cannot say that the failure of Peggy to assert her claim to the property immediately in 1976, when the parties were initially separated and no plans were yet made for a divorce, so far as the record indicates, is sufficient to invoke the doctrine of laches.

The appellants next argue that the chancellor erred in awarding Peggy any interest in the value of the property

represented by the improvements thereon, because such an award results in the unjust enrichment of the appellee, citing *Frigillina* v. *Frigillina,* 266 Ark. 296, 584 S.W.2d 30 (1979). There, we said that a person is unjustly enriched and will be required to make restitution when another person confers a benefit through mistake, whether of fact or law. Here, we find no evidence that the appellant, Walter Padgett, built the dwelling which increased the value of the property under the influence of a mistake as to fact or law. His conduct in obtaining the appellee's signature on the house construction contract and mortgage to the bank indicates that he was not mistaken with respect to Peggy's interest in the property. As abstracted, he did not testify that he was under the influence of any mistaken belief as to her claim to the property.

The appellants next argue the chancellor erred in failing to apply the homestead exemption contained in the partition statute, Ark. Stat. Ann. § 34-1801 (Supp. 1981), which provides as follows:

> Any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned courtesy [curtesy], or in coparceny, absolutely or subject to the life estate of another, or otherwise, *or under an estate by the entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons,* shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear. (Italics supplied.)

The italicized portion of the statute was added by Acts of

Arkansas, 1947, No. 161 § 1. Section 3 of Act 161, the emergency clause, states:

> It is hereby found and declared by the General Assembly that the present statute relative to partition of real property in Arkansas, having been enacted many years ago, is inadequate and *not broad enough to provide this form of relief in numerous cases* in the State of Arkansas, and which are working an unjust hardship upon citizens owning property jointly, in common, or in coparceny, absolutely or subject to the life estate of another or otherwise, under an estate by the entirety, where said owner shall have been divorced either prior or subsequent to the passage of this Act, and that such condition is hindering the alienation of real property and prejudicing the property rights of many citizens. (Italics supplied.)

The appellants contend that the homestead exception should be construed to limit the right to partition with respect to each form of tenancy listed in § 34-1801. We disagree. Act 161 added the portion of the statute creating the right to partition an estate by the entirety where the owners have been divorced and simultaneously added the homstead exception, which on its face applies only to "said divorced persons." Thus, the express language of the exception refers only to that portion of § 34-1801 creating a right to partition land held as tenants by the entirety by divorced persons. Furthermore, the emergency clause pf Act 161, quoted above, clearly indicates that the legislative intent was to broaden rather than narrow the availability of the remedy of partition. Accordingly, we hold that the homestead exception contained in § 34-1801 applies only to property held by divorced persons as tenants by the entirety and not to property held as tenants in common, as here.

The appellants also argue that the chancellor erred in applying Ark. Stat. Ann. § 34-1215 (Supp. 1981), which states:

> Hereafter when any Chancery Court in this State renders a final decree of divorce, any estate by the

> entirety or survivorship in real or personal property shall be automatically dissolved unless the Court order specifically provides otherwise, and in the division and partition of said property parties shall be treated as tenants in common.

Section 34-1215 was first enacted in 1947. At that time the legislature gave to the chancery courts the authority to dissolve tenancies by the entirety into tenancies in common upon a final decree of divorce. Acts of Arkansas, 1947, No. 340. In 1975 § 34-1215 was amended by substituting the language quoted above for the old statute enacted by the 1947 Act 340. The appellants argue that since the tenancy by the entirety was created in 1969, six years before the dissolution of tenancies by the entirety was made automatic in the absence of specific provision otherwise in the divorce decree, it is an unconstitutional retroactive legislation to apply § 34-1215 in its present form. The appellants rely upon *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S.W.2d 124 (1951), where we held that Act 340 of 1947 could not be applied retroactively. Prior to 1947 our cases held that a decree of divorce could not dissolve an entire estate, so the courts could not divest one spouse of the estate by the entirety. *Jenkins* v. *Jenkins, supra.* Thus, in *Jenkins,* our holding was that a vested estate could not by subsequent legislation be made contingent upon continued marriage and the action or inaction of a court. However, all estates by the entirety created after the effective date of Act 340 of 1947 were made contingent upon continued marriage and the action or inaction of the court in any divorce proceedings. Here, the estate in tenancy by the entirety created in 1969 was, by the terms of Act 340 of 1947, contingent upon continued marriage. The tenancy by the entirety was, from its inception, subject to divestment upon divorce. The 1975 amendment merely changed the procedure by which the divestment might occur. The rule as to changes in procedures is stated in 16A Am. Jur. 2d § 675 (1979) as follows:

> Although the distinction between remedial procedures and impairment of vested rights is often difficult to draw, it has become firmly established that there is no vested right in any particular mode of procedure or

> remedy. Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retrospective application, and remedial legislation may, without violating constitutional guarantees, be construed . . . to apply to suits on causes of action which arose prior to the effective date of the statute . . . A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective . . . .

Finally, the appellants made an abbreviated argument that the award of attorney's fees to appellee Peggy Haston's attorney was not a "reasonable fee" for bringing the partition action. Ark. Stat. Ann. § 34-1825 (Supp. 1981) provides there shall be an allowance of a reasonable attorney's fee in a partition action. We have construed this provision as being mandatory. *Johnston* v. *Smith,* 248 Ark. 929, 454 S.W.2d 649 (1970); and *Cole* v. *Scott,* 264 Ark. 800, 575 S.W.2d 149 (1979). There is no fixed formula in partition actions, unlike probate proceedings, to be applied in the determination of an attorney's fee. *Cole* v. *Scott, supra.* We have said it is within the broad discretion of the trial court, although it must not be abused. *Equitable Life Assur. Society* v. *Rummell,* 257 Ark. 90, 514 S.W.2d 224 (1974). Here, suffice it to say that in our opinion the appellants failed to meet their burden of demonstrating an abuse of discretion by the chancellor.

Three points are raised on cross-appeal. The cross-appellant Peggy Haston first argues the chancellor erred in finding her guilty of laches and awarding cross-appellee Walter Padgett $10,364.67 from the proceeds of the partition sale for the improvements he made after the divorce in 1978.

In *Avera* v. *Banks,* 168 Ark. 718, 271 S.W. 970 (1925), the court said:

> There is no hard and fast rule as to what constitutes laches. It is well settled that a court of equity may, in the

> exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the relief asked. It is usually said that the two most important circumstances in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other in so far as it relates to the remedy. (Citing cases).

Here, the parties were divorced in March 1978. The cross-appellant had an opportunity to raise her claim to the property in that proceeding, but she did not do so, though her attorney indicated she wished to resolve the property issues out of court. Instead, she waited three years before instituting this action for partition. During that time, her former husband, Walter, and his second wife, Carol Sue, the cross-appellees, borrowed and expended more than $10,000 to improve the property. The cross-appellant was in contact with her son who was living on the premises and she either knew or had opportunity to know of these improvements. Her excuse for the three year delay in asserting her rights is that she wished her son to live in the house. However, that is no justification for sleeping on her rights. The chancellor mitigated the effects of the doctrine of laches by limiting its application to the improvements after divorce. He did not declare that the cross-appellant had forfeited her rights with respect to the title to the property or the improvements made before the divorce. We find no error. For the same reasons we affirm the chancellor's award of $1,795.54 to Walter Padgett, cross-appellee, for the amount of principal reduced on the mortgage after the divorce and the marriage between Walter and Carol Sue Padgett.

Finally, the cross-appellant argues that the court erred in holding her interest in the property to be subject to a mortgage held by the Bank of Eureka Springs. She argues the original mortgage, which she signed, was extinguished when the cross-appellees refinanced the original loan and executed a new mortgage, which she did not sign. The original mortgage was never released of record. By its terms,

it secured future or additional debts owed by any person designated "Mortgagor." Walter Padgett was designated as a "Mortgagor." The subsequent debts were of the same character as the original debt. They were used to improve the same property as were the proceeds from the original debt. Furthermore, the subsequent debts were incurred during the period of time that the original mortgage was intended to secure the original note. Therefore, in the facts of this case, we hold the original mortgage continued to secure the additional debt incurred by Walter Padgett in 1979, even if, as the cross-appellant argues, the original debt was extinguished at the time the 1979 notes were executed. See Meek, *Mortgage Provisions Extending the Lien to Future Advances and Antecedent Indebtedness,* 26 Ark. Law Rev. 423 (1973).

Affirmed on direct and cross-appeal.

SERVICE COMMUNICATIONS, INC. *v.*
Roy WELLS and Floyd McCONNELL

83-127 651 S.W.2d 100

Supreme Court of Arkansas
Opinion delivered June 6, 1983

Eldridge & Eldridge, by: *John D. Eldridge, III.,* for appellant.

David Hodges, for appellees.

JOHN I. PURTLE, Justice. A White County Circuit Court jury returned a defendant's verdict upon appellant's complaint for damages in which it was claimed that appellee was guilty of negligence which proximately caused appellant's damages. The only argument on appeal is that there was no

substantial evidence to support the verdict. We cannot agree with this argument.

Roy Wells, one of the appellees, owned farmland in White County and agreed to lease a portion of his land to appellant who then constructed a radio transmitter tower thereon. Guy wires were fasted to the tower and anchored to the ground. Wells farmed the land for a time but later rented or leased it to Floyd McConnell, the other appellee.

On June 5, 1980, about 8:30 p.m., Wells, working as hired hand for McConnell, drove a farm tractor into one of the guy wires with sufficient force to fell the tower. The complaint alleged that Wells was careless and negligent in the operation of the tractor. During the trial the only evidence of anything causing the tower to fall was the force of the impact of the tractor with the guy wire. Wells testified that he knew the wires were present and was in fact looking back to see if the disk he was pulling would clear one wire when the outside dual wheel of the tractor struck another wire. The left front tire on the tractor struck the wire with sufficient force to topple the tower. Wells stated the sun was getting low and was in front of him when he drove into the guy wire. The wire he struck was in the shade at the time it was struck. He further stated he was acting in exactly the same manner he had on other occasions while farming this same land and he did not know of anything he had failed to do which any ordinary person in the same situation would have done. The trial court overruled appellant's motion for a new trial.

The only question on appeal is whether the evidence, or lack of it, was sufficient to support the verdict. This court will not reverse a trial court's denial of a motion for a new trial if the decision is supported by substantial evidence. *Landis* v. *Hastings,* 276 Ark. 135, 633 S.W.2d 26 (1982). However, the trial court is guided by ARCP, Rule 59 (a). One of the grounds listed in Rule 59 (a) upon which a trial court can grant a new trial is a finding that the verdict is contrary to the preponderance of the evidence or is contrary to the law. Rule 59 (a) (6) was amended by per curiam on May 17, 1982, to make it read "clearly contrary." In *Clayton* v.

Wagnon, 276 Ark. 124, 633 S.W.2d 19 (1982), we announced that on appeal the decision of the trial court will not be reversed absent an abuse of discretion. In *Wagnon* we were dealing with a situation where the trial court granted a motion for a new trial. In *Landis* v. *Hastings, supra,* the motion for a new trial was denied. Both cases were affirmed because there was not a sufficient showing of abuse of discretion. The motion for a new trial was denied in the present case. In accordance with the opinion in *Landis* we find that there was substantial evidence to support the verdict and there was no abuse of discretion. Therefore, we will not disturb the trial court's action.

The court instructed the jury in accordance with AMI 603 to the effect that the occurrence of a collision is not evidence of negligence. The court also gave AMI 301 which states in part:

> To constitute negligence an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.

At the time of this occurrence, appellee Wells was driving his tractor west into the sun. Also, the guy wire which he strick was in the shadows. Additionally, he stated that he was working in the same manner in which he had worked in past years, and that he had worked this field before. We cannot say that there was no substantial evidence upon which the jury could have made its finding that Wells was not guilty of negligence in striking the guy wire. In *Celotex Corp., Inc.* v. *Lynndale Int'l., Inc.,* 277 Ark. 242, 640 S.W.2d 792 (1982), we quoted with approval from an earlier case which stated:

> A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony.

We think the case of *Spink* v. *Mourton,* 235 Ark. 919, 362 S.W.2d 665 (1962) stated the rule appropriately when it said: " . . . the motion for judgment n.o.v. was properly denied unless it can be said that the trial court should have directed a verdict in favor of the plaintiffs." The facts before us in this case provide no evidence of error on behalf of the trial court in failing to direct a verdict in favor of the plaintiffs. We feel that the trial court acted properly in denying the motion for new trial.

Affirmed.

Roger L. GREEN, M.D. *v.* Edna GOWEN and Curtis GOWEN

83-132 652 S.W.2d 624

Supreme Court of Arkansas
Opinion delivered June 6, 1983
[Rehearing denied July 11, 1983.]

Joseph Philip James, for appellant.

Charles R. Easterling, for appellees.

ROBERT H. DUDLEY, Justice. On February 10, 1979, appellee, Edna Gowen, a patient of appellant, Dr. Roger L. Green, suffered a severe fracture of the right femur while in appellant's waiting room. Appellee and her husband, Curtis Gowen, contended that the fall occurred when an employee of appellant negligently pushed a castered stool into her path. Appellant's defense was that the appellee fell for no apparent reason. The trial court denied appellant's motion for a directed verdict and the jury then returned a verdict in the sum of $15,000. The court subsequently denied appellant's motion for a new trial. Appellant contends the trial court erred in refusing to direct a verdict and in refusing to grant a new trial. We find no error. Jurisdiction of this tort case is in this Court pursuant to Rule 29 (1) (o).

In determining on appeal the correctness of the trial court's action concerning a motion for a directed verdict by either party, we view the evidence that is most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. The motion should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Pritchard* v. *Times Southwest Broadcasting, Inc.,* 277 Ark. 458, 642 S.W.2d 877 (1982).

The appellee testified that her fall and the resulting injury occurred because appellant's employee pushed a castered stool into her path. Her orthopedic surgeon testified that the line of her fracture was consistent with falling across an object. Such evidence, although disputed, is not so

insubstantial as to require the jury verdict to be set aside. A question of credibility of the witnesses was presented and the jury chose to believe the evidence presented by the appellees.

Since the trial court correctly found the evidence was sufficient to deny the motion for a directed verdict, it follows that it also correctly denied the motion for a new trial based upon insufficiency of the evidence. *See Landis* v. *Hastings,* 276 Ark. 135, 633 S.W.2d 26 (1982).

Affirmed.

BERKELEY PUMP COMPANY *v.*REED-JOSEPH LAND COMPANY et al

82-197 653 S.W.2d 128

Supreme Court of Arkansas
Opinion delivered June 6, 1983
[Supplemental Opinion on Denial of Rehearing delivered July 18, 1983.]

Atchley, Russell, Waldrop & Hlavinka, by: *Victor Hlavinka,* for appellant.

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Charles A. Morgan,* for appellee Reed-Joseph Land Company.

Hubbard, Patton, Peek, Haltom & Roberts, by: *Phillip N. Cockrell* and *James R. Hubbard,* for appellees S & W Well Drilling and Irrigation Corporation and Riceland Machine & Supply Corporation.

STEELE HAYS, Justice. This products liability case involves three irrigation pumps consisting of components manufactured by Berkeley Pump Company, appellant, and assembled and installed by Riceland Machine and Supply Corporation and S & W Well Drilling and Irrigation Corporation, appellees. The pumps were purchased in 1978

from Riceland by J. B. Joseph and Clark Reed, appellees, to supply irrigation to Reed-Joseph's rice and soybean crops on lands along the Red River in Miller County. In addition to relying on the pumps for their own irrigation needs, Reed-Joseph contracted with Agri-Vestors Corporation, appellee, to supply water for Agri-Vestors' rice crop.

A few years earlier, Reed-Joseph had purchased a pumping system from Riceland with components supplied by Berkeley consisting of three slant-mounted pumping units having a combined capacity of 30,000 gallons per minute. Wanting an increase in capacity, and relying on performance curves published by Berkeley, Reed-Joseph elected to purchase three new Berkeley impellers which were expected to produce 36,000 gallons per minute. The system, installed in April, 1978, performed inadequately, resulting in drought damage to the crops of Reed-Joseph and Agri-Vestors, and springing this litigation.

Riceland initiated this action by suing Reed-Joseph for the value of the pumps and equipment. Reed-Joseph counterclaimed for damages for its crop losses on counts of strict liability, breach of express and implied warranties, negligence and fraud. Riceland brought Berkeley in by third-party complaint seeking contribution and indemnity and tendering to Berkeley the defense of the Reed-Joseph claims. Agri-Vestors intervened seeking recovery for its losses.

The case was submitted to the jury on all theories and a verdict of $684,753.42[1] was awarded Reed-Joseph. Riceland was awarded judgment of $134,039.15 and indemnified against Berkeley as to any money recovered by Reed-Joseph and Agri-Vestors with responsibility for the total fault apportioned by the jury at 90% to Berkeley, 10% to Riceland. Riceland was granted full indemnification from Berkeley and awarded $134,039.15 as expenses incurred in defending the litigation. Reed-Joseph was also awarded $15,698.15 and prejudgment interest of $126,081.20. Riceland was given judgment against Reed-Joseph for $32,407.22 plus prejudgment interest of $5,833.30.

[1]By stipulation, $45,000.00 went to Agri-Vestors.

On appeal, Berkeley alleges numerous errors, some of which must be sustained. It is urged that there was no breach of warranty for a particular purpose as there was no evidence that any particular purpose was communicated to Berkeley; that it was error to submit the case to the jury on the issue of strict liability and on the issue of fraud; that the court should not have awarded Reed-Joseph $15,698.15 and prejudgment interest, nor should it have indemnified Riceland and allowed it to recover the costs of defense.

Riceland argues on cross-appeal that prejudgment interest should not have been awarded to Reed-Joseph and, in the event of reversal, that the jury should not have been instructed with respect to breach of an express warranty because any such warranties were negated by Reed-Joseph's failure to comply with certain conditions of warranty; that there was no evidence that Riceland knew of any particular purpose intended for the pumps and the jury should not have been instructed on the issue of a breach of warranty of fitness for a particular purpose.

I

We first consider what we regard as the pivotal point, whether under the evidence it was appropriate to submit the issue of strict liability to the jury.

After the immunity of manufacturers to all but the original purchaser was destroyed by *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) the progress of products liability was gradual but deliberate. Producers of food and beverages experienced the first exposure and other manufacturers followed. In 1960 the Supreme Court of New Jersey applied strict liability to the user of a defective automobile, though wholly on the basis of an implied warranty. See *Henningsen* v. *Bloomfield Motor Company*, 32 N.J. 358, 161 A.2d 69 (1960).

In 1965, decisions were reached in two significant cases: in February the New Jersey Supreme Court handed down *Santor* v. *A. and M. Karagheusiam, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), upholding a recovery of an economic loss by a consumer against the manufacturer of a defective

rug, recognizing a cause of action in tort, independent of fault or warranty. Justice Francis described the cause as hybrid in character, "having its commencement in contract and its termination in tort." A few months later the Supreme Court of California, through Chief Justice Traylor, rejected the reasoning of *Santor,* saying "only if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort." *Seely* v. *White Motor Company,* 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). The opinion points out that the tentative draft of 402A, Restatement of Torts (Second) limits recovery in strict liability to physical harm to persons or property.

That same year 402A was formally adopted by the American Law Institute, providing that one who sells "any product in a defective condition unreasonably dangerous to the user or consumer or to his property" is strictly liable. With the approval of 402A, strict liability "swept the country," [Prosser, *The Law of Torts,* § 98 at p. 567-8 (4th Edition 1971)] and within a decade all but a few jurisdictions had embraced the concept (*Berman* v. *Watergate West, Inc.,* 391 A.2d 1351 [D.C. 1978]).

In Arkansas the change from fault to strict liability was legislative rather than judicial, with the adoption of Act 111 of 1973, which provides for strict liability by suppliers of a product "in a defective condition which rendered it unreasonably dangerous." (Ark. Stat. Ann. § 85-2-318.2). While our act is "substantially verbatim" to 402A (*See* Woods, *Products Liability: Is Comparative Fault Winning the Day?* 36 Arkansas Law Review, No. 3, p. 360, at 364), Act 111 broadened the scope of strict liability in two important respects: by substituting "supplier" for "seller" and injury to "persons and property" for "users" or "consumers." More recently, the legislature enacted the "Arkansas Products Liability Act of 1979" (Act No. 511) (Ark. Stat. Ann. §§ 34-2801 — 34-2807 [Repl. 1962]), which makes no substantive changes, but simply codifies certain precepts and evidentiary rules affecting strict liability. (Powell, *Survey of Torts,* 3 UALR Law Journal 316.)

With that background, we turn to Berkeley's arguments. It contends that strict liability is not applicable: one,

where the product, in spite of any defective condition, does not constitute an unreasonable danger to persons or property; or two, in the absence of injury to persons, such defect causes purely economic loss.

We addressed the issue of economic loss only recently in *Blagg* v. *Fred Hunt Co., Inc.,* 272 Ark. 185, 612 S.W.2d 321 (1981), where by dictum we opted in favor of the reasoning of Justice Francis in the *Santor* case. We see no need to review that choice. The other phase of the argument, i.e. that the product must be unreasonably dangerous, was not raised in *Blagg* and accordingly was not decided. Nor was it raised in another recent decision, *Southern Company* v. *Graham,* 271 Ark. 223, 607 S.W.2d 677 (1980). Thus, we have not yet considered to what extent a product in a defective condition must be "unreasonably dangerous" so as to render the supplier or manufacturer strictly liable.

We have little doubt that the language of 402A contemplates a type of defect which renders the product not merely inadequate, but one which poses an actual danger to persons or property. That is explicit in the language, "any product in a defective condition unreasonably dangerous", and is said at least as plainly in our statute, which requires that the defective condition render the product unreasonably dangerous. We construe the wording as requiring a defect that renders the product not simply deficient but dangerous.

In spite of the clear language of 402A, some disagreement has developed over the terms "unreasonably dangerous" and "defective condition". A few states have placed the emphasis on defectiveness. In *Cronin* v. *J.B.E. Olson Corp.,* 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), the California Supreme Court refused to set aside a verdict for a consumer whose injuries were incurred when a defective safety hasp on a bread truck broke, allowing heavy trays of bread to slide forward into the driver. The result is understandable enough, as a defective hasp behind the driver's seat of a bread truck readily suggests a danger within the scope of 402A. But the trial court had not instructed the jury that it must find the condition "unreasonably dangerous" as well as defective and the Supreme Court declined to reverse. Noting that strict liabilty was adopted in Cali-

fornia, not in the aftermath of 402A, but in advance of it, in the form of *Greenman* v. *Yuba Power Company,* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), the Supreme Court reasoned that to require proof that a product is both defective and unreasonably dangerous imposes a greater burden on the plaintiff than was applied in *Greenman.* Thus, the court concluded that it was not bound by the unreasonably dangerous requirement of 402A because of that history. Cases following *Cronin* are *Azzarello* v. *Black Brothers Co., Inc.,* 480 Pa. 547, 391 A.2d 1020 (1978); *Mandell* v. *Gulf Leasing Corp.,* 250 Pa. Super. 128, 378 A.2d 487 (1977); *Glass* v. *Ford Motor Co.,* 123 N.J. Super. 599, 304 A.2d 562 (1973); *Berkebile* v. *Brantly Helicopter Corp.,* 462 Pa. 83, 337 A.2d 893 (1975).

In Arkansas, however, Model Jury Instructions have contained instructions drafted in response to our strict liability act since their approval in 1973. AMI 1008 and AMI 1012 tell the jury that a plaintiff must prove, among other things, that the product was supplied in a defective condition which rendered it unreasonably dangerous, and the defective condition was a proximate cause of the damage. We believe it was not the intent of 402A to make manufacturers insurers of their products, irrespective of danger, fault or warranty, and going beyond foreseeable consequences, and hence to apply strict liability simply on the basis of a finding of "defective condition" widens the scope of 402A considerably. [See *Suvada* v. *White Motor Co.,* 32 Ill. 2d 612, 210 N.E.2d 182 (1965)]. This is the majority view and is consistent with the views of Dean John W. Wade, who participated in the formulation of 402A. He explains that strict liability under the Restatement "is not to be imposed unless [the defect] makes the product unreasonably dangerous".

> The only real problem is whether the product is "unreasonably dangerous," because "defective condition", if it is to be applied at all, depends on that. Strict liability is appropriate for these cases, and it would be better in them not to refer to any requirement of defectiveness. As a matter of fact, even in the first type of cases in which the article was defective because of

> something that went wrong in the manufacturing process, *the true problem in the end is whether that defect makes the product unreasonably dangerous.* (Our italics.) ("Strict Tort Liability of Manufacturers", 19 Southwestern Law Journal 5, at p. 15.)

A majority of cases have taken a position counter to the result in *Cronin: Ford Motor Company* v. *Lonon,* 398 S.W.2d 240 (Tenn. 1966); *Northern Power Co.* v. *Caterpiller,* 623 P.2d 324 (Alaska, 1981); *Vineyard* v. *Empire Machinery,* 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978) (expressly rejecting *Cronin*); *Liberty Mutual* v. *Sears,* 35 Conn. 687, 406 A.2d 1254 (1978); *Texsun Feedyards Inc.* v. *Ralston Purina Co.,* 447 F.2d 660 (5th Cir. 1971) (feed supplement failed to increase weight of cattle, as intended. Strict liability held not to apply where product was not dangerous, simply ineffective). *Kirkland* v. *General Motors,* 521 P.2d 1353 (Okla. 1974); *Brown* v. *Western Farmers Assn.,* 268 Or. 470, 521 P.2d 537 (1974); *Heldt* v. *Nicholsen Manufacturing Company,* 72 Wis. 2d 110, 240 N.W.2d 154 (1976); *Medham* v. *White Laboratories,* 639 F.2d 394 (7th Cir. 1981); *Two Rivers* v. *Curtiss Breeding Co.,* 624 F.2d 1242 (5th Cir. 1980); *Patthoff* v. *Alms, Clark Equipment Co., et al,* 41 Colo. App. 51, 583 P.2d 309 (1978), (expressly rejecting *Cronin* as the minority view). *Tenney* v. *Seven-Up Co.,* 92 N.M. 158, 584 P.2d 205 (Ct. App. 1978); *Moorman Manufacturing Co.* v. *National Tank Co.,* 91 Ill. 2d 69, 435 N.E.2d 443 (1982). See cases cited in 13 ALR 3d 1057 and in 63 Am. Jur. 2d § 132 p. 138.

Here, we can find no evidence that the defectiveness of Berkeley's pumps rendered them dangerous — inadequate and dysfunctional, to be sure, but not dangerous. The pumps may have failed to produce the volume of water Reed-Joseph had a right to expect, but those are issues of warranty, negligence, or misrepresentation and do not render them unreasonably dangerous within the meaning of our act.

Reed-Joseph concedes the question to be whether there is sufficient evidence to sustain a finding that the irrigation pumps or parts were in a defective condition which rendered them unreasonably dangerous, but they cite nothing from the testimony or proof to enable us to confirm that this

evidence exists. Their brief suggests that the sale of pumps by Berkeley "without adequate submergence data or without a warning that such data was available, made these pumps 'defective' and their use 'unreasonably dangerous' to the lands, crops and property" of Reed-Joseph. There are two answers to the argument: first, the fact that the pumps failed to produce water at a level desired or expected does not render them dangerous, at worst, merely useless. Moreover, the comments to 402A and our Act 511 define unreasonably dangerous as requiring something *beyond* that contemplated by the ordinary and reasonable buyer, taking into account any special knowledge of the buyer concerning the characteristics, propensities, risks, dangers, and proper and improper uses of the product. The likelihood that a pump might fail to produce an optimum volume of water on a sustained basis (whatever the river levels and conditions might be) could hardly be thought to be beyond the contemplation of a knowledgeable buyer, such as we have here. The testimony of Mr. Barthell Joseph makes it clear that he was thoroughly familiar with irrigation techniques and aware that pump performances varied, depending on a number of conditions. It would be too much to think that it was beyond his comprehension that a pumping system like this one might not produce the goal of 36,000 gallons per minute, and was, therefore, unreasonably dangerous. The evident fact is that Reed-Joseph watched the results of the new system closely, and Mr. Joseph testified that by May, 1978, soon after the new pumps were installed in April, it was apparent that the new system was not producing as much water as before. Second, the fact that the pumps failed to produce the volume of water expected is not a hidden, latent danger, but an obvious one, which carries no duty to warn. *Rost* v. *C. F. & I. Steel Corp.*, ___ Mont. ___, 616 P.2d 383 (1980); *Jacobson* v. *Colorado Fuel and Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969); *Garrett* v. *Nissen Corp.*, 84 N.M. 16, 498 P.2d 1359 (1972).

We conclude that the pumps were not dangerous within the context of strict liability and it was error to submit that issue to the jury.

II

Berkeley insists the jury should not have been instructed with respect to breach of warranty of fitness for a particular purpose because there is no evidence to show that any particular purpose of Reed-Joseph was communicated to Berkeley. Instruction No. 26 explained to the jury the six theories on which the case was being submitted, i.e. strict liability, negligence, breach of an implied warranty of merchantability, implied warranty of fitness for a particular purpose, breach of an express warranty, and fraud.

Comment 2 to Ark. Stat. Ann. § 85-2-315 (Repl. 1961), Uniform Commercial Code, explains how a "particular purpose" may differ from an ordinary purpose:

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

Berkeley argues that before a supplier can be held liable for a breach of warranty of fitness for a particular purpose, it must be shown the supplier knew that a particular purpose was intended by the consumer. Granted, but it is enough if the supplier is aware of the particular purpose a buyer has in mind and permits the buyer to make the purchase on the assumption that the goods are suitable for his needs. That was our holding in *Delamar Motor Co.* v. *White,* 249 Ark. 708, 460 S.W.2d 802 (1970). Nor must actual knowledge be evidenced; it is enough that under all the circumstances the supplier has reason to realize the purpose intended or that the reliance exists. *Lewis* v. *Mobil Oil Corporation,* 438 F.2d 500 (8th Cir. 1971). *Wilson* v. *Marquette Electronics, Inc.,* 630 F.2d 575 (8th Cir. 1980). We cannot say with certainty there was no evidence arising from the arrangements between Berkeley, as seller, either through Riceland, or direct with Reed-Joseph, as buyer, from which the jury could have

inferred Berkeley's awareness of the purpose intended for these pumping components.

III

Two closely related points are that a) the trial court should not have instructed the jury on the issue of fraud, because the evidence failed to show a misrepresentation and an intent by Berkeley to deceive; and b) it was error to give an instruction framed in terms of AMI 601 and 903, that a violation of Ark. Stat. Ann. § 70-904 (Repl. 1979), prohibiting the employment of any deception or the intentional concealment of a material fact in the sale or advertisement of goods, could be considered as evidence of negligence.

Our cases dealing with fraud state generally that fraud is never presumed. *Hembey* v. *Cornelius,* 182 Ark. 417, 31 S.W.2d 539 [1930]), and requires that one party intentionally induce the other party to rely on a representation he knows to be false or, not knowing, that he asserts to be true. [*Welch* v. *Farber,* 188 Ark. 693, 67 S.W.2d 588 (1934)].

Reed-Joseph concedes that there was no affirmative misrepresentation, rather, they argue, there was an intentional and positive concealment of material facts, though what was concealed is not spelled out in specific terms. They do cite a letter from Berkeley to Reed-Joseph containing information regarding the pumps but evidently this was furnished after the components were purchased by Riceland in 1978 and how the information is misleading, even in retrospect, is not made clear.

Reed-Joseph submits that Berkeley was in a fiduciary relationship, but we cannot agree with that assertion. Two early Arkansas cases are cited: *McDonough* v. *Williams,* 77 Ark. 261, 92 S.W. 783 (1905) and *Gillespie and Wife* v. *Holland,* 40 Ark. 28, 48 AmRep 1 (1882). Those cases are plainly distinguishable. In *Gillespie,* a youthful, inexperienced woman was overreached by an older brother who stood *in loco parentis* to her; in *McDonough* the decision describes intimate business dealings from which a confi-

dential relationship could be inferred. We find nothing comparable here.

Reed-Joseph quotes a familiar passage of law that there are times when the law imposes a duty to speak rather than remain silent, when a failure to speak is the equivalent of fraudulent concealment (37 Am Jur 2, Fraud and Deceit, § 146). But this rule is based on special circumstances not evident here, such as a confidential relationship, so that a duty to speak arises where one party knows another is relying on misinformation to his detriment. The general rule is to the contrary, and ordinarily, absent affirmative fraud, a party, in order to hold another liable in fraud (as opposed to breach of implied warranty, as in *Delamar, supra*), must seek out the information he desires and may not omit inquiry and examination and then complain that the other did not volunteer information. (See 37 *Corpus Juris Secundum,* Fraud, § 15, p. 242 and Smith, "Law of Fraud", § 8 p. 18.) We find nothing in the abstract suggesting circumstances from which that rule of law might be found applicable. If fraud exists, whether affirmatively or by concealment, it ought not to be difficult to isolate and cite it. We conclude that the evidence of fraud was not sufficient to warrant submitting that issue to the jury.

Assuming at a second trial that fraud is established so as to constitute a submissible issue, we find no error in the instruction to the jury framed in terms of AMI 601 and 903. We have often said that violation of a statute is evidence a jury may consider in determining whether a defendant is guilty of negligence. *Bridgforth* v. *Vandiver,* 225 Ark. 702, 284 S.W.2d 623 (1955); *Bussell* v. *Missouri Pacific Railroad Co.,* 237 Ark. 812, 376 S.W.2d 545 (1964). Moreover, our rule gives the defendant the benefit of the more favorable view, notwithstanding a majority view to the contrary [See Prosser, *Law of Torts,* at 200 (4th edition)], i.e. that such violation is merely evidence of negligence and not negligence per se. Here, the statutes were designed to protect the public from deceptive marketing and advertising practices and there is sound authority that such statutes imply a right of enforcement by civil action by persons injured by their breach. (*Id.* at § 36, p. 191.) We have upheld the giving of a

comparable instruction to AMI 601 in civil litigation based on the violation of a criminal act. *Rogers* v. *Stillman,* 223 Ark. 779, 268 S.W.2d 614 (1954). Similar instructions have been upheld in consumer acts. See *Sellinger* v. *Freeway Mobile Home Sales, Inc.,* 110 Ariz. 573, 521 P.2d 1119 (1974); *Rice* v. *Snarlin, Inc.,* 131 Ill. App. 3d 434, 266 N.E.2d 183 (1970); *Young* v. *Joyce,* 351 A. 2d 857 (Del. 1975).

IV

Berkeley's argument that the trial court erred in augmenting the judgment awarded Reed-Joseph by the added sum of $15,698.18 in accordance with a stipulation between the parties is rendered moot by the remand of this case and may or may not be relevant to a second trial.

V

Berkeley's argument that it was error to allow Reed-Joseph prejudgment interest of $126,081.29 is also rendered moot by this decision, but because the issue may confront the trial court on retrial, we need to consider it. While we have approved prejudgment interest on claims involving specific amounts or for the recovery of damages to property where values were susceptible of exact determination, it has been the rule in this state, and in most jurisdictions, that prejudgment interest is generally not recoverable where damages are inexact and uncertain. *Lovell* v. *Marianna Federal Savings and Loan Association,* 267 Ark. 164, 589 S.W.2d 577 (1979). There are exceptions, and no hard and fast rule has emerged.

Both sides cite *Lovell,* where we reversed and remanded an equity case for the allowance of prejudgment interest. The dispute was over a refusal by a savings and loan association to pay a certificate of deposit totalling $36,000.00. Noting that the CD's had an exact value on the date payment was wrongfully refused, we ruled prejudgment interest should have been allowed. The *Lovell* opinion reviewed earlier decisions of this court in an attempt to reconcile conflicting cases and draws several

conclusions: a) that the test of the recoverability of prejudgment interest is whether there is a method of determination of the value of the property at the time of the injury; b) where the damages cannot be ascertained at the time of the loss, prejudgment interest should not be allowed; c) where damages cannot be measured until some future date, as with personal injuries, prejudgment interest is not recoverable; d) if the damages are not by their nature capable of *exact* determination, both in time and amount, prejudgment interest is not an item of recovery.

Reed-Joseph asserts that because it carefully compiled production records of other crop yields in its farm system, which were not deprived of water, it was possible to show exact damages. The argument has some merit, in that it removes some of the uncertainty of crop damage claims, but that is only half the test, at best, as it is clear that for interest to attach, the loss must have occurred at a specific time. That was the case in *Dickerson Construction Co.* v. *Dozier,* 266 Ark. 345, 584 S.W.2d 36 (1979), where we allowed prejudgment interest for damage to "knee-high" soybeans totally destroyed by heavy rains within a forty-eight hour period, resulting from the defendants having wrongfully dammed a drainage ditch. Here, no matter how carefully comparable records were compiled, drought damage to crops because an irrigation system produced less water per minute than expected, results in losses that cannot be specifically determined as to time, certainly not during the growing season, as the damage is a gradual process brought on by the deprivation of a necessary element.

We note, too, that the damages alleged in Reed-Joseph's pleadings were not exact amounts, but stated in broad terms typical of general damage claims: in the counterclaim against Riceland damages of $1,000,000.00 were claimed and by amendment against Berkeley, $750,000 (filed September 29, 1980) for crop losses and additional sums for interest and coincidental expense.

Cases decided since *Lovell* have stressed the requirement of certainty as to time and amount. See *Brown* v. *Summerlin Assoc., Inc.,* 272 Ark. 298, 614 S.W.2d 227 (1981);

Wooten v. *McClendon,* 272 Ark. 61, 612 S.W.2d 105 (1981) and *Taylor* v. *Jones,* 495 F.Supp. 1285 (E.D. Ark. 1980). In *Wooten,* we said:

> Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. This interest must be allowed for any injury where, at the time of loss, damages are immediately ascertainable with reasonable certainty.

VI

Berkeley contends evidence of its financial condition should not have been introduced and we sustain the contention. Proof of financial condition where punitive damages are claimed is allowed as against a single defendant [*Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96 (1961)]; however, we have held that because of the obvious prejudice that results when one of several defendants is singled out by the introduction of his financial condition, the right to make such proof is waived where there are two or more defendants. See *Life and Casualty Insurance Co.* v. *Padgett,* 241 Ark. 353, 407 S.W.2d 728 (1966). We adhered to that principle in two recent decisions: *Dalrymple* v. *Fields,* 276 Ark. 185, 633 S.W.2d 362 (1982) and *Curtis* v. *Partain, Judge,* 272 Ark. 400, 614 S.W.2d 671 (1981). On retrial, evidence of Berkeley's financial condition should not be received in evidence.

VII

Berkeley contends the court erred in refusing to give an instruction on intervening cause. However, the instruction is not abstracted and we have consistently held it is appellant's duty to furnish us with an abridgement of the record, including the instructions, where appropriate, as will enable us to follow the arguments. *Hurley* v. *Owens,* 238 Ark. 874, 385 S.W.2d 636 (1965); *Jacobs and Garrett* v. *Bentley,* 86 Ark. 186, 110 S.W. 594 (1908); *St. Louis, Iron Mountain and Southern Railroad Co.* v. *Boyles,* 78 Ark. 374, 95 S.W. 783 (1906).

VIII

Another assertion by Berkeley is that it was error to award judgment in favor of Riceland for costs of defending the litigation and for any amounts recovered from Riceland by either Reed-Joseph or Agri-Vestors on the basis of indemnity. While these issues are mooted by our reversal, it should be said for the purposes of another trial the jury's finding the plaintiff's damage was the result of *active* fault by Riceland, which the jury apportioned at 10% by Riceland against 90% by Berkeley, renders the problem one of contribution, and not of indemnity. See Prosser, Law of Torts, 4th Edition, § 51 p. 310. If retrial should result in similar findings, Riceland would be entitled to *contribution* from Berkeley for any amounts recovered from it by Reed-Joseph in excess of Riceland's portion of the fault, but Riceland would not be entitled to *indemnity* from Berkeley for any amounts paid in satisfaction of the judgment, nor for expenses incurred in connection with the litigation. We believe interrogatory No. 2, encompassed within the instruction labeled Court's 3A, is overly broad and should not have been given.

Riceland argues on cross-appeal that it was error for the trial court to give instruction No. 26 on the theory of a breach of express warranties as it related to Riceland, because any express warranties were negated by Reed-Joseph's failure to meet Riceland's conditions of warranty. Riceland cites three Texas cases [*Fetzer* v. *Haralson,* 147 S.W. 290 (Tex. Civ. App. 1912), *Londen* v. *Curlee,* 336 S.W.2d 836 (Tex. Civ. App. 1960) and *Elanco Products Co.* v. *Akin-Tunnell,* 474 S.W.2d 789 (Tex. Civ. App. 1971), on appeal after remand, 516 S.W.2d 726], for the rule that a purchaser of goods covered by an express warranty, must show that he complied with any conditions to which the warranty was subject. But we think the court's instruction No. 27 recognized that any express warranties made to Reed-Joseph may have been subject to certain conditions and told the jury, first, that it was Riceland's burden to prove those conditions and if the jury so found, then it was Reed-Joseph's burden to prove such conditions were satisfied. It would require an independent search of the testimony to

determine the existence of evidence of compliance with conditions of warranty, and we are unwilling to do that where Riceland has omitted in the first instance to point to the evidence that such conditions were, in fact, imposed.

Riceland's other argument, i.e. prejudgment interest and breach of warranty for a particular purpose, coincide with Berkeley's points of error and have been dealt with earlier in this opinion.

Reversed and remanded.

Supplemental Opinion on Denial of Rehearing delivered July 18, 1983

1. DAMAGES — PUNITIVE DAMAGES — PROOF OF FINANCIAL RESPONSIBILITY. — Although a plaintiff who claims punitive damages from several defendants waives the right to introduce evidence of the financial worth of *one* defendant, where punitive damages are claimed from only one of several defendants, that right to introduce evidence of financial condition is not waived when the alleged improper conduct is different from, and greater than, that of the other defendant.
2. DAMAGES — PROOF OF FINANCIAL RESPONSIBILITY — ADMONITION TO JURY. — If the evidence on retrial is sufficient to submit the issue of punitive damages to the jury, the plaintiff may introduce evidence of Berkeley's financial condition, with the jury admonished to consider such evidence only in connection with the claim of punitive damages.
3. DAMAGES — HARMLESS ERROR TO SUBMIT PUNITIVE DAMAGE ISSUE TO JURY ON INSUFFICIENT EVIDENCE. — It is usually harmless error to submit the issue of punitive damages to the jury where there is insufficient evidence to support such an instruction.
4. DAMAGES — REVERSIBLE ERROR TO SUBMIT ISSUE OF PUNITIVE DAMAGES TO JURY ON INSUFFICIENT EVIDENCE WHERE PROOF OF FINANCIAL CONDITION ALSO INTRODUCED. — If evidence of financial condition is also introduced, then the error of submitting the issue of punitive damages to the jury absent sufficient proof becomes reversible because a verdict for compensatory damages is tainted by the improper evidence.

STEELE HAYS, Justice. In its motion for rehearing, Reed-Joseph contends first, that there was sufficient evidence of misrepresentation and intentional deceit by Berkeley to sustain the submission of the issue of punitive damages to

the jury and second, that our opinion erroneously assumed that punitive damages are being claimed against Berkeley and Riceland, when in fact punitive damages are claimed only against Berkeley. Reed-Joseph insists that the trial court carefully adhered to the requirements of *Dalrymple* v. *Fields,* 276 Ark. 185, 633 S.W.2d 362 (1982), and *Curtis* v. *Partain, Judge,* 272 Ark. 400, 614 S.W.2d 671 (1981), and on retrial evidence of Berkeley's net worth should be permitted. We concede the merit of the argument with respect to the introduction of Berkeley's financial condition and modify our opinion accordingly.

While we have held that a plaintiff who claims punitive damages from several defendants waives the right to introduce evidence of the financial worth of *one* defendant (see *Life and Casualty Insurance Co.* v. *Padgett,* 241 Ark. 353, 407 S.W.2d 728 [1966] and *Dalrymple* v. *Fields, supra*), we have *not* held that where punitive damages are claimed from only one of several defendants, the right to introduce evidence of financial condition is waived, where the alleged improper conduct is different from, and greater than, that of the other defendants. None of the cases cited in the original opinion reached that holding. In *Curtis* v. *Partain, Judge, supra,* we granted prohibition against the introduction of financial condition as against only one of several defendants, but it was done because that one defendant was plainly being singled out for a claim of punitive damages for conduct for which *all* were chargeable. We conclude that if the evidence on retrial is sufficient to submit the issue of punitive damages to the jury, the plaintiff may introduce evidence of Berkeley's financial condition, with the jury admonished to consider such evidence only in connection with the claim of punitive damages.

As to the other argument, i.e. misrepresentation and deceit, the issue is moot as to the first trial, and we need not belabor the point except to say that our comments in the original opinion were intended to alert the parties and the trial court, for purposes of a second trial, to the fact that the proof of intentional misrepresentation, or fraud, seemed to be too weak to support the issue. Reed-Joseph argued that the fraud was to be found in Berkeley's deliberate failure to disclose data with respect to the performance of its pumps

which was material to Reed-Joseph's intended use. We could not say categorically, without an independent search of the record, that the proof was lacking; however, we can say it was not demonstrated in the briefs to our satisfaction. Whether the issue will be sufficiently proved on retrial we have no way of predicting.

It should be noted that several cases have contained error because the issue of punitive damages was submitted to the jury when the evidence did not support it [*see Life and Casualty Insurance Co.* v. *Padgett, supra,* and *Dalrymple* v. *Fields, supra,* for example.] Ordinarily, it is merely harmless error for the issue of punitive damages to be wrongly submitted; however, if evidence of financial condition is also introduced, then the error becomes reversible because a verdict for compensatory damages is tainted by the improper evidence. This is what happened in *Padgett* and *Dalrymple.* Thus plaintiffs' counsel generally would be well advised to use restraint in urging the submission of punitive damages where the evidence is marginal and, especially, in offering proof of financial condition, as reversible error is the likely result if the punitive issue fails on review.

Other points in the petition constitute reargument and need no discussion.

Rehearing denied.

In the Matter of the Estate of Charlie Frank SARGENT, Deceased *v.* BENTON STATE BANK, Administrator of the Estate of Charlie Frank SARGENT, Deceased

83-73 652 S.W.2d 10

Supreme Court of Arkansas
Opinion delivered June 6, 1983
[Rehearing denied July 5, 1983.]

Perroni & Rauls, P.A., by: *Samuel A. Perroni* and *Stanley D. Rauls;* and *William R. Wilson, Jr.*, for appellant.

Hardin & Hardin, P.A., by: *Joe K. Hardin* and *Robert N. Hardin,* for appellee.

STEELE HAYS, Justice. Charlie Frank Sargent was fatally shot on February 18, 1980. His wife Kate, and his three sons Donald, Roy and Cecil were all charged with first degree murder. The charges against Cecil and Roy were dismissed, Donald was convicted of first degree murder and Kate Sargent of second degree murder.

Charlie Sargent died intestate and the administrator of his estate petitioned to exclude the wife and sons from inheriting because of their involvement in his death. The Chancellor found that all four had participated in the murder and excluded them from the estate. Cecil Sargent is appealing the order on the grounds that the evidence is insufficient to show his participation in his father's murder. We agree with appellant and reverse the Chancellor.

Appellee's petition charged that Cecil had participated in a conspiracy to murder the father. He argues that the evidence would support Cecil's participation as an accomplice or an accessory after the fact, as well as a conspirator in the wrongful and unlawful death of his father. Under Arkansas law for reasons of sound public policy one who wrongfully kills another is not permitted to profit by the crime. *Wright* v. *Wright,* 248 Ark. 105, 449 S.W.2d 952 (1970). *Horn* v. *Cole,* 203 Ark. 361, 156 S.W.2d 787 (1941).

We believe the evidence presented in this case was not sufficient to find involvement by Cecil on any theory. The trial court's findings that related to Cecil are as follows: 1) Donald Sargent had discussed killing the father with other members of the family; 2) Donald shot his father while all of the family members were in the home; 3) the wife and

three sons removed the father from the home after the shooting; while he was still alive, and took him to the place where the body was found. The deposition of the Medical Examiner reflects that when the body was doused with kerosene Mr. Sargent was dead at the time. Mr. Sargent lived a very short time after receiving the four wounds. The only way the Court can reconcile the testimony of the parties to Dr. Malak's report and deposition is that after Mr. Sargent was taken in the truck to the place where the body was found, one or more bullet wounds was inflicted at that time. Mr. Sargent died before the kerosene was poured on him; 4) the wife and all three of the boys participated in the murder of the father.

With nothing more, the first two findings tell us nothing of Cecil's participation. The third adds very little and is tempered by other considerations surrounding the incident which we will discuss further on. The last finding is simply conclusory. The appellee cites the following evidence in support of the trial court's findings: Cecil was at the table with his father when Donald first shot him; Cecil testified that his father asked him to call an ambulance but Cecil said he didn't know the number, and that he also helped carry his father to the truck; Cecil, Roy and the mother followed the truck in their car; Roy had placed gasoline in a firebomb in the car before the left to follow Donald; Roy saw Cecil keep the father in the truck as Donald was pouring gasoline on him; Donald watched as the truck in which his father was placed was set on fire with the firebomb; Cecil helped push the truck after the firebomb didn't work; Roy testified that all four family members discussed what to tell the police; Cecil did not tell the police the whole truth when first questioned.

We believe the disputed factual issue here is to be decided by a preponderance of the evidence, as in civil cases generally. [*See Vesey* v. *Vesey,* 237 Minn. 10, 53 N.W.2d 809 (1952)]. Still, it may be well to examine relevant criminal laws. Ark. Stat. Ann. § 41-707[1] requires that one have the

[1]41-707. Criminal conspiracy. — A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense he:

(1) agrees with another person or other persons:

purpose of promoting a criminal offense and *agrees* with another that he will engage in that activity or will aid in planning it. None of the evidence appellee offers goes at all convincingly to any of these elements. Cecil's presence at the home at the time of the shooting tells us nothing of his purposefulness or indicates *any* agreement. Nor is mere association or presence at the scene sufficient to prove conspiracy. *U.S.* v. *James,* 528 F.2d 999 (5th Cir. 1976). As to Donald discussing the killing of the father, the appellee points to no evidence that goes beyond mere discussion. Evidently, Donald was given to loose talk about his intentions, but the indications are that no one took him seriously. More importantly, there is no evidence that shows with whom Donald had discussions and no evidence that Cecil was present. Nothing points to anything even suggesting that Cecil was involved in any agreement to purposefully murder his father.

The activities Cecil was involved in that followed Donald's shooting Sargent leave us with many questions. Absent any evidence of conspiracy, even assuming the father was still alive at the time the family moved his body in the truck, we can't say that there were conspiratorial acts. The Commentary to § 41-707 emphasizes this point by noting that the statute excludes from its provisions "application to persons who engage in conduct that furthers the ends of a conspiracy but who have no purpose to do so. This is so even if the persons knows his conduct assists in the accomplishment of the criminal objective." Nor could we say that Cecil's acts made him an accomplice. Ark. Stat. Ann. § 41-303[2] requires one have the *purpose* of promoting the offense and that he solicits or encourages another in

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(a) that one or more of them will engage in conduct that constitutes that offense; or

(b) that he will aid in the planning or commission of that criminal offense; and

(2) he or another person with whom he conspires does any overt act in pursuance of the conspiracy.

[2]41-303. Criminal Liability for conduct of another — Accomplices. (1) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:

(a) solicits, advises, encourages, or coerces the other person to

committing the offense or aids or attempts to aid another in committing the offense. Cecil's actions themselves, with no evidence of conspiring, or any other evidence of purpose to commit the crime coupled with the fact that Donald had already delivered the fatal wounds leaves an accomplice theory unsupported. The offense of accessory after the fact has now been abolished (see Commentary to Ark. Stat. Ann. § 41-302) and such activity now comes under the authority of Chapter 28, Obstructing Governmental Operations. Cecil's activities might constitute such an offense, but the competing considerations surrounding his acts, and the acts themselves make his involvement far too attenuated to sustain the results of the court's decision.

In sum, it was the burden of the appellee to show that Cecil was aware of a plan to kill his father and that he participated in the furtherance of that plan, or, at least, he concurred in it. Failing in that, there must be evidence of Cecil's actions after the shooting from which those same conclusions can be rationally inferred. Here, there is nothing in the evidence before the shooting to implicate Cecil, except that he happened to be in the house where he lived eating supper along with the rest of the family. Moreover, Cecil's actions after the shooting are as consistent with a fear of his older brother, as with a desire to carry out a murder scheme. The two explanations are equally plausible. That being so, when the circumstances in their entirety are weighed, i.e. Cecil's immaturity, Donald's threats and occasional physical abusiveness of his brothers, the fact that

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commit it; or

(b) aids, agrees to aid, or attempts to aid the other person in planning or committing it; or

(c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

(2) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense, he

(a) solicits, advises, encourages or coerces another person to engage in the conduct causing the result; or

(b) aids, agrees to aid, or attempts to aid another person in planning or engaging in the conduct causing the result; or

(c) having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

Cecil was said to be close to his father, the absence of any motive by Cecil, and the state of shock and confusion which may well have accompanied the witnessing of those extraordinary events, they lead us to the conclusion that a finding that Cecil knowingly participated in the death of his father is clearly against the preponderance of the evidence. (ARCP 52).

The decree is reversed and the cause remanded for further orders not inconsistent with this opinion.

ADKISSON, C.J., and GEORGE ROSE SMITH and DUDLEY, JJ., dissent.

GEORGE ROSE SMITH, Justice, dissenting. My strong disagreement with the court's opinion is based on two considerations: First, as the opinion itself recognizes, this is a civil case in which the controlling question is whether the trial judge's finding that Cecil Sargent participated in the murder of his father is clearly against the preponderance of the evidence. Whether he was technically a principal, an accomplice, or an accessory is immaterial. Second, we must view the evidence in the light most favorable to the trial judge's decision, deferring to his judgment in matters of credibility.

This murder was planned in advance, with a homemade gasoline bomb and two gallons of gasoline in readiness for the burning of the body. Donald shot his father at the house, apparently striking a major artery in the arm, but that was not the fatal wound, though it would eventually have caused death if not treated. Dr. Malak testified, and the trial judge indicated, that the immediate cause of death was two bullet wounds in the chest, making two holes in the lungs and one in the heart. Dr. Malak said that the lung wounds caused massive bleeding in the chest cavity within ten minutes and that the victim could have lived only a very, very short time. Yet some 45 minutes elapsed between the first shooting and the consummation of the crime three miles away in the truck. For that reason the trial court found, with justification, that one or more bullet wounds were inflicted at the place where the wife and three sons tried to burn the body. Death occurred there; so Cecil participated in

the killing and could not have been merely an accessory after the fact.

Cecil Sargent is not exactly an immature and innocent child. He was 15 years old at the time, criminally responsible under the law. He was no longer going to school, but was working at a garage instead. He was his father's favorite son, but when his father in his agony appealed to Cecil for help three times, Cecil ignored his pleas each time. When Cecil was charged along with the other three survivors with murder, he successfully bargained for immunity in return for turning state's evidence and testifying against his own mother and his older brother. He has admittedly told so many lies about his connection with the homicide that the trial judge was fully warranted in disregarding his self-serving statements at the hearing below — a hearing at which he was repeatedly evasive in his testimony, professing not to remember incriminating facts until he was confronted with his own testimony at the trial of his mother and brother.

As for Cecil's participation in the murder, soon after the first shooting Sargent appealed to his favorite son, Cecil, to call an ambulance, but Cecil gave the ridiculous answer that he didn't know the number — as if a person had to know a telephone number to call an ambulance or the fire department in an emergency. After the shooting the group stayed at the house for a considerable length of time. Sargent was not able to walk, but Cecil and Donald held him upright between them and forced him to stumble with them to the truck. The father again begged his favorite son to help, to knock Donald in the head, but again Cecil refused to help him.

Despite Cecil's supposed fear of Donald, not asserted until weeks later, Cecil willingly got in the car with his mother and brother and followed Donald's truck for three miles. There Sargent got out of the truck, but Cecil and Donald pushed him back in. Sargent was still alive when Donald threw gasoline on him. Sargent again appealed to his favorite son, screaming for help. In Cecil's own words in his taped statement to the police: "Yeah, he screamed. He told me to knock him [Donald] in the head, please Cecil

knock him in the head." Later on, when the fire failed to spread from the bed of the truck to the cab, where Sargent was, Cecil helped the others try to push the truck down the embankment by the road, presumably to create the appearance of an accident. When a car was seen approaching, all four of the survivors "piled" into their car and "took off," leaving Sargent apparently still alive and suffering. At the hearing below Cecil piously testified that when he got home he went to bed. "I was so upset and in a strain.... It upset me real bad.... Yes, sir, I was upset for about two weeks after my daddy died."

Not so upset, however, that he was unable to join with the other three in deciding what to tell the police. When he was finally questioned, more than two weeks after the murder, he first said that after the shooting he went to bed, thinking Donald had taken his father to the hospital. An hour later, after the officers had questioned the others, Cecil admitted that he had helped carry his father to the truck. At still a third interview, some four hours later, he finally revealed his part in the murder. In that long interview, conducted in his mother's presence and taped, Cecil said not one syllable about being afraid of Donald or having been threatened by him. That came later, but when he was asked at the hearing below just what were Donald's prior acts of violence, he said Donald threw a screwdriver at Roy once, hitting him in the knee, and that he himself and Donald had a couple of fist fights. That was all. I find no independent support in the record for Cecil's statements that he was afraid of Donald or had been threatened by him. Quite evidently the trial judge, who had the advantage of observing Cecil's manner on the witness stand, did not believe him.

The administrator of the estate, which consisted primarily of a house and two acres, plus over $30,000 in life insurance, filed this petition to exclude the widow and the three sons from inheriting the estate and receiving the insurance money. The widow and Donald were hardly in a position to resist, having already been convicted of Sargent's murder. Roy had scant grounds for a defense, having admitted to the officers that he helped plan the murder by making the gasoline bomb two or three days before the murder and having melted the gun with a blowtorch

afterwards. That left only Cecil to disclaim any responsibility for what was in fact a group murder. He now appeals from the adverse judgment in the hope of being declared to be the sole eligible beneficiary, thus keeping the money and property in the family. I am dismayed that the strategy has proved successful.

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

Erma Jean FONTENO *v.* The Estate of Booker T. MATTHEWS and Mary Bell JAMES

83-88 651 S.W.2d 466

Supreme Court of Arkansas
Opinion delivered June 6, 1983

Macom, Moorhead, Green & Henry, by: *J. W. Green, Jr.,* for appellant.

Eilbott, Smith, Eilbott & Humphries, by: *Zachary Taylor,* for appellees.

STEELE HAYS, Justice. Booker Matthews died intestate in 1975. Several persons asserted an interest in the estate, including Mary Bell Matthews, as widow, asking to be declared the sole distributee and claiming all statutory allowances to which she would be entitled. The last petition was filed by Nelson Thomas, claiming to be an heir, denying that petitioners Dorothy Friends and Erma Fonteno were legal heirs, or that the widow, Mary Bell Matthews, was entitled to more than a dower interest. All petitions were filed in 1975.

By order dated October 19, 1981, the probate court found Mary Bell Matthews was the widow and Erma Fonteno, Dorothy Friends and Ernestine Caldwell were daughters. On January 26, 1982, an order was entered approving the final accounting and payment of fees. On February 9, 1982, Mary Bell Matthews petitioned for dower and on March 3, 1982, a response was filed by Erma Fonteno alleging that dower rights should be denied because at the time of Booker Matthews' death the dower statute was unconstitutional under our decisions in *Stokes* v. *Stokes,* 271 Ark. 300, 613 S.W.2d 372 (1981) and *Hess* v. *Wims,* 272 Ark. 43, 613 S.W.2d 85 (1981). The probate court granted the dower petition, finding that dower should be granted pursuant to the statute in force at the time of death because the widow's dower rights had vested at that time. Erma Fonteno has appealed, arguing that the *Stokes* and *Hess* cases were controlling at the time the court made its decision and, therefore, Mary Bell Matthews is precluded from any dower rights in the estate. We agree with the decision of the trial court but affirm on grounds not specifically addressed by the court.

Recent changes in the law of dower have led to some confusion in dealing with those cases where the husband had died prior to the *Stokes* and *Hess* decisions. The circumstances of each case must determine the outcome and we look for direction in this case to the later decisions of *Hall* v. *Hall,* 274 Ark. 266, 623 S.W.2d 833 (1981) and *Mobley* v.

Estate of Parker, 278 Ark. 37, 642 S.W.2d 883 (1982). In *Hall* we stated that the *Stokes* and *Hess* decisions have never been completely retroactive in the sense that a widow who was awarded her statutory dower some years before those cases could not be stripped of her estate by a disgruntled heir. (*Hall* at 267). In *Mobley,* a case factually similar to this case, we relied on that statement in *Hall* and applied it to the facts of that case. We pointed out that the widow and heirs of Parker had treated the dower interest as if it had vested. The trial court had found that the attorney for the appellant had expressly recognized the widow's dower interest in November, 1980, and we held that the principle of estoppel was properly applied against the appellant when later raising the constitutional issue after the *Stokes* and *Hess* decisions were handed down.

Here, soon after the death of the husband in 1975, conflicting petitions were filed by the widow and persons claiming to be heirs. The petition of Nelson Thomas alleged that the only legitimate interest of Mary Bell Matthews was that of dower and not of the entire estate. Not until March 3, 1982 was any constitutional issue raised as to the right of dower. The *Stokes* and *Hess* cases had been decided over a year earlier. In the interim, the right to dower remained unchallenged. In October, 1981, upon the order finding Mary Bell Matthews widow, no objection of any kind was made, nor after the order approving the final accounting and payment of fees was any objection made. We find here as we did in *Mobley* that the facts indicate that all parties treated the dower interest as having vested and under the principle of estoppel enunciated in *Mobley,* we find the appellant is precluded from raising the issue at this time.

Affirmed.

Wilburn Anthony HENDERSON *v.* STATE of Arkansas

CR 82-107 652 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Kearney Law Offices, by: *Jesse L. Kearney,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. A jury convicted appellant, Wilburn Anthony Henderson, of capital felony murder, and he was sentenced to death by electrocution. On appeal from that conviction we affirm.

The victim was murdered at approximately 2:00 p.m. on November 26, 1980, while she was working in her family owned furniture store in Fort Smith, Arkansas. The autopsy revealed that she was shot once in the head with a .22 caliber pistol and died instantly. The police arrived at the crime scene at about 2:15 p.m. and found the victim lying face down behind the counter. The cash register was open, and at least $41 was missing.

During the police investigation of the crime scene, one of the detectives found a piece of paper on the floor about six feet from the victim's body. The victim's daughter testified that it had not been there when she was in the store at 1:40 p.m. that afternoon. It was this piece of paper which led to the development of appellant as a suspect in the case. On the paper was a drawing of a floor plan, two phone numbers, an address, and the name of a real estate agent. When contacted by the police, the agent recognized the drawing as the floor plan of a cabin he was trying to rent. It was then discovered that appellant had looked at the cabin, and had had an appointment with the agent to talk about renting it at 4:30 p.m. the day of the crime; appellant failed to keep this appointment. Appellant was eventually traced to Houston, Texas, where he was picked up by the Houston police.

Appellant gave a statement in Houston to the Fort Smith police in which he admitted that he was in the store at the time of the murder, but stated that an acquaintance killed the victim. The acquaintance was questioned, released, and later testified at trial.

There was additional evidence linking appellant to the crime. The investigation revealed that appellant had redeemed a pawned .22 caliber pistol on November 24 but had pawned the pistol again on November 29. A female acquaintance of appellant testified that appellant acted peculiarly when a television report gave a description of the subject sought in the murder. She also testified that appellant told her that the Fort Smith police were looking for him regarding a murder and that if the police asked about him, to tell them he had telephoned from Kansas City. In addition, she was to tell anyone that asked that he still had his moustache, even though he had shaved it off. It was also established that when appellant left for Houston, he abandoned the van he was driving on the day of the murder.

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

Appellant argues that our capital murder statute is unconstitutionally vague. We reject this argument. We have upheld the constitutionality of this statute on numerous occasions. In this regard, see *Simpson* v. *State,* 278 Ark. 334, 645 S.W.2d 688 (1983); *Ford* v. *State,* 276 Ark. 98, 633 S.W.2d 3 (1982); *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981).

Appellant alleges that the capital murder sentencing statutes are unconstitutionally vague for three reasons: First because the aggravating circumstances of Ark. Stat. Ann. § 41-1303 (Repl. 1977) are too closely related to the elements of capital felony murder as set out in Ark. Stat. Ann. § 41-1501 (Repl. 1977); this contention was answered in *Wilson* v. *State,* 271 Ark. 682, 611 S.W.2d 739 (1981) where we held that the aggravating circumstances are not an element of capital murder. Secondly, appellant points to the fact that there is no specific definition of "mitigating circumstance" in Ark.

Stat. Ann. § 41-1304 (Repl. 1977); however, we have held that the fact that the jury is not limited to specifically enumerated mitigating factors accrues to the benefit of the defendant, because it gives the jury a greater opportunity to extend leniency to him. *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980). Thirdly, appellant argues that our sentencing statutes are unconstitutional because there is no accurate comparison of death penalty cases, since not all such cases are appealed and those that are do not always contain complete records; in answering this contention we note that it is highly unlikely that any death case will not be appealed; the constitutionality of our appellate process in death penalty cases was upheld in *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977); appellant's allegation that the records in death cases are inadequate has no merit.

Appellant argues that the trial court erred in excusing for cause a juror who stated that she could not under any circumstances impose the death penalty, thereby allowing a "death qualified" jury to determine his guilt or innocence. More specifically, appellant argues that since Ark. Stat. Ann. § 41-1302 (Repl. 1977) does not *require* that a jury be composed only of members who can recommend the death penalty, persons who cannot impose the death penalty should be allowed to sit on the jury. However, the statute contemplates that persons on the jury will be capable of imposing the death penalty. It is not error for the court to strike for cause persons who cannot carry out the law. *See Haynes* v. *State,* 270 Ark. 685, 606 S.W.2d 563 (1980). Appellant's contention that a death qualified jury is more conviction prone was rejected in *Lasley* v. *State,* 274 Ark. 352, 625 S.W.2d 466 (1981), and appellant's argument concerning a bifurcated trial, with one jury for determining guilt or innocence and another one for sentencing, was rejected in *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982).

Appellant also alleges that the trial court erred in not granting his motion for expert witnesses to testify at a hearing on the issue of a death qualified jury. The court satisfied appellant's request by allowing appellant to introduce several documentary studies on this issue:

> The Court: We will resume the hearing on Wilburn Anthony Henderson. On Defendant's Motion for Witness Fee, Expert Witness Concerning Exclusion of Veniremen, defendant was allowed to introduce several studies or papers. Does that satisfy your request for a witness in this matter, Mr. Settle?
>
> Mr. Settle: [Defense attorney]
>
> The court has accepted these documents into evidence?
>
> The Court: Yes.
>
> Mr. Settle: And accepted it as evidence to the other motions I filed?
>
> The Court: Yes, sir.
>
> Mr. Settle: All right, sir.
>
> The Court: That motion will be satisfied.

Appellant made no objection to this ruling, and under these circumstances, this point has not been properly preserved for appeal.

Appellant argues that the trial court erred in refusing to suppress the statement he gave to a Fort Smith detective while incarcerated in Houston. This argument is without merit. Although an in-custody statement is presumed to be involuntary, in this case the State has met its burden of proving that appellant's statement was made voluntarily, without hope of reward or fear of punishment. *Watson* v. *State,* 255 Ark. 631, 501 S.W.2d 609 (1973). At the pretrial hearing to determine voluntariness, a verbatim transcript of appellant's recorded statement was introduced into evidence. The transcript reflects that appellant was asked if he was treated fairly, to which he responded, "Yes, sir," and that he was given an opportunity to say anything he desired concerning the voluntariness of his statement at the end of the interview. He responded that he had nothing more to say. The detective who took the statement testified that he

advised appellant of his *Miranda* rights, that appellant agreed to make a statement, and that no promises, threats, or coercion were used to obtain the statement. At trial appellant testified that the statement was involuntary because he was frightened since the Houston police officer, who took him in, told him if he attempted to escape he would "blow him away." However, that officer did not question him and was not present when he gave his statement. Appellant admitted that the interrogating officers did not abuse him in any way. Therefore, even in light of appellant's testimony at trial, the trial court's finding of voluntariness will not be disturbed on appeal.

Appellant next argues that the trial court erred in admitting a photograph of the victim taken in the autopsy room. The photograph depicted the area of the wound and it enabled the jury to better understand the testimony of the state medical examiner. The admissibility of photographs is within the sound discretion of the trial court, and will not be set aside absent a manifest abuse of discretion. *Roleson* v. *State,* 277 Ark. 148, 640 S.W.2d 113 (1982). Here, we cannot say that there was an abuse of discretion. Appellant argues that the admission in evidence of the autopsy report was error; the admission in evidence of an autopsy report is permitted by Ark. Stat. Ann. § 42-1220 (Supp. 1981).

Appellant also alleges that prejudicial error occurred when he had to object to certain photographs proffered by the State. We cannot agree. The discussions concerning the photographs occurred at the bench. We find no prejudicial error in this regard.

Appellant contends that the trial court erred in refusing to sequester the jury during his trial. To support this argument, appellant points to the fact that his first trial ended in a mistrial because of publicity and the fact that there was television and newspaper coverage surrounding his second trial. The decision of whether or not to sequester the jury is left to the discretion of the trial court. Ark. Stat. Ann. § 43-2121 (Repl. 1977). The trial court's decision will not be disturbed in the absence of a clear showing of prejudice. *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982).

Here, appellant has failed to demonstrate the necessary showing of prejudice. Each juror was thoroughly questioned about media influence, and each one selected was admonished to refrain from discussing the case, reading about it in the newspaper, or listening to radio or television reports. Appellant is not entitled to a jury completely ignorant of the crime. *Anderson* v. *State,* 278 Ark. 171, 644 S.W.2d 278 (1983). It is sufficient if the juror can lay aside his opinions and render a verdict based on the evidence presented in court. *Kellensworth* v. *State,* 276 Ark. 127, 633 S.W.2d 21 (1982).

Appellant argues that the trial court erred in instructing the jury as to the lesser included offense of second degree murder, AMCI 1503. He cites *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980) for the proposition that the State must choose either the capital murder instruction or the second degree instruction, but not both. Such reliance is misplaced. This court has held that the jury should have the opportunity to consider lesser included offenses where the evidence warrants, even if the defendant objects. *Caton and Headley* v. *State,* 252 Ark. 420, 479 S.W.2d 537 (1972). In any event, appellant was clearly not prejudiced by the submission of the second degree murder instruction since the jury convicted him of the greater offense of capital felony murder.

Appellant also alleges that it was error to give AMCI 1501-A, the Capital Murder — Associated Felony instruction, because it was cumulative of AMCI 1501, the Capital Murder instruction. This argument is without merit. The "note on use" following 1501-A explains:

> A charge of capital murder committed in the course of one of the felonies specified in Ark. Stat. Ann. § 41-1501 (a) (Repl. 1977) will require proof of that felony. This instruction is designed for use in defining the felony if requested by either party or if the court feels it would be helpful to the jury.

Here, appellant was charged with murder committed during the course of a robbery; therefore, it was not error for AMCI 1501-A defining robbery to be given.

Appellant argues that the trial court erred in allowing the State to ask appellant certain allegedly irrelevant and prejudicial questions concerning a previous marriage and other names he had used in the past. Appellant alleges that he was prejudiced by the State inquiring into these "morally stigmatizing subjects," but we cannot say from an examination of the record that these questions, standing alone, constituted prejudicial error.

We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive. *See Sumlin* v. *State,* 273 Ark. 185, 617 S.W.2d 372 (1981).

In the sentencing phase of the trial the jury received as evidence of aggravating circumstances four prior felony convictions in California for the felony crimes of rape, assault with a deadly weapon, assault by means of force likely to produce great bodily injury, and robbery. This evidence supported the jury's finding that appellant had previously committed another felony, an element of which was the use of threat of violence to another person. The jury found no mitigating circumstances. The jury's finding that the aggravating circumstances outweighed, beyond a reasonable doubt, any mitigating circumstances is supported by the evidence.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. *See Earl* v. *State, supra.*

Affirmed.

Ernest MAXWELL, Jr. *v.* STATE of Arkansas

CR 83-10 652 S.W.2d 31

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Mobley & Smith, by: *William F. Smith,* for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant, Ernest Maxwell, Jr., was charged with first-degree murder in the death of Carol Conn, was found guilty in a two-stage trial, and was sentenced as an habitual offender to life imprisonment. We find it necessary to order a new trial, because the

prosecuting attorney brought inadmissible and prejudicial matter to the jury's attention and because the expert witness Monroe was permitted to state an inadmissible opinion.

On the morning of June 25, 1981, the badly battered body of Carol Conn, 20, clothed in a T-shirt, blue jeans, and tennis shoes, was found near the Plumerville exit from Interstate 40, in Conway County. The clothed body was taken to the state medical examiner for an autopsy. That afternoon the police questioned Maxwell, 43, with whom Carol had been living for about four weeks in his home near Atkins, in Pope County. Maxwell said then, and testified at the trial, that he last saw Carol at his home at about five o'clock the preceding evening. He went to sleep then. When he awoke at about eight, Carol was gone. He went into Atkins at about eleven to ask his brother if he had seen Carol; the next morning he asked about her elsewhere. He told the officers that during the four weeks he and Carol had been living together he had hit her only once, about two weeks earlier and with his open hand.

The state medical examiner, Dr. Malak, performed the autopsy, which at his request was witnessed by Berwin Monroe, a state police officer having extensive training and experience in criminal investigation. Dr. Malak testified, with the support of photographs he had taken, that Carol's body was bruised from head to foot, front and back. Some of the bruises had been inflicted about ten days before her death, others about three days before death, and others still later. Her skull had been fractured, but the actual cause of death was a heavy blow to the area of the umbilicus (navel), which burst her intestines and caused her death from internal bleeding within not more than ten minutes. Dr. Malak was of the opinion that Carol had been nude when she was killed; some recent wounds had bled, but there was no blood on her clothing, which must have been put on her body after death. The sufficiency of the evidence is not questioned.

Near the end of the trial, Maxwell took the witness stand and admitted on direct examination that he had been convicted of rape and that he had also been convicted of

having escaped from jail and having stolen a car during the escape. The prosecuting attorney began his cross-examination with this question:

> Mr. Streett: Q. Mr. Maxwell, I believe you acknowledged to Mr. Mobley [defense counsel] that in 1968 you pled guilty and were convicted of the raping of an eleven-year-old girl, and received a thirty-year — [Mr. Mobley interrupts with his objection.]

After a brief colloquy not heard by the jury the court denied a defense motion for a mistrial but admonished the jury not to consider Mr. Streett's reference to the girl's age.

We cannot say that in the circumstances the admonition cured the possibility of prejudice. The prosecutor's action must have been deliberate, for he could not reasonably have believed that Maxwell had admitted the inadmissible and prejudicial fact that he had raped an eleven-year-old child. In fact, the prosecutor did not argue during the colloquy that the question was proper, nor does the State make such a contention in its brief. We liken the situation to that in *Clark* v. *State,* 244 Ark. 772, 427 S.W.2d 172 (1968), where the prosecutor in the jury's presence went through the pretense of attempting to call the defendant's wife as a witness, knowing that she could not testify against him. We reversed the conviction because, while the crime was described as heinous and revolting, the offer to call the wife "exceeded the bounds of fairness, so essential to an unprejudiced trial." We cannot establish a precedent that a deliberately unfair tactic such as the one before us can be made harmless by anything less than a reprimand in the presence of the jury or by the granting of a mistrial.

There is another error that must be avoided upon a retrial. Berwin Monroe qualified as an expert witness in crime scene investigation and in the scientific examination of minute physical evidence. The State's theory was that Maxwell killed Carol in his home, that she was nude at the time of her death, and that Maxwell later put the clothing on her body, disposed of the body at the Plumerville exit, and cleaned up the room with a wet string-type mop.

Monroe gave convincing testimony about the many particles of steel wool, blue paint, orange-red paint, fish-like scales, flakes of glitter, sand, insect-egg material, and other microscopic matter that he found on the surface of Carol's body, on the *inside* of the clothing on the body, on the soles of the tennis shoes on the body, on her feet, and on exhibits recovered from the house: the mop, two pillow cases, and a pair of cut-off jeans that had belonged to Carol. Monroe was properly permitted to explain to the jury why the presence of the particles on the bottom of Carol's feet and on the soles of the tennis showes showed that she could not have walked out of the house, either barefooted or wearing the tennis shoes, and have walked for even a slight distance on grass, concrete, or asphalt without disturbing the particles on her feet and on the shoes. No complaint is made about that testimony.

The court, however, also permitted Monroe to testify that in his opinion Carol had met her death in the Maxwell house. Neither he nor Dr. Malak was able to say just what instrument if any was used in the murder. We can find in Monroe's testimony no scientific basis beyond the comprehension of the jury for his opinion that her death occurred in the house. His conclusion seems to have been based solely on the proof that she did not walk out on her own feet and that she died within ten minutes. Under Uniform Evidence Rule 702, Ark. Stat. Ann. § 28-1001 (Repl. 1979), the drawing of such a simple inference should not have been presented to the jury gift-wrapped with the fabric of expert scientific opinion. As the Advisory Committee's Note to Rule 702 puts the matter:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952).

There is no merit in the appellant's third argument, that the prosecutor should not have been permitted to refer to Maxwell, in the closing argument, as a rapist, thief, and escapee. The exact words used were not reported, but the prosecutor did state, in answering defense counsel's request for a mistrial, that he had used the terms only in arguing Maxwell's credibility as compared to that of the police witnesses. In that context the argument was not improper.

Reversed and remanded for a new trial.

ADKISSON, C.J., concurs.

TERMINAL TRUCK BROKERS *v.* MEMPHIS TRUCK & TRAILER, INC.

83-11 652 S.W.2d 34

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Macom, Moorhead, Green & Henry, by: *William M. Moorhead,* for appellant.

No brief filed by appellee.

FRANK HOLT, Justice. The appellee secured a default judgment against Larry Fletcher. In an effort to collect the judgment, it had a writ of garnishment issued against the appellant. The appellant did not respond, and a default judgment was entered against it. In a timely manner, the appellant filed a motion to set aside the default judgment. The trial court held that the objections by appellant to the form of the writ of garnishment were well taken; however, by having answered a previous writ in this same case, the appellant garnishee knew what was required of it. The motion to set aside the default judgment against appellant was denied and hence this appeal.

The appellant contends the default judgment should have been set aside because it established a meritorious defense and because the writ of garnishment was voidable for lack of compliance with the requirements of ARCP Rule 4 (b). We agree.

The parties have stipulated that, from the time the writ of garnishment was issued until the date of the filing of the motion to set aside the default judgment, the appellant was

not indebted to Larry Fletcher nor did it have in its possession any property or money belonging to him. This is sufficient to demonstrate the existence of a meritorious defense to an action for garnishment. *Coward* v. *Barnes,* 232 Ark. 177, 334 S.W.2d 894, 82 A.L.R.2d 854 (1960); *Dalhoff Construction Co.* v. *Adams,* 76 Ark. 98, 88 S.W. 1134 (1905); Ark. Stat. Ann. § 31-305 (Repl. 1962).

It further appears that the writ of garnishment here fell short of the requirements of ARCP Rule 4 (b) in substantially the same manner as the summons which we held defective in *Tucker* v. *Johnson,* 275 Ark. 61, 628 S.W.2d 281 (1982). Here, as in *Tucker,* the writ was not directed to the appellant but was directed to the sheriff; it did not direct the appellant to file a pleading and defend; and it did not state that any default judgment would be for the relief demanded, which was the amount owed to the appellee here by Larry Fletcher. The writ in the instant case also was defective in that it was not under the seal of the court, as required by ARCP Rule 4 (b). We have held that a writ of garnishment must meet the requirements applicable to summonses in civil cases. *DeSoto, Inc.* v. *Crow,* 257 Ark. 882, 520 S.W.2d 307 (1975). Actual knowledge of a proceeding does not validate a default judgment where there was, as here, a defective process. *Tucker* v. *Johnson, supra.* The default judgment should have been set aside.

Reversed and remanded.

Jerry ELLIS *v.* STATE of Arkansas

CR 83-26 652 S.W.2d 35

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Marion A. Humphrey, for appellant.

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

DARRELL HICKMAN, Justice. The only question before us is whether there is substantial evidence to support Jerry Ellis' convictions for kidnapping and aggravated robbery. We find that there is and affirm the judgment.

We view the evidence in the light most favorable to the State. Late Saturday night, November 21, 1981, Harold Austin left a nightclub in Pine Bluff and was walking along

a highway. A white Pontiac with two men and a woman stopped and insisted Austin get in the car. Austin rode in the back seat with a man he later identified as Jerry Ellis, the appellant. Austin testified that he tried to get out of the car several times but that his abductors refused to let him and at one point the man in the front seat produced what Austin described as a sawed-off shotgun.

They went to a gas station in Little Rock where Austin's abductors ordered him to charge gasoline, three quarts of oil, and an air filter on his VISA credit card. Austin was then taken to an isolated area in south Little Rock. Austin was let out of the car and the man in the front seat, later identified as Larry Wright, ordered Austin to lie face down on the road and, with a gun to his head, Austin was robbed of his money and credit cards. His abductors told him to get up and run, which he did.

On November 23, 1981, Ellis and two other men were arrested at Dillard's Department Store in Little Rock after trying to make purchases with Austin's VISA. They were in possession of a white Pontiac which was searched. The search produced three quarts of oil, a .22 caliber rifle and some items taken from a Holiday Inn.

Ellis gave the police a statement which said that he saw Austin hitchhiking and that he accepted the offer of a ride and that Austin told them he wanted to go to Little Rock. Ellis said that at the time there was a .22 caliber rifle hidden in the front of the car which did not belong to him. Ellis said that later Austin was ordered out of the car at an isolated spot and robbed.

At Ellis' trial, testimony established that Ellis had checked into a Pine Bluff Holiday Inn on November 22nd, using Harold Austin's VISA. The jury convicted Ellis on both counts and sentenced him to five years for kidnapping and thirty years for aggravated robbery. The sentences were set to be served consecutively.

On appeal Ellis argues that there was no evidence presented at trial that Austin was forced to get in the car at

gunpoint. It is not necessary that a victim be captured or held at gunpoint for the offense of kidnapping to be established under Ark. Stat. Ann. § 41-1702 (Repl. 1977). To prove kidnapping the State must only prove that the accused restrained the victim so as to interfere substantially with the victim's liberty, without the victim's consent, for a specific purpose outlined by the statute. Austin testified that he entered the car involuntarily and was restrained from leaving it.

Austin testified that after being forced into the car and being shown a weapon he was ordered to buy gas. He testified that he was taken to a rural area, forced at gunpoint to lie face down, and while Wright was holding a gun and Ellis was sitting on his leg, he was robbed. Ellis also admitted that Austin had been robbed, although he claimed that he had nothing to do with it.

On appeal we review the evidence in a light most favorable to the appellee and if there is substantial evidence to support the conviction we will affirm. *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981). Evidence is substantial if it is of sufficient force and character to compel a conclusion of reasonable and material certainty. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). In this case the jury had the choice of believing either Ellis or Austin as to the circumstances surrounding Austin's presence in the car. The jury obviously believed Austin and we are bound by their judgment as to the credibility of the witnesses. *Jones* v. *State, supra; Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980). We find manifest substantial evidence to support Ellis' convictions.

Ellis' final argument on appeal, that his motion for a directed verdict should have been granted, also questions the sufficiency of the evidence which we have answered.

Affirmed.

ARKANSAS NURSING HOME, INC., RILEY'S OAKHILL MANOR, INC., Charles STEWART et al, CRESTPARK, INC., and SAGECO, INC. *v.* Honorable Judith ROGERS, Chancellor, and STATE of Arkansas, ex rel Steve CLARK, Attorney General

83-35 652 S.W.2d 15

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Daggett, Daggett & Van Dover, by: *Jimason J. Daggett; House, Holmes & Jewell, P.A.,* by: *Charles R. Nestrud* and *Mitchell, Williams, Selig, Jackson & Tucker,* by: *Byron Freeland,* for petitioners.

Steve Clark, Atty. Gen., by: *Mary B. Stallcup* and *Thomas Gay,* Asst. Attys. Gen., for respondents.

JOHN I. PURTLE, Justice. Petitioners filed an original action in this court for a writ of prohibition against the respondent, Pulaski County Chancery Court (Third Division), praying that the respondent be prohibited from

hearing and determining consolidated cases against petitioners. The petition is denied.

Petitioners were named defendants in an action filed in the Pulaski County Chancery Court by the Attorney General of the State of Arkansas, pursuant to the Consumer Protection Act. Ark. Stat. Ann. § 70-904 (Repl. 1979). The complaint sought to enjoin the petitioners from collecting certain charges from nursing home patients, to recover for past charges to patients, and to redress any unjust enrichment. After the complaints were filed the matter of an injunction was rendered moot but the chancellor refused to dismiss the complaints as to the other charges. The complaints have not been set for trial.

The object of the writ of prohibition is to prevent an inferior court from proceeding in a matter which is entirely without its jurisdiction. *Duncan* v. *Kirby, Judge,* 228 Ark. 917, 311 S.W.2d 157 (1958). Prohibition may also issue when an appeal is an inadequate remedy. *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S.W.2d 358 (1938). A writ of prohibition will not issue to prevent an inferior court from erroneously exercising its jurisdiction. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S.W. 13 (1927). Prohibition may not be used as a substitute for appeal. Nor can it be used as a remedy to force transfer between law and equity courts. *Butkiewicz* v. *Williams, Chancellor,* 229 Ark. 556, 317 S.W.2d 15 (1958).

Petitioners rely upon the case of *Curry, County Judge* v. *Dawson, Chancellor,* 238 Ark. 310, 379 S.W.2d 287 (1964) to support their petition. We do not think *Curry* supports the present petition because there the court stated the rule that an election contest may not be heard by a court of chancery. This holding simply does not apply to the case before us.

Certainly the chancery court had jurisdiction to hear a motion to transfer to law but according to the record no such motion has been made. Therefore, the petition for a writ of prohibition must be denied.

Writ denied.

HAYS, J., not participating.

Mark Christian HENDERSON *v.* STATE of Arkansas

CR 82-155 652 S.W.2d 16

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Philip M. Clay and *James C. Graves,* for appellant.

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

ROBERT H. DUDLEY, Justice. Mark Christian Henderson, the appellant, was convicted of the January 30, 1982, capital felony murders of Steve Francis and Diane Francis in Arkadelphia. He was sentenced to life imprisonment without parole. We reverse and remand for a new trial. Jurisdiction in is this Court pursuant to Rule 29 (1) (b).

We first address appellant's meritorious argument that the trial court erroneously limited cross-examination of the accomplice.

Two people were murdered during the course of a robbery. The appellant, Mark Henderson, was charged with both capital felony murders. He was subjected to the penalties of death or life imprisonment without parole. Ark. Stat. Ann. § 41-1501 (Repl. 1977). In contrast, Jeffrey A. Brown, an admitted accomplice, was allowed to plead guilty to murder in the first degree which carries a penalty of not less than ten nor more than forty years, or life with the possibility of parole. Ark. Stat. Ann. §§ 41-901 and 41-1502

(Supp. 1981). The admitted accomplice, who had been allowed to plead guilty to the lesser charge, took the stand during the State's case-in-chief and testified that the appellant was the one who actually murdered the victims. The defense attorney, in cross-examining the accomplice, asked, "What kind of a deal are you getting for yourself, Mr. Brown?" The prosecuting attorney objected and the court sustained the objection.

The ruling was erroneous. We have consistently taken the view that full cross-examination should be allowed in order to show bias. *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981). This is especially true in the case of an accomplice since his testimony is the direct evidentiary link between the defendant and the crime. *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1981). In *Klimas* v. *State,* 259 Ark. 301, 305-06, 534 S.W.2d 202, 205 (1976), we stated:

> It is generally permissible for a defendant to show by cross-examination anything bearing on the possible bias of the testimony of a material witness. *Bethel* v. *State,* 162 Ark. 76, 257 S.W. 740; *Ringer* v. *State,* 74 Ark. 262, 85 S.W. 410; Annot. 62 A.L.R.2d 611 (1958). This rule applies to testimony given under expectation or hope of immunity or leniency or under the coercive effect of his detention by authorities. *Stone* v. *State,* [162 Ark. 154, 258 S.W. 116]; *Boyd* v. *State,* [215 Ark. 156, 219 S.W.2d 623]. See also *Campbell* v. *State,* 169 Ark. 286, 273 S.W. 1035; *Alford* v. *U.S.,* [282 U.S. 687 (1930)]. The test is the expectation of the witness and not the actuality of a promise. *State* v. *Little,* [87 Ariz. 295, 350 P.2d 756]; *Spaeth* v. *United States,* 232 F.2d 776, 62 A.L.R.2d 606 (6 Cir., 1956).
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> Denial of cross-examination to show the possible bias or prejudice of a witness may constitute constitutional error of the first magnitude as violating the Sixth Amendment right of confrontation. *Davis* v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974).

Indeed, the State does not contest the argument that the ruling was erroneous. Instead, it contends that no proffer was made and thus no reversal should be had on this point. Ark. Unif. Rules of Evid. 103 (a) and 103 (a) (2) provide:

> Rule 103. Rulings on evidence. — (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> * * *
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Normally, we will not consider a point involving the exclusion of evidence when there was no proffer of excluded evidence because we have no way of knowing the substance of the evidence. *Parker* v. *State,* 268 Ark. 441, 597 S.W.2d 586 (1980). However, there is no need for a proffer in either of two situations. First, there is no need for a proffer where the substance of the offer was apparent from the context within which the questions were asked. Rule 103 (a) (2). Here, the distinction between charges of capital felony murder with a possible sentence of death and murder in the first degree with a maximum sentence of forty years or life with the possibility of parole is obvious to one trained in law. A jury is not trained in criminal law and might not understand that the accomplice may well have taken a desperate option and prevented risking his own life by blaming the appellant. This is the very type of evidence of bias which the defendant is entitled to present for a jury to weigh. The substance of the answer to the question objected to is apparent to us. Second, in this situation it is normally only the prosecutor and the accomplice who know what expectation, if any, the state is holding out for the accomplice. The defendant and his attorney do not usually have this information. Rule 103 (a) (2) does not contemplate a proffer of evidence when the information is unavailable to the cross-examiner. The

exclusion of evidence of possible bias or possible prejudice by the accomplice is sufficient. A proffer was not necessary.

The error is prejudicial and requires that we reverse the case. However, we must also address appellant's next argument in great detail because, he argues, it requires not only reversal but also dismissal. That issue is whether there was sufficient corroboration, independent of the testimony of the admitted accomplice, to sustain the conviction.

The testimony of an accomplice must be corroborated by other independent evidence which tends to connect the defendant with the commission of the crime. It is not sufficient to prove that the crime was committed and the circumstances of the crime. Ark. Stat. Ann. § 43-2116 (Repl. 1977); *Pollard* v. *State,* 264 Ark. 753, 574 S.W.2d 656 (1978). The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Bly* v. *State,* 267 Ark. 613, 593 S.W.2d 450 (1980), *citing Froman* v. *State,* 232 Ark. 697, 339 S.W.2d 601 (1960); *Anderson* v. *State,* 256 Ark. 912, 511 S.W.2d 151 (1974). Corroboration must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with the crime and not directed toward corroborating the accomplice's testimony. *Olles* v. *State,* 260 Ark. 571, 573, 542 S.W.2d 755, 758 (1976), *citing Yates* v. *State,* 182 Ark. 179, 31 S.W.2d 295 (1930). In addition to being substantive, the corroborating evidence must be substantial. *Olles,* at 573, 542 S.W.2d at 757. Substantial evidence is stronger evidence than that which merely raises a suspicion of guilt. It is evidence which tends to connect the accused with the commission of the offense charged. However, it is something less than that evidence necessary in and of itself, to sustain a conviction. *Olles,* at 573, 542 S.W.2d at 757-58; *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202 (1976). The corroborating evidence may be circumstantial, but it must be of a material nature and legitimately tend to connect the accused with the commission of the crime. *Pollard* at 756, 574 S.W.2d at 658, *citing Roath* v. *State,* 185 Ark. 1039, 50 S.W.2d 985 (1932).

Corroboration may be furnished by the acts, conduct, declarations or testimony of the accused. *Olles,* at 574, 542 S.W.2d at 758. False statements to the police and flight by an accused may constitute corroborating evidence. *Bly,* at 619-20, 593 S.W.2d at 454. On the other hand, an explanation by the accused of suspicious circumstances may be considered in determining whether the corroborating evidence is sufficient. *Olles,* at 575, 542 S.W.2d at 759, *citing King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973).

To test the sufficiency of the corroborating evidence in this case we eliminate the testimony of Jeffrey Brown, the accomplice, and determine whether the testimony of the other witnesses establishes the crime and tends to connect the accused with the commission of that crime.

Brian Francis, the older brother of victim Steve Francis, testified that Steve was a regular seller and consignor of marijuana. Often he would consign marijuana to comeone in order for that person to resell it and pay him. Brian Francis testified that on the evening of January 30, 1982, Steve Francis had between an ounce and two and one-half ounces of marijuana in a brown bag. Steve also had $90 in his billfold. Robert Cooper and Mark Batson, both Arkadelphia policemen, testified that they found the victims Steve Francis and Diane Francis in their Chevrolet automobile on Hunter Street in Arkadelphia shortly after 5:00 a.m. on January 31. Both were dead. Dr. Fahmy A. Malak, the State Medical Examiner, testified that both victims died between 10:00 and 11:00 p.m. on January 30, 1982 from contact gunshot wounds to their heads. He removed the bullet fragments and supplied them to the State Crime Laboratory.

Ralph Turbyfill, the Chief Latent Fingerprint Expert with the State Crime Laboratory, examined the victims' Chevrolet automobile but found only the victims' fingerprints. He found mud on the back seat floorboard which indicated at some time someone entered the back seat from the passenger side and exited on the driver's side. He also found the brown bag in which the victim usually kept

marijuana. It contained one plastic bag containing marijuana and a number of unused baggies.

Jack Ursery of the Arkansas State Police searched the pockets of the victims' clothing and found only four pennies in one of Steve Francis' pockets. His billfold did not contain any money. This chain of evidence establishes the murders in the course of robbery and proves the circumstances surrounding the crime. However, it does not tend to connect appellant with the crimes.

The following evidence tends to connect the appellant with the robbery and murders. Don Holmes, appellant's half-brother, testified that for six weeks prior to the murders appellant had lived in a room of his home. Holmes identified a .22 caliber pistol which he had kept under a diaper box and discovered missing four weeks before the crimes. One week later, three weeks before the crimes, he found the gun in his home and hid it under his mattress. The day after the murders, the police came to his house to search appellant's room. The fully loaded .22 caliber pistol was still under Holmes' mattress. He gave the pistol to the police.

Robert Phillips, the Firearms and Tool Mark Examiner with the State Crime Laboratory, testified that he performed a comparison of the bullets removed from the victims and test bullets fired from Holmes' .22 caliber pistol and he could neither identify nor eliminate the pistol as the one which fired the fatal bullets but testified that the fatal bullets were fired "from this weapon or one just like it."

Jeff Buford testified that on the night of January 30 he drove to the Holmes residence for the purpose of visiting appellant. He stated that the Francises' Chevrolet automobile was parked in front of that residence and he parked about one and one-half car lengths from their car. He testified that he did not see either of the victims. On direct examination he stated that the time of this observation was between 9:45 and 10:20 p.m. but on cross-examination he stated that he did not have a watch on and his car did not have a clock but guessed that it was later than 9:00 p.m. and before 11:00 p.m. He testified that the appellant stated he

was about to purchase a quarter of a pound of marijuana and would meet him later at a car wash and sell some of it to him. However, appellant never met him at the car wash.

Ricky Arnold and Bruce Golden testified that around 11:00 p.m. the appellant was at Arnold's apartment. Golden testified that at that time the appellant had a zip-lock bag half full of marijuana while Arnold testified that the bag was full. Both testified that the appellant left Arnold's apartment within the hour. Around midnight, and after appellant had left, Arnold and Golden went to a local nightclub, the Watergate Club. There Arnold saw the appellant rolling a marijuana cigarette.

Charles Lambert, a criminal investigator for the Arkansas State Police, testified that he and Sergeant Jack Ursery interviewed appellant in North Little Rock three days after the crimes and appellant denied that he had known the victims, denied that he knew the accomplice and denied having any marijuana on the night of the crimes.

The appellant testified that his livelihood came from collecting welfare and selling marijuana. He stated that Steve Francis, one of the victims, was his regular supplier of the drug and on the evening of the crimes came by to sell him $90 worth of marijuana. Appellant stated that he paid $30 at the time and Francis gave him $60 credit until the next morning. He intended to sell the marijuana that night at the Watergate Club. He stated that the Francises then drove away and he went to Lavonne Todd's house, then to Bennie Lee Barnes' house, then to Ricky Arnold's apartment and then to the Watergate Club to sell the marijuana. He admitted to having about $100 in cash at the club and admitted he had only $30 earlier. He testified that he acquired the money from marijuana sales but could account for only one $5 sale. The next morning he waited for Francis to come by his residence to collect the $60. He waited until 2:30 in the afternoon and he and the accomplice went to his cousin's house in Hot Springs "to party." After that he went to a relative's home in North Little Rock. He said he was not attempting to flee as he did not take all of his clothes; he took only one pair of pants and two shirts. Appellant denied

killing the Francises. He testified that he had no motive to kill them because Steve Francis was his main supplier of marijuana.

Appellant readily admitted trying to pawn his half-brother's pistol some weeks before the crimes as described by Doug White. He stated this was done in order to get money to purchase marijuana. He admitted lying to the police about knowing Steve Francis because he thought he was being arrested for selling marijuana which he had purchased from Francis.

The summary of testimony establishes six items of evidence to be weighed in order to determine if there is something more than suspicion for corroboration. Those six are as follows: (1) Appellant was seen standing near the victims' family automobile for a short period of time. The time was estimated by the witness to be as early as 9:00 and as late as 10:20 p.m. The estimate of the time of death of the victims is between 10:00 and 11:00 p.m. Therefore, appellant could have been near the victims' car shortly before or as much as two hours prior to the deaths. The jury may have concluded these times coincided and that inference is permissible under the proof. (2) Appellant possessed half of a bag of marijuana shortly after one of the victims had been robbed of his marijuana. This possession of marijuana could be viewed as incriminating when examined with the other evidence. (3) Appellant had access to Don Holmes' .22 caliber pistol. The victims were murdered with shots fired from a .22 caliber pistol. (4) At 2:30 on the afternoon following the murders the appellant went to Hot Springs and later to North Little Rock. He had not returned on February 3 when suspicion began to center on the accomplice and him. He had not told his half-brother, Don Holmes, he was leaving town. (5) Appellant, upon first being questioned, gave the police a statement which included three pieces of false information: (a) he denied that he knew the victims; (b) he denied that he knew the accomplice, Jeffrey Brown; and (c) he denied having any marijuana on the night in question. Appellant's explanation of the above factors may be considered in determining whether there is a sufficient link in a chain of circumstances making the

corroborating evidence sufficient. In his testimony he admitted that he lied about all three points when he was first questioned. He stated that he thought the police were there to arrest him for selling drugs which he had purchased from Steve Francis. The credibility of appellant's explanation of why he gave false statements was for the jury to decide. (6) Appellant's friend, Jeff Buford, was a reluctant witness for the State. He testified that as he was driving by appellant's house, he saw appellant coming out to the Francis vehicle. When appellant saw Buford he flagged him down and had a conversation with him: "He kind of told me what was going on, that he was going to get some marijuana, a quarter of a pound, and to meet him at the car wash in an hour. He didn't say where he was going to get this quarter of a pound, but he said he was going to get. He was going to cop one, is what he said." On cross-examination Buford tried to minimize the word "cop" as meaning "to buy." But the word is well recognized as a slang for "steal." Webster's New Unabridged Dictionary, 2d Edition, defines "cop" as "to steal, or to rob, especially on the spur of the moment."

The corroborating evidence is sufficient to sustain the conviction. Therefore, even though prejudicial error occurred in limiting cross-examination, we only reverse and remand for new trial.

Most of the other assigned points of error are not likely to arise again upon retrial. The issues regarding the qualification of the jury for the death penalty are now moot. *Fuller* v. *State,* 246 Ark. 704, 439 S.W.2d 801, *cert. denied,* 396 U.S. 930 (1969); *Sneed* v. *State,* 159 Ark. 65, 255 S.W. 895 (1923).

Reversed and remanded.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I disagree that this case should be reversed simply because the trial court sustained an objection to a question which may have been objectionable. The question — "What kind of deal are you getting for yourself, Mr. Brown?" — is, at best, argumenta-

tive and the ruling may have been prompted by the form of the question. Had counsel asked questions of the witness in proper form with respect to a negotiated plea, the matter would have been relevant and, doubtless, admitted by the trial court. The fact that the trial court was not denying the defense the right to question the witness concerning a trade-out for his testimony is demonstrated by the follow-up question, "Mr. Brown, you expect to be out of jail fairly soon don't you, sir?" If the point was deemed important to the defense, the issue should not have been abandoned so abruptly.

Even if the ruling was technically incorrect, which is debatable, it fails to meet the requirement of Rule 103 of the Uniform Rules of Evidence, that error may not be predicated on a ruling which admits or excludes evidence unless a *substantial* right of the party is affected. Counsel heard the comment from the prosecutor, "There's no deal." He could easily have asked the witness whether *he* had any understanding or expectation of leniency, yet he chose not to do so and I would not impose the heavy burden of another trial simply to provide a second opportunity for one which was originally declined.

Meyer BRICK *v.* Vera B. SIMONETTI et al

83-2 652 S.W.2d 23

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Rubens & Rubens, by: *Kent J. Rubens,* for appellant.

Rieves, Shelton & Mayton, for appellees.

STEELE HAYS, Justice. Meyer Brick and Vera Simonetti were opposing candidates for Justice of the Peace in District No. 11, Crittenden County, in the Democratic Preferential Primary held on May 25, 1982. Simonetti won the election and Brick has challenged her residency qualifications as set out in Ark. Stat. Ann. § 17-3605 and Art. 7, § 4 and Art. 19, § 4 of the Arkansas Constitution. Section 17-3605[1] specifically provides that all Quorum Court officers reside within their respective districts. The trial court sitting as a jury found that Simonetti was a resident of and domiciled in District No. 11.

Simonetti has resided in Crittenden County, Mound City Township, for thirty-seven years. In 1975, the township

[1]§ 17-3605. Residence required. — All county, Quorum Court District and township officers shall reside within their respective townships, districts and counties. An office shall be deemed vacant if a county officer removed his legal residence from the county or a Quorum Court District or township officer removes his legal residence from the district township from which elected. For purposes of this section, legal residence shall be defined as the domicile of the officer evidenced by the intent to make such a residence a fixed and permanent home. [Acts 1977, No. 742, Ch. 2, Part E, § 45, p. 1736; 1979, No. 413, § 9, p. ___].

was made a part of District No. 11. Simonetti has since run for Justice of the Peace for that district at each election. On February 2, 1982, there was a reapportionment and Mound City Township was moved to District No. 10. Until Simonetti received a letter from Jake Brick, the Chairman of the Democratic Central Committee on March 24, 1982, she believed that she was in District No. 11. In order to qualify for the position, Simonetti then moved to an apartment within District No. 11. She moved in enough furniture to set up housekeeping, changed her voter registration to the new address and obtained a telephone in her own name. Later, she moved in enough furniture to furnish two bedrooms, a living room and a kitchen. She entertained friends there and ate most of her meals there. There was testimony from other apartment occupants that she had made the apartment her home and was living there.

The issue involved, however, is whether or not this move fulfilled the requirements of § 17-3605, which states:

> . . . [L]egal residence shall be defined as the domicile of the officer evidenced by the *intention to make such residence a fixed permanent home.* (our italics)

Brick contends that the evidence was insufficient as a matter of law to support a finding that Simonetti was domiciled in District No. 11.

Brick cites several cases where residency issues were involved and underscores our general requirements that conduct and actions must be in conformity with the stated intent. *Booth* v. *Smith,* 261 Akr. 838, 552 S.W.2d 19 (1977) and that both the intent and conduct must be considered as factors, *Pike County School District 1* v. *Pike Board of Education,* 247 Ark. 9, 444 S.W.2d 72 (1969). Leflar, Conflict of Laws, § 10 is also cited:

> . . . The principal manner by which a new domicile can be acquired is by physical presence at a new place with the state of mind of regarding the new place as HOME. The new domicile arises instantaneously when these two facts occur. . . .

Meyer Brick points to certain conduct which he claims is inconsistent with Vera Simonetti's declared intent to make the apartment her permanent home — receipt of mail at the same post office box as that of her prior home, residence at the previous home for thirty-seven years, living apart from her husband of many years, leaving behind her china, washing machine, some of her clothing, and leasing the apartment for only one year.

But these circumstances are not so convincing as to override the trial court's finding that Simonetti intended to reside permanently within the district. The post office box where she had been receiving her mail prior to moving to the apartment is three-quarters of a mile from her apartment and, evidently, a convenient place to receive mail. She testified that she had access to a washing machine at the apartment complex and had no need to move the one from the farm. The maximum time for which a lease could be given on the apartment was one year. As to being separated from her husband, she stated that he was only five minutes away if he needed her. It isn't necessary that her every arrangement be found plausible, if the cumulative circumstances, considered along with her sustained interest in politics, do not compel us to a view different from that of the trial court. Gleaning a state of mind is uncertain work, at best, yet *intent,* in large measure, determines where one's home is. Here, the trial court pointedly commented on the credence he attached to the assertions of Simonetti that she intended to make her permanent home in the district, and that finding must weigh heavily on review. Where those assertions are supported by manifestations consistent with such an avowed intent, we are not inclined to declare that clear error occurred. See ARCP Rule 52 (a).

Brick also points out that the logical purpose of the constitutional and statutory requirements of residency is so that elected officials will reside in the same district as their constituents, and thereby better know and serve the interests of their constituency. In this case, in addition to finding the evidence sufficient, we find nothing to suggest that the stated purpose of the statute is being thwarted. Simonetti was not only a long time resident of the area, but had a

proven interest in local politics. As to District No. 11 specifically, she had been within that district since 1975, and it was only by a quirk of redistricting, shortly before the election, that her prior home was placed outside the district.

We are satisfied that under all the circumstances of this case the trial court had sufficient evidence to find Mrs. Simonetti a resident of District No. 11 in accordance with § 17-3605.

Affirmed.

Lyndell APPLETON-RICE, Guardian of the Estate of Mary Ella DAVIS, an Incompetent *v.* Dr. Joe CRUMPLER, Dr. Douglas LOWERY, and Dr. David WILLIAMS

83-140 ___ S.W.2d ___

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Edward Gordon, for petitioner.

W. A. Eldredge, for respondent.

PER CURIAM. Appellant has filed a Petition for Writ of Certiorari requesting a 60-day extension of time from June 6, 1983, to complete and file the record on appeal, alleging that the extension is needed for the court reporter to be able to prepare the transcript. Appellees have filed a brief in opposition and asked that the writ be denied and the case dismissed.

On November 12, 1982, judgment was entered in this case in the trial court. On December 7, 1982, notice of appeal and designation of the record was filed by appellant. The notice of appeal did not contain a statement that the designated portions of the transcript had been ordered from the court reporter as required by Rule 3 (e), Rules of Appellate Procedure, Ark. Stat. Ann., Vol. 3A (Repl. 1979).

On February 16, 1983, appellant filed a motion to extend time to prepare and file the transcript of the proceedings stating that "the court reporter has advised that she will need the full seven (7) months to prepare and file the

transcript of the proceedings." This motion was granted on February 16; the trial court extended the time for filing the transcript until June 6, 1983; but, contrary to the requirement of Rule 5 (b), Rules of Appellate Procedure, Ark. Stat. Ann., Vol. 3A (Repl. 1979), the trial court did not find "that a reporter's transcript of such evidence or proceeding has been ordered by appellant. . . ."

This court had occasion to rule on this precise issue in *Hudson* v. *Hudson,* 277 Ark. 183, 641 S.W.2d 1 (1982):

> The provision for ordering the transcript under Rule 3 (e) has been construed to be satisfied by substantial compliance, provided the appellee has not been prejudiced or misled by the failure to strictly comply with the rule. *Brady* v. *Alken, Inc.,* 273 Ark. 147, 617 S.W.2d 358 (1981); *Davis* v. *Ralston Purina Co.,* 248 Ark. 14, 449 S.W.2d 709 (1970). However, we stated in *Brady, supra,* that:
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> > . . . Our review is that if for any reason counsel are not able to state in the notice of appeal that the transcript or portions of it have been ordered, the proper practice would be for an appropriate explanation to be included in the notice of appeal. . . .
>
> Here, there was no compliance with the pertinent provisions of Rule 3 (e), substantial or otherwise. The rule was totally ignored. The trial court erred in not dismissing the appeal for failure to file a proper notice of appeal. . . .

On February 17, 1983, appellees filed a Motion to Dismiss Appeal in the trial court on the basis that the appellant had failed to comply with Rule 3 (e) in filing his notice of appeal. The trial court erred in not dismissing the appeal because appellant failed to follow the requirement of Rule 3 (e) in filing the notice of appeal. Appellees have renewed their motion to dismiss in this court based on Rule 3 (e) which should be granted.

The appeal is dismissed and the trial court's final decree of November 12, 1982, is affirmed.

HOLT, PURTLE and HAYS, JJ., would grant petition.

Cecil KNAPPENBERGER *v.* STATE of Arkansas

CR 83-7 652 S.W.2d 25

Supreme Court of Arkansas
Opinion delivered June 13, 1983

Howard & Howard, by: *William B. Howard,* for appellant.

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

PER CURIAM. Petitioner Cecil Knappenberger was charged with second degree murder and convicted by a jury of manslaughter, Ark. Stat. Ann. § 41-1504 (Repl. 1977). He was sentenced to a term of ten years imprisonment in the Arkansas Department of Correction. We affirmed. *Knappenberger* v. *State,* 278 Ark. 382, 647 S.W.2d 417 (1983), amended on denial of rehearing (March 28, 1983).

When this case first came before us on direct appeal, petitioner raised the same allegations that he now raises in

this petition. In our first opinion we indicated our approval of an evidentiary hearing on the allegations of ineffective assistance of counsel without requiring a separate verified petition for postconviction relief in this Court. On rehearing, we amended our original opinion to note that A.R.Cr.P. Rule 37.1 requires that a separate verified petition for postconviction relief be filed in this Court after a case has been affirmed on appeal if the allegations of ineffective assistance of counsel are being raised for the first time. Petitioner has now submitted such a petition.

Permission is granted for petitioner to proceed in circuit court on the specific allegations of ineffective assistance of counsel set out in the petition.

Petition granted.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. Petitioner is not entitled to postconviction relief. The allegations that counsel's cross-examination was irrelevant and that he allowed the jury to hear prejudicial testimony does not warrant an evidentiary hearing. The style of questioning a particular witness is a matter about which competent advocates could disagree. While some counsel are more skilled in the area of cross-examination, a line-by-line examination of an attorney's questions to determine how effective they are is not within the purview of our postconviction rule unless petitioner can demonstrate prejudice and the denial of a fair trial. Even if a question proves unwise in retrospect, mere errors are not good cause for granting relief. *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973).

With regard to petitioner's confession, it is apparent that the ultimate fact of petitioner's guilt is given little consideration. He does not allege that his confession was not a true statement of his involvement in the crime. He does not allege that it was coerced or otherwise involuntary. He argues instead that since there were no eyewitnesses to the crime, he would not have had to testify in his own behalf at

trial and would have been entitled to a directed verdict on the charge of first degree murder if his confession had not been introduced into evidence. He asks this Court in effect to weigh the evidence existing at the time he confessed and that which would have developed at trial and conclude that counsel erred in allowing him to confess. It is apparent that petitioner is seeking to expand the standard by which we judge the competence of attorneys in criminal cases. There is a presumption of effective assistance of counsel. *Hoover* v. *State,* 270 Ark. 978, 606 S.W.2d 749 (1980). To overcome that presumption a petitioner must show by clear and convincing evidence that he was prejudiced by the conduct of counsel. *Unquhart* v. *State,* 275 Ark. 486, 631 S.W.2d 304 (1982). *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). Furthermore, he must show that the actual prejudice suffered denied him a fair trial. *Hill* v. *State,* 278 Ark. 194, 644 S.W.2d 282 (1983); *Blackmon, supra.* In determining whether a petitioner was prejudiced, and as a result denied a fair trial, this court must not attempt to weigh the evidence against the petitioner when counsel gave his advice. There is no doubt that there are any number of criminal cases in which an accused elects on advice of counsel to confess or give a statement which later contributes in some degree to his conviction. Rule 37 was not designed to provide a method for retracting an otherwise valid confession or statement merely because the petitioner later attacks the sufficiency of the evidence against him. Society deserves finality in criminal cases. Claims of ineffective assistance of counsel must be scrutinized carefully; they must not be a means to frustrate the legal process and undermine findings of guilt reached by way of a full and fair trial. Petitioner here has not met the heavy burden of showing that counsel's conduct prejudiced him and resulted in denial of a fair trial.

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

J. D. WILLIS *v.* CRESTPARK OF WYNNE, INC. (Intermediate)

83-49 652 S.W.2d 625

Supreme Court of Arkansas
Opinion delivered June 20, 1983

Killough & Ford, by: *Robert M. Ford,* for appellant.

Rieves, Shelton & Mayton, by: *Elton A. Rieves, IV,* for appellee.

GEORGE ROSE SMITH, Justice. In this slip-and-fall case the plaintiff Willis argues that the trial judge should not have directed a verdict for the defendant nursing home. We agree with the trial court. (Our jurisdiction includes tort cases. Rule 29 [1] [o].)

At about 9:45 a.m. Willis was about to visit Jim Sutherland, a patient in the nursing home. Willis testified that as he reached the foot of Sutherland's bed "my feet went everywhere." While he was still on the floor he heard an employee of the nursing home say, "I been telling them all the time that something like this was going to happen." The other relevant proof is that Sutherland had been spitting at night for several years and often missed the waste can near the head of his bed, that the floor had been cleaned with a wet

mop between 8:30 and 9:00 a.m., and that nothing was found on the floor when the cleaning employee checked the area not more than ten minutes after Willis fell.

Willis had the burden of proving that he slipped on a substance which either had been put there by the defendant's negligence or had been there so long that the defendant should have known of it and was negligent in not removing it. AMI Civil 2d, 1105 (1974). Willis failed to make a case for the jury. He did not even prove what substance, if any, caused his fall. He argues that it could have been Sutherland's sputum, though there is no proof that Sutherland ever spat either during the daytime or near the foot of his bed, or that it could have been moisture left by the mop at least 45 minutes earlier, through no one testified that the floor was other than dry when Willis fell. The plaintiff's proof fell decidedly short of proving that his fall was caused by the nursing home's negligence. The trial judge had no choice except to direct a verdict for the defendant.

Affirmed.

Herman PICKENS *v.* STATE of Arkansas

CR 83-13 652 S.W.2d 626

Supreme Court of Arkansas
Opinion delivered June 20, 1983

Gene E. McKissic, for appellant.

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

FRANK HOLT, Justice. The appellant was convicted by a jury of burglary and aggravated robbery. The jury fixed his punishment, as a habitual offender, at 30 years imprisonment for the burglary and 60 years imprisonment for the aggravated robbery conviction. Three points are raised on appeal. We affirm.

The appellant first argues, through his court appointed counsel, that the trial court erred by denying him, an indigent, an independent fingerprint expert at state expense in violation of his right to due process of law. The critical testimony with respect to identification came from a fingerprint expert with the FBI, who testified that the appellant's

palm print was found on a paper bag. The robber had masked his face with a paper sack during the alleged robbery following which a paper sack was discovered in that portion of the bank where the robbery occurred. Prior to trial the appellant requested state funds to hire an independent expert to examine and evaluate the palm prints on the bag. He did not name nor list any particular expert; he did not provide the court with a list of possible experts whom he might call; he did not make a proffer of any evidence that might be adduced; and he made no suggestions as to what the cost of the expert testimony might be. He merely requested funds to pay for the attendance of an out-of-state fingerprint expert. We have held that the decision whether to provide a defendant with an unnamed fingerprint expert to rebut the state's expert testimony is within the discretion of the trial court. *Adams* v. *State,* 276 Ark. 18, 631 S.W.2d 828 (1982); see also, *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982); and *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). We find no abuse of discretion here.

The appellant next argues that the trial court erred in admitting into evidence the identification testimony of Judy Gibbs and Leon Carroll based upon their identification of him at a pretrial lineup. Gibbs was the bank employee who was held up. She did not see the assailant's face, because he had a paper sack with eye holes over his head. She was able to describe his build and body shape. She picked the appellant out of a lineup one month after the robbery. She admitted that her identification was not positive. Carroll saw a man emerge from the bank at the approximate time of the robbery. He said that the appellant looked exactly like the man whom he saw but he could not say for certain it was he. He had also picked the appellant out of the same lineup. Appellant's argument is that this testimony was irrelevant and, even if relevant, inadmissible because its probative value was outweighed by its prejudicial effect. Ark. Stat. Ann. § 28-1001, Rules 401, 402 and 403 (Repl. 1979). However, as abstracted, the record does not reflect that these specific arguments were addressed to the trial court. They are raised for the first time on appeal. Consequently, we do not consider them. *Pace* v. *State,* 265 Ark. 712, 580 S.W.2d 689 (1979).

Finally, the appellant argues that the evidence was not sufficient to support the jury verdict. It is undisputed that a burglary and robbery occurred, but the appellant contends that the identification testimony is insufficient, and there is no direct evidence placing him in the bank. Judy Gibbs, the bank employee who was the victim of the crime, testified that the assailant was of the same general build as the appellant. She picked him out of a lineup of persons similar in appearance when each man stepped forward and reiterated the words of her assailant. At the armed robber's command, she had placed the bank money in a dirty sack, the size of a pillow case. Leon Carroll saw a man carrying a "big old sack" as he left the bank at the approximate time of the crime. The appellant looked exactly like the man whom he saw. He, as did Gibbs, had picked appellant from the lineup. It is true that neither witness was certain in their identification. The state, however, adduced evidence that a paper sack, which had not been in the manager's office where the robbery occurred the day before the crime, was found there following the crime. The appellant's palm print was found on this sack. Certainly, this evidence is sufficiently substantial to support the jury's verdict. *Brown* v. *State,* 278 Ark. 604, 648 S.W.2d 67 (1983); and *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982).

Affirmed.

James F. MILLER *v.* Floyd J. LOFTON, Judge, et al

83-31 652 S.W.2d 627

Supreme Court of Arkansas
Opinion delivered June 20, 1983

Davidson, Horne, Hollingsworth, Arnold & Grobmyer, by: *Allan W. Horne;* and *Virginia R. Williams,* Rule XII Law Student, for petitioner.

Steve Clark, Atty. Gen., by: *David L. Williams,* Deputy Atty. Gen., for respondent.

DARRELL HICKMAN, Justice. James F. Miller is a licensed bail bondsman and he filed this original action with us seeking a writ of prohibition against six Pulaski County judges. He asks that an order they entered on November 1, 1982, be declared void and they be prohibited

from enforcing it. He also asks that an oral order entered by Judge Floyd Lofton, apparently denying a criminal defendant bail on a bond Miller had written for an appearance in Little Rock Municipal Court, also be declared void.

The petition concedes that the judges have some jurisdiction regarding bail but not to enter the order they did, which is a comprehensive local order concerning bail in their courts. It is argued that the Insurance Department has the sole power to license and regulate bail bondsmen in Arkansas by virtue of Act 400 of 1971. Furthermore, it is argued that Act 400 repealed by implication Act 268 of 1979 in which the General Assembly recognized that trial courts had authority to deal with bail and bail bondsmen. It is also stated Judge Lofton's order violates A.R.Cr.P., Rule 9.

We deny the petition for the writ of prohibition because it is not in order. A writ of prohibition is an extraordinary writ and is only granted when the lower court is wholly without jurisdiction, there are no disputed facts, there is no adequate remedy otherwise, and the writ is clearly warranted. *Webb* v. *Harrison,* 261 Ark. 279, 547 S.W.2d 748 (1977). The true test of whether appeal is an adequate remedy is answered in determining if the lower court is without jurisdiction. *Springdale School District* v. *Jameson,* 274 Ark. 78, 621 S.W.2d 860 (1981).

The order in question is quite sweeping, and obviously contains some questionable features, but we do not reach those features because prohibition is not the proper remedy in this case for several reasons. First, the trial judges do have some inherent jurisdiction and authority in the matter; second, the nature of the so-called oral order of Judge Lofton — at one point it is referred to as an explanation of the written order — is not exactly clear. The State does not concede such an "order" was given. Finally, to grant a writ of prohibition in this case we would have to determine exactly all of the jurisdiction and authority of the lower court judges in the matter of bail, reconcile Acts 268 and 400, or determine if the latter repealed the former by implication, rule on orders that have already been entered, and anticipate

all the questions that could arise from the broad order of the lower court judges.

These are the very reasons that a writ of prohibition, a narrow, extraordinary writ, should not be granted, even if part of the order is beyond the jurisdiction of the judges. Those questions can be properly raised on appeal.

Writ denied.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I agree with the law as stated in the majority opinion. However, I would consider the case on its merits and make a decision now rather than put the parties through the trouble and expense of an additional trial. As it now stands we will face the same situation when it next comes before us on appeal.

Sheila CASTLEMAN *v.* Billy DUMAS et ux

83-43 652 S.W.2d 629

Supreme Court of Arkansas
Opinion delivered June 20, 1983

David M. Donovan, for appellant.

W. Q. Hall, for appellees.

ROBERT H. DUDLEY, Justice. Billy and Elda Dumas, appellees, filed a petition in the County Court of Madison

County alleging that they have no access to their lands. They petitioned the court to appoint road viewers to lay out a road connecting their land to a county road running along appellant's land. The county court appointed three viewers who determined that it is necessary for appellees to have a road laid over appellant's land. They established where the road should be and assessed damages totaling $2,500. The county judge issued an order in accordance with the viewers' report and appellant, Sheila Castleman, appealed to circuit court.

The circuit court found that it is necessary that the appellees have a road laid out and established to their property; that the road laid out by the viewers is the most reasonable and feasible route considering the convenience and inconvenience to all parties concerned; and that the damages set by the viewers for the road easement are reasonable and proper. We affirm. Jurisdiction is in this Court pursuant to Rule 29 (1) (c).

Appellant raises three points for reversal. First she alleges that the circuit court erred in failing to consider the requirement of necessity for the proposed road as required by Ark. Stat. Ann. § 76-110 (Repl. 1981). In *Pippin* v. *May*, 78 Ark. 18, 21, 93 S.W. 64 (1908), we stated as follows:

> In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not.

The trial court specifically found that it was necessary that the appellees have a road laid out to their property. Appellant, however, argues that appellees had access to their land over another portion of appellant's land, although the alternate route was less convenient to the appellees. Appellant is correct that mere inconvenience is not a sufficient

reason to entitle one to condemn a private right-of-way over another's land. *Mohr* v. *Mayberry,* 192 Ark. 324, 90 S.W.2d 963 (1936). However, in this case, unlike the situation in *Mohr,* the evidence established that appellees did not have a way off their own land to the highway and were not seeking to condemn appellant's land for their own convenience. The road viewers, the county court, and the circuit court all found that the proposed road was necessary to give the appellees a means of ingress and egress. In addition, the proposed route was found to be the most convenient and the least injurious to all parties involved, including appellant.

The appellant did not appear in person at the trial and her attorney called no witnesses. All of the witnesses were called by the appellees. Although appellant argues that she offered and would have preferred the road on another portion of her property, there is no evidence of this in the record.

Second, appellant argues that the circuit court erred in requiring the appellant to show that the order of the county court was incorrect. There was no prejudice because the circuit court allowed the case to proceed to trial with the appellees establishing their case *de novo* as required by Ark. Stat. Ann. § 27-2007 (Repl. 1979). *See also Armstrong* v. *Cook,* 243 Ark. 230, 419 S.W.2d 308 (1967). Appellant contends that despite the appellees' assumption of the burden of proceeding first with their proof, she erroneously retained the burden of establishing the critical issues such as necessity and damages. There is no merit to appellant's contentions, however, because the findings of the trial court on all of the critical issues are supported by the unrefuted evidence presented by the appellees and are not clearly erroneous. ARCP Rule 52; *Alley* v. *Rodgers,* 269 Ark. 262, 599 S.W.2d 739 (1980).

Finally, appellant contends that the circuit court erred in assessing damages. The road viewers set appellant's damages at $2,500. Ark. Stat. Ann. § 76-110 (Repl. 1981) provides for the assessment of damages by the viewers and the trial court found their assessment reasonable. The viewers testified that in assessing damages they considered

the value of the land taken, the fact that fences would have to be built, and the "nuisance value." The appellant did not submit any evidence nor did she refute the qualifications of the viewers or their testimony. The trial court's findings on this issue were supported by the evidence and not clearly erroneous. ARCP Rule 52.

Although this case is affirmed, the appellant is entitled to her costs of the appeal to this Court in this particular type of case. The reason is that it would be most unfair to take one's land and require her to pay the costs of that proceeding. *Parrott* v. *Fullerton,* 209 Ark. 1018, 193 S.W.2d 654 (1946).

Affirmed.

HICKMAN, J., concurs. *See Dowling* v. *Erickson,* 278 Ark. 142, 644 S.W.2d 264 (1983).

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