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Roy L. BALENTINE *v.*
ARKANSAS STATE BOARD OF EDUCATION

84-224 684 S.W.2d 246

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*Guy Jones, Jr., P.A.,* for appellant.

*Steve Clark,* Att'y Gen., by: *C. R. McNair, III,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The State Board of Education, after a hearing, revoked the appellant's certificate as a school superintendent. The circuit court upheld the revocation. Upon this appeal, which comes to us under Rule 29(1)(c), the appellant does not question the accuracy of the State Board's finding that Balentine knowingly falsified the records of the Timbo School by overstating the number of students enrolled, the number of students transported to the school, and the number of school lunches for which reimbursement was claimed. Instead, the appellant makes one argument, that the State Board's action was not authorized by the controlling statute, Ark. Stat. Ann. § 80-1228 (Repl. 1980).

The pertinent part of the statute is its first sentence:

> The State Board of Education is hereby directed to revoke the teachers certificate of any teacher of this State who knowingly falsifies any attendance records kept by such teacher that are used in computing the average daily attendance of the school district in which the teacher teaches, and the State Board of Education is hereby directed to revoke the certificate of any superintendent of schools who knowingly permits or requires any teacher to falsify such attendance records.

It is argued that the statute directs the State Board to revoke a superintendent's certificate only when he permits or requires a teacher to falsify an attendance record, not when he falsifies the record himself.

We are not persuaded by this argument. Attendance records are ordinarily kept by teachers or other employees, not by the superintendent. The legislature expressed its intention to prohibit falsification of the records by punishing teachers who falsify them and superintendents who permit or require teachers to do so. Even though the statute is penal, it is a civil measure, not a criminal one. We must not construe it so narrowly as to exclude cases which the statutory language, in its ordinary acceptation, would embrace. *St. Louis I.M. & S. Ry.* v. *Waldrop,* 93 Ark. 42, 123 S.W. 778 (1909). In the case at bar the circuit judge was right

in his understanding of the legislative purpose:

> The obvious purpose of the Act in question in this case is to prevent the falsification of attendance records to the State. The purpose of the Act was not to prevent superintendents from directing teachers to falsify records, but to prevent anyone in authority including the superintendent from falsifying records to the State.

We adopt his reasoning and affirm his judgment.

Affirmed.

Carmen Lewis PETTY, as Successor Administratrix and Sole Heir-at-Law of Major William LEWIS, Deceased *v.* Tommy LEWIS and Ronald BURTON

84-225 684 S.W.2d 250

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*Wood Law Firm,* for appellant.

*Brazil, Clawson & Adlong,* by: *William Clay Brazil,* for appellee Lewis; and *Wright, Lindsey & Jennings,* for appellee Burton.

DARRELL HICKMAN, Justice. This appeal concerns the estate of Major William Lewis. His daughter and sole heir, Carmen Lewis Petty, sued Tommy Lewis, the original administrator, and Ron Burton, the attorney for the estate. The suit was essentially for damages for breach of fiduciary duties and sought an accounting. After a thorough hearing, a special master found no impropriety but did find that Tommy Lewis owed the estate an amount to be offset by his administrator's fee and by a debt owed to him by Major Lewis. The master's nine page report was adopted by the Faulkner County Probate Court, and it is from those findings that Carmen Petty appeals. We affirm.

Major Lewis, a cattleman who owned and operated a livestock auction barn in Conway, Arkansas, died in October, 1977. He had no lineal heirs other than the appellant, Mrs. Petty, who is his illegitimate daughter. The probate court declared her to be Major Lewis' heir, and we affirmed in *Lewis* v. *Petty,* 272 Ark. 250, 613 S.W.2d 585 (1981).

Two days prior to Major Lewis' death, he held a sale at his barn. After the sale he wrote thousands of dollars in checks to the sellers of cattle. The checks were to be paid from a custodial account required by the Packers and

Stockyards division of the United States Department of Agriculture. It developed that the account did not have sufficient funds with which to pay the checks. Tommy Lewis, Major Lewis' nephew, who was the administrator of the estate, and George Hartje,[1] Major Lewis' attorney, made arrangements with the bank to hold the checks until sufficient funds could be amassed to pay the outstanding checks. All of Lewis' cattle and other assets were gathered, and the checks were paid. This is the basis for one of Mrs. Petty's chief contentions. The record reveals that gathering the assets was a monumental task.

Every witness who had access to Major Lewis' books testified that his records were inaccurate and incomplete. His former bookkeeper had to be hired by the estate to interpret those books and determine which of the accounts receivable were valid. No records were kept of Major Lewis' cattle and they had to be found. Even the attorney who represented Mrs. Petty at the time testified that Tommy Lewis had done a commendable job in marshalling Major Lewis' assets and in being totally cooperative with Mrs. Petty during his administration.

During the appeal of *Lewis* v. *Petty, supra,* in October, 1980, Mrs. Petty fired her attorney and hired her present counsel. At that point an inventory and an accounting had been filed. Another accounting had been made and circulated among the parties but, inadvertently, was not filed until the trial of this case. After Mrs. Petty was determined to be Major Lewis' sole heir, Tommy Lewis was relieved as administrator and Mrs. Petty was appointed. That was on June 2, 1981. No objection was made to any action by Tommy Lewis or Ron Burton until September 27, 1982, when this action was filed.

The suit sought a final accounting by Tommy Lewis and made 16 specific allegations of wrongdoing which included contentions as to the inventory being filed late and

[1]Ron Burton, one of the appellees, was George Hartje's associate and assumed Hartje's responsibilities for handling the estate when Hartje was appointed to the bench in January, 1979.

the second inventory not being filed at all. Additionally, the suit alleged breach of fiduciary duties by Tommy Lewis and Ron Burton. The special master heard extensive testimony from the parties and numerous other witnesses. With respect to the inventory, he concluded that the estate was in such disarray that it would not have been possible to file an inventory in 60 days. He also found that although the second accounting should have been filed, Mrs. Petty's attorney had knowledge of it, no objection to it was filed, all the records were turned over to Mrs. Petty, and there was no evidence of any damage to the estate. As to the prayer that Tommy Lewis be ordered to file a final accounting, the master found that Tommy Lewis turned over all records for the estate at the time Mrs. Petty was appointed administratrix, and that no demand was made for a final account. He found, therefore, that Mrs. Petty waived her right to demand a final accounting and that it would be useless to order one at that late date.

The special master, after reviewing all the evidence, also found that there was no negligence in the handling of the custodial account, as had been alleged by Mrs. Petty. He observed that it appeared that Mrs. Petty believed she might receive a windfall by the estate being found wrong in honoring the checks written by Major Lewis. In summary, the special master found no evidence of bad faith or fraud on the part of either of the appellees.

On appeal Mrs. Petty makes several arguments that ignore that, in reality, there has been as complete an in-court accounting as possible. The parties that were responsible for the administration of the estate were under oath and, except for the expenditures made by Tommy Lewis found to be unnecessary, there was no evidence upon which Mrs. Petty could be found to be entitled to damages. The fact that an accounting was not duly filed and that other formalities were not strictly observed does not entitle Mrs. Petty to recover. Mrs. Petty was not able to show what could have been revealed by forcing Tommy Lewis to submit a final accounting. The master concluded that all information was given to Mrs. Petty, and to simply order Tommy Lewis to file a form would be pointless.

To support her arguments that information was withheld from her, Mrs. Petty claimed that Lewis had an interest in a trucking partnership that was unaccounted for. An offer was made to Mrs. Petty to sell that interest in the partnership which was rejected by her. This matter is in litigation in a separate case and any interest owned by Major Lewis will certainly be awarded to his estate. Mention was also made of real estate that should have been accounted for. The witnesses answered every question asked in this regard and Mrs. Petty was unable to show any wrongdoing.

Several arguments are made on appeal as to the handling of the custodial fund. Again, the special master investigated the actions of the administrator and George Hartje thoroughly and concluded that only Major Lewis' just obligations had been paid. There is nothing in the record which would lead us to a different finding.

Mrs. Petty has been unable to demonstrate any wrongdoing on the part of the appellees. The evidence totally supports the finding that Tommy Lewis was honest and forthright with Mrs. Petty in every way. Indeed, it was his testimony that made it possible for her to establish heirship in her former lawsuit. He testified there that she was Major Lewis' daughter and had always been treated as such.

We agree with the trial court's finding that Mrs. Petty is entitled to no relief other than the specific findings made in her favor in the master's report.

Affirmed.

Roger Dale SHERRON *v.* STATE of Arkansas

CR 84-138 684 S.W.2d 247

Supreme Court of Arkansas
Opinion delivered February 18, 1985
[Rehearing denied March 25, 1985.]

*Wayne Emmons,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Roger Dale Sherron was convicted of first degree murder in the death of his estranged wife. The Crittenden County Circuit Court sentenced him to life imprisonment. On appeal the only issue is whether the trial court erred in refusing to instruct the jury on the lesser offense of negligent homicide. The trial court did instruct the jury on the lesser offenses of second degree murder and manslaughter.

In an unbroken line of decisions, it has been held there is no error in failing to give an instruction on one lesser offense if other lesser offenses were covered by the instructions given, and the jury returns a verdict for the greater offense. *Cooper* v. *Campbell,* 597 F.2d 628 (8th Cir. 1979); *Jones* v. *State,* 282 Ark. 56, 665 S.W.2d 876 (1984); *Robertson*

v. *State,* 256 Ark. 366, 507 S.W.2d 513 (1974); *Chaney* v. *State,* 256 Ark. 198, 506 S.W.2d 134 (1974); *Newsome* v. *State,* 214 Ark. 48, 214 S.W.2d 778 (1948). Since that is the only question before us, we find no error.

Under Ark. Stat. Ann. § 43-2725 (Repl. 1977), as put into effect by our Rule 11 (f), we consider all objections brought to our attention in the abstracts and briefs in appeals from a sentence of life imprisonment or death. In this case we find no prejudicial error in the point argued or in the other objections abstracted for review.

Affirmed.

Terry WELLS and Larry HOWARD *v.* STATE of Arkansas

CR 84-157 684 S.W.2d 248

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*Thomas A. Martin,* for appellants.

*Steve Clark,* Att'y Gen. by: *Joyce Rayburn Green,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. This is another in a series of appeals concerning the Omnibus DWI Act. Terry Wells and Larry Howard were separately charged and tried in municipal court for driving while intoxicated but were jointly tried and found guilty, on appeal to the Boone County Circuit Court. Wells was convicted of DWI, third offense, and sentenced to a year in prison with all but 90 days suspended, a $1,000 fine, and revocation of his driver's license for two years. Howard was convicted of DWI, first offense, and sentenced to 60 days in jail, all of which was suspended. He was fined $250 and his driver's license was suspended for 90 days. We affirm the judgments.

Two questions are presented with regard to the Act that we have not yet answered. The first issue is whether Ark. Stat. Ann. § 75-1031.1 (c) (Supp. 1983) requires the state to produce in court the Arkansas State Health Department official who certifies the breathalyzer machine. The answer is no. The statute provides:

> The chemical analysis referred to in this section shall be made by a method approved by the State Board

> of Health. The method approved may be proved by a certificate duly acknowledged by a representative of the State Board of Health and said certificate shall be admissible per se in any criminal prosecution and shall not be subject to any objections on grounds of heresay [hearsay]. Provided, however, the machine performing the chemical analysis shall have been duly certified at least once in the last three [3] months preceding arrest and the operator thereof shall have been properly trained and certified. Provided further, the person calibrating the machine and the operator of the machine shall be made available by the State for cross-examination by the defendant or his counsel of record upon reasonable notice to the prosecuting attorney.

The state offered the testimony of the police officer who calibrated the machine in both cases. The defense insisted that the statutes required the state health official to be present who certified the machine. We find no such requirement. In fact the statute allows certification to be proven with the certificate itself. That was not done in this case, but the appellants did not object below to the absence of the certificates; instead, they only argued that the official must be present. On appeal the argument is somewhat altered to object to the lack of the certificate. We do not reach arguments on appeal not made below. *Swaite* v. *State,* 274 Ark. 154, 623 S.W.2d 176 (1981).

The other question is whether a defendant has the right to counsel at the time the breathalyzer test is taken. The appellants argue that the test is a "critical stage" of the prosecution requiring presence of counsel.

The right to counsel guaranteed by the Sixth Amendment to the United States Constitution applies to all critical stages of a criminal proceeding. *United States* v. *Wade,* 388 U.S. 218 (1967). *Wade* held that pretrial procedures must be scrutinized to determine the potential for prejudice to the defendant and whether counsel's presence could help avoid that prejudice. The Supreme Court held that while a post-indictment lineup is a critical stage, requiring that an accused be given the right to counsel, certain scientific tests are not such stages. The Court stated:

> The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different — for Sixth Amendment purposes — from various other preparatory steps such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary process of cross-examination of the Government's expert witnesses and the presentation of his own experts. The denial of a right to have his counsel at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

In *Holmberg* v. *54-A Judicial Dist. Judge,* 60 Mich. App. 757, 231 N.W.2d 543 (1975), the appellant argued that the denial of his request for counsel before being given a breathalyzer test violated his constitutional rights. The Court of Appeals of Michigan found, as we do, that there was no constitutional right to counsel before a breathalyzer test is given.

Affirmed.

Willie Lee GIRTMAN *v.* STATE of Arkansas

CR 84-170 684 S.W.2d 806

Supreme Court of Arkansas
Opinion delivered February 18, 1985

[redacted]

*James W. Haddock,* for appellant.

*Steve Clark,* Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Late in the afternoon of January 28, 1984, in Crossett, Arkansas, the appellant, Willie Lee Girtman shot Ulysses Jasper four times with a .38 revolver and killed him. Girtman was charged with first degree murder and convicted by a jury. He was sentenced to 60 years imprisonment after the jury found he had two prior convictions.

On appeal Girtman argues his conviction must be set aside for insufficiency of the evidence, the wrongful admission of evidence touching on the character of the deceased, and because it was not shown he had legal counsel when he was previously convicted. We find no merit to any of these arguments.

Essentially Girtman's argument is the jury could not have returned a finding of guilty of first degree murder because it chose to disbelieve his version of the killing. Girtman's defense was justification or self-defense as defined in Ark. Stat. Ann. §41-507 (Repl. 1977).

Girtman's version of the incident was that he and the victim had had problems before, and on the day of the incident they had a fight at the home of Willie Carter where several people had gathered to play cards. Several witnesses

testified that the victim, Jasper, was drunk and, without provocation, started a fight with Girtman. After the fight was well started the bystanders stopped it. Girtman said that Jasper told him the next time they met one of them would "leave here." Girtman took the statement as a death threat. He said he went home and discovered he had left his watch at Carter's and started to return. He took his mother's pistol and en route saw Jasper waiting for him in an alley. According to Girtman, he tried to avoid Jasper by going another way but Jasper ran in front of him and blocked his way. Girtman said Jasper "went for" his pocket and he shot him.

Several witnesses testified and corroborated Girtman's version of what happened at Carter's home. There were no eyewitnesses to the killing.

On appeal we must view the evidence in a light most favorable to the state and if there is substantial evidence to support the jury's verdict we must affirm their finding. *Johnson* v. *State,* 270 Ark. 992, 606 S.W.2d 752 (1980).

There was sufficient evidence for the jury to find Girtman deliberately and premeditatedly killed Jasper. Their previous altercation was over and the parties had withdrawn. Jasper was very intoxicated. His blood alcohol content was .26%. Girtman by his own sworn statement admitted he never saw a weapon. In the pocket of Jasper's trousers was found an unopened pocket knife. That is the only evidence Jasper had any sort of weapon. Girtman shot him four times. According to the evidence from the medical examiner, two shots were undoubtedly to Jasper's face, but two were to his back, when the decedent was apparently in a crouching or falling position. Girtman hid the gun and ran home. As he was running one of the neighbors called out to him, but he kept going, not answering. The jury had the right to resolve the facts after hearing the evidence and to decide whether or not to believe Girtman's account. We do not disturb their findings if they are supported by any substantial evidence. *McLemore* v. *State,* 274 Ark. 527, 626 S.W.2d 364 (1982).

Deadly physical force is justified as self-defense only if the use of such force cannot be avoided as by retreating. We have held that a condition precedent to a plea of self-defense is an assault upon the defendant "of such a character that it is with murderous intent, or places the defendant in fear of his life, or great bodily harm. A mere assault is not sufficient to justify the plea of self-defense." *Blaylock* v. *State,* 236 Ark. 924, 370 S.W.2d 615 (1963).

Nor have we found a plea of self-defense justified where the evidence showed the defendant armed himself and went to a bar in anticipation that the decedent would be there and would attack him; or that the defendant provoked an attack upon himself by the decedent with the intention of killing the decedent. *Burton* v. *State,* 254 Ark. 673, 495 S.W.2d 841 (1973). The jury in this case would have been justified in finding that Girtman took the gun and left his home with the intention of killing Jasper.

Even if Jasper were the original aggressor, once he withdrew from the encounter and the danger to Girtman was no longer "immediate, urgent and pressing," Girtman was not justified in pursuing him to continue the fight. *Thomas* v. *State,* 266 Ark. 162, 583 S.W.2d 32 (1979).

The appellant also argues that evidence was wrongfully admitted concerning the character of the deceased. The defense was allowed to place before the jury the deceased's reputation for violence, not only generally but by specific acts. During the examination by the state of one of their witnesses, the witness said:

> And the conversation he is at my daughter's house, he was talking and, ah, he was talking to me about going to church and, ah, he said all he know of me that I had gone to church all my life. He was gonna go to church with me and I told him why don't you come on and go today and he said I'm is going. And then he went on to tell me that he had somthing to happen to him in the army and wondered would he get forgived for that. I told him under conditions that you was obeying orders that I believed the Lord would forgive you.

It is argued this remark was so prejudicial as to deny the appellant a fair trial. Specifically it is argued this was evidence of specific acts of good conduct which are inadmissible under Unif. R. Evid. 405 (b) since it was not an essential element of appellant's claim of self-defense. *See, West* v. *State,* 265 Ark. 52, 576 S.W.2d 718 (1979).

Actually the defense was not careful in its presentation of character evidence of the deceased. According to Unif. R. Evid. 405 that evidence should have consisted of *reputation* in the community, not specific acts. *Jones* v. *State,* 1 Ark. App. 318, 615 S.W.2d 388 (1981). Four witnesses, including Girtman, testified about the deceased's reputation or propensity for violence, especially when he had been drinking. Most mentioned specific instances. The statement complained of is hardly the sort that could deny Girtman a fair trial. "One who opens up a line of questioning or is responsible for error should not be heard to complain of that for which he was responsible." *Berry* v. *State,* 278 Ark. 578, 647 S.W.2d 453 (1983). So we find this harmless error at best.

Girtman's last argument can be answered by merely reciting what the records showed about counsel for the two prior convictions.

The first conviction was for burglary, grand larceny and possession of stolen property on March 18, 1975, case number 75-99 and it reads:

> Mr. Switzer previously appointed to represent Dft. Court again explains his rights to trial by Jury & Counsel. Pleads guilty. Sentenced to five (5) years in State Penentary [sic]. Same to run concurrently with sentence in case No. CR 76-29 Mr. Switzer granted fee of $50.00 for his services.

The second conviction is for theft of property on March 18, 1976, case number 76-29 and it reads:

> Dft. arraigned in presence of court appointed counsel. Declines trial & Counsel, Sentenced to (5) years in State

Penrtentary [sic] same to run Concurrently with sentence in CR NO. 75-99.

The state proved Girtman had counsel or waived it regarding these convictions.

Affirmed.

Robert T. KIMREY, et al *v.* Ira Willard BOOTH, et al.
Ira Willard BOOTH *v.* NATIONAL
BANK OF COMMERCE

84-216, 84-257 & 84-258 685 S.W.2d 139

Supreme Court of Arkansas
Opinion delivered February 18, 1985
[Rehearing denied March 25, 1985.]

*Guthrie, Burbank, Dodson & McDonald,* for appellant Thomas Joe Booth.

*Shackleford, Shackleford & Phillips, P.A.,* for appellant Albert Hanna.

*Vickery & Jones, P.A.,* for appellants Robert T. Kimrey and St. Paul Fire and Marine Ins. Co.

*Compton, Prewett, Thomas & Hickey, P.A.,* by: *William I. Prewett*; and *Barber, McCaskill, Amsler, Jones & Hale,* by: *Glen W. Jones, Jr.,* for appellants.

*Harrison & Brown, P.A.,* by: *Robert L. Brown,* for appellee Ira Willard Booth.

*Bobby E. Shepherd,* for appellees Clara Maud Renfro Hodges, Louis Renfro, Clinton Renfro, Cal W. Renfro, Billy Renfro Prothro, and Peggy Renfro Kimrey.

JOHN I. PURTLE, Justice. This appeal results from the trial court's dismissal of appellant's complaint to terminate a family trust on grounds that it was operating contrary to public policy of the State of Arkansas inasmuch as the primary beneficiary of the trust had killed his parents. The complaint also alleged fraud in the management of the estates of the decedents before such assets were merged into the trust.

Appellants argue several reasons for reversal but the arguments essentially allege that the trial court erred in applying the doctrine of res judicata and in failing to conduct a hearing.

Calvin Leslie Booth and his wife, Betty Renfro Booth,

were killed on December 17, 1978. The son of the decedents, Thomas Joe Booth, was charged with voluntary manslaughter in connection with his parents' death. Estates were opened for Calvin and Betty Booth. At the time Calvin and Betty Booth died, Calvin's father, Roland Booth, was past 80 years of age and was in a nursing home. A guardian was appointed to act on his behalf in making a claim for the estates of Calvin and Betty Booth. The son and the grandfather eventually came to an agreement whereby the decedents' estates were merged into a family trust. The "Booth trust" was established on February 11, 1981. The assets of Roland Booth were included in the family trust. At the time the trust was created Roland Booth's estate had a value of $30,000, Betty Booth's estate had a value of $40,500, and Calvin Booth's estate was valued at $242,700. The terms of the trust provided that Roland Booth would receive $850 per month for the rest of his life. Roland Booth died on September 2, 1981, survived by several siblings or their children.

While Calvin and Betty's estates were pending the court found that Tom was the sole heir. During his lifetime Roland Booth petitioned the Probate Court to redetermine heirship in Calvin's estate on the basis that Tom should not profit from his parents' deaths. No hearing was held on this petition. Sometime after the redetermination petition had been filed a compromise agreement was reached whereby the estates were merged and the trust created. The complaint to terminate the Booth trust was filed on October 4, 1983. On May 23, 1984, the Chancellor and Probate Judge dismissed all pending cases attacking the trust on the grounds of res judicata. The cases are consolidated on appeal.

The primary attack on this estate is on the grounds that a person should not be entitled to benefit from the death of any person when the beneficiary caused the death. We reaffirm our holding that public policy prevents an heir from sharing in the victim's estate when the death is purposely caused by that heir. *Wright* v. *Wright,* 248 Ark. 105, 449 S.W.2d 952 (1970). In the present proceeding there was an allegation that Tom Booth had been convicted of voluntary manslaughter; however, no such proof was presented when

the estates of his parents were opened. The appellants argue that they did not enter into the estate proceedings because they did not receive notice. Tom and Roland Booth were the only possible heirs of Betty and Calvin Booth. Therefore, notice was not required to be given to appellants. Ark. Stat. Ann. § 62-2111 (Repl. 1971). The reason notice was not required is that these appellants had no direct interest in the estates of either Calvin or Betty Booth. In ARCP Rule 17(a), it is said that every action shall be prosecuted by the real party in interest. With respect to the question whether Tom could inherit from his parents, Roland was the real party in interest, and it was Roland who raised the issue and entered into the settlement. These appellants had no standing to do so then, and the fortuity of Roland's death gives them no standing now.

While the trial court's ruling was on the basis of res judicata rather than the appellant's lack of standing, it is clear that the correct result was reached, and on that basis we can affirm. *Greeson* v. *Cannon,* 141 Ark. 540, 217 S.W. 786 (1920). See also, *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979), and the cases cited in that opinion.

Affirmed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. Appellant sought a hearing before the probate judge on allegations that under a settlement between Thomas Joe Booth and Roland Booth, Thomas Joe Booth was acquiring the estates of his natural mother and adoptive father, when in fact he had caused their deaths by stabbing. Certified copies of criminal convictions in Texas accompanied appellants' petition. The public policy of this state against such occurrences is so pronounced [see *Sargent, Estate of* v. *Benton State Bank, Adm'r,* 279 Ark. 402, 652 S.W.2d 10 (1983); *Wright* v. *Wright,* 248 Ark. 105, 449 S.W.2d 952 (1970); *Belt* v. *Baser,* 238 Ark. 644, 383 S.W.2d 657 (1964); *Smith* v. *Dan,* 226 Ark. 438, 290 S.W.2d 439 (1956)] and appellants' allegations so flagrant, that I believe the trial court should have given appellants a hearing to determine the facts and whether fraud and

collusion warranted vacating the settlement and reopening the estates.

To say that only Thomas Joe Booth and Roland Booth were entitled to notice of the appointment of administrators for the estates of Betty Booth and Calvin Booth puts form above substance and ignores the obvious — that Thomas Joe Booth is alleged to be the killer of both decedents. The notice requirements of our Probate Code were not drafted with this extraordinary situation in mind, and make no alternative provision for notice when an heir may be disqualified by his own homicide. Otherwise, some provision would doubtless have been made to prevent such developments. The recourse is for the trial court to reopen the proceedings on the petition of interested parties and I would reverse and remand for that purpose.

Don VENHAUS, County Judge, et al *v* STATE of Arkansas, ex rel., Floyd J. LOFTON

84-205 684 S.W.2d 252

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*Henry & Duckett,* by: *James M. Duckett,* for appellant.

*Frederick K. Campbell;* and *Steve Clark,* Att'y Gen., by: *Jeffrey A. Bell,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The underlying issue in this case is whether the legislature, the quorum court, or the circuit judge has the authority to set the salary for circuit court probation officers. Act 591 of 1981 (not codified because it is categorized as local legislation) provides that the salaries of the probation officers of Pulaski County shall not be less than $15,000 nor more than $20,000 and that the salaries of deputy probation officers shall not be less than $13,000 nor more than $18,000, with the exact amount to be set by the circuit judge. The act specifies that the salaries shall be paid by Pulaski County. Appellee Circuit Judge Floyd Lofton, of the first division of the sixth circuit, set the amounts of the salaries for the first division of the sixth circuit at $20,000 and $18,000. The Quorum Court of Pulaski County appropriated only $17,800 and $16,457 for the two employees. The Circuit Judge informed the County Judge by letter that the salaries of $20,000 and $18,000 were necessary and essential expenses for the administration of justice. The County Judge refused to approve disbursement of county funds in excess of the appropriation by the Quorum Court. The Circuit Judge then sought a writ of mandamus to compel the County Judge, Treasurer and Quorum Court to pay the higher salaries. The circuit court, by a judge on assignment, issued the writ of mandamus. We reverse. Jurisdiction to interpret the Constitution of Ark-

ansas, to determine the constitutionality of state law and to hear the appeal of a mandamus action directed to county officials is in the Court. Rule 29 (1)(a), (c), and (f).

The county officials argue that the writ of mandamus should be dissolved because Amendment 55 to the Constitution of Arkansas implies that the quorum court should set the salaries of circuit court employees. The argument is without merit. Traditionally quorum courts have been held to have jurisdiction only over local matters, and a circuit court and its employees are not a local matter. *Campbell, County Judge* v. *Arkansas State Hospital,* 228 Ark. 205, 306 S.W.2d 313 (1957). Amendment 55 does not cause us to modify this body of law. The Amendment provides that the quorum court may exercise only "local legislative authority." Section 1 (a). In addition, our earlier cases have set out additional reasons the quorum court is without discretion to set the expenses of state courts.

In *Burrow, County Judge* v. *Batchelor,* 193 Ark. 229, 98 S.W.2d 946 (1936), the county court refused to pay the salaries for the court reporter and grand jury stenographer in the amounts set by the legislature, and we authorized the circuit court to impound county funds to pay the salaries. In the material part of the opinion, we wrote:

> These claims are a part of the necessary expenses of the operation of the county government and take precedence over all permissive expenditures. They are provided by statute so that courts and other such agencies may function. They are imposed by law and must be paid as long as there is money within the general fund to pay them. If this were not so, county government must stop. It is not discretionary with the county court to allow them. The county court must allow them, and, if it fails to do so, the circuit court may compel him to perform this ministerial act. This court ruled in the case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S.W. 1002, in speaking of all necessary expenses imposed by law, that the county court has no control or discretion over them except, perhaps, the amount to be allowed for the services. In the instant

> case, the amount to be allowed is fixed by law. If the law were otherwise, county courts might obstruct the necessary and orderly administration of the affairs of the county. In view of the supervisory power of the circuit court over inferior tribunals, it did not exceed its authority in impounding the fund in the hands of the treasurer until the proceeding in mandamus might be adjudicated.

In *Crawford County* v. *City of Van Buren,* 201 Ark. 798, 146 S.W.2d 914 (1941), it was claimed that a legislative enactment requiring the quorum court to appropriate money for municipal court purposes was unconstitutional. In upholding the statute, we wrote:

> We do not think, however, that these sections of the Constitution operate to deprive the general assembly of the power to impose duties upon counties and to require counties to pay therefor. Our cases are to the contrary. For instance, in the case of *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S.W. 1002, there is an enumeration of various items of expenses imposed upon counties by legislative enactment. In the case of *Burrow, County Judge* v. *Batchelor,* 193 Ark. 229, 98 S.W.2d 946, there was involved an act of the general assembly requiring all counties to pay salaries of circuit court and grand jury stenographers. This act was upheld, . . .

In *Campbell* v. *Arkansas State Hospital,* 228 Ark. 205, 306 S.W.2d 313 (1957), we held that a county was required to pay expenses for mental tests of defendants, when ordered to so do by a circuit court and we stated:

> "Act 77, § 6, Ark. Acts of 1879, Pope's Digest § 2527, now codified as Ark. Stat. (1947) § 17-409, has been considered and discussed in many cases. In *Polk County* v. *Mena Star Co., supra,* it was pointed out that '***this court, many years ago, determined and held that there were two classes of obligations dealt with in this section of the statutes (Ark. Stat. (1947), § 17-409); first, those that are imposed on the counties by law and about which the county court is substantially without discretion; *** items 1 to 4 inclusive, being in the first class ***' It is interesting to note that the first item (Ark.

Stat. (1947) § 17-409, sub-par. Sixth — 1.) provides: '1. To defray the lawful expenses of the several courts of record of the county or district and the lawful expenses of criminal proceedings in magistrate's courts, ***'

"From this plain language and the many decisions analyzed in reaching the conclusion herein set forth, it seems fundamental that the County Court is responsible for the expenses of the courts in our judicial system.

* * *

"Here we have an item having to do with expenses of the Circuit Courts, *** It is inconceivable that the framers of our Constitution could have intended to stretch the plain language of Art. 7, § 28, so as to vest the County Court, an office requiring no special knowledge of the law, with exclusive jurisdiction to completely thwart the operation of our criminal courts in granting an accused certain rights, by refusing to pay expenses of that court. The Circuit Court, a State Office, was hereby discharging a duty imposed on it by the legislative branch, namely, granting a mental examination to one accused of a crime who has raised the defense of insanity. In view of the myriad of cases and the longstanding operation of Ark. Stat. (1947) § 17-409 (1879 Act) there can be no question but that the County Court and the Quorum Court, its appropriating agency, *must* pay the expenses of the courts of record within their boundaries."

The quorum court is without discretion to establish the amount of the salaries of circuit court employees.

The county officials alternatively argue that Act 591 of 1981 is constitutionally invalid. The argument is correct. The Constitution of the State of Arkansas provides for three separate but equal branches of government. Article 4, Sections 1 and 2. Under our constitutional doctrine, the legislative branch is to fix salaries. *Beaumont, Judge* v. *Adkisson, Judge,* 267 Ark. 511, 593 S.W.2d 11 (1980). While the General Assembly may not delegate its legislative authority, it may by providing guidelines, delegate "the

power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is by its terms made to depend." *Walden* v. *Hart,* 243 Ark. 650, 420 S.W.2d 868 (1967). This rule was stated in *Hooker* v. *Parkin,* 235 Ark. 218, 225, 357 S.W.2d 534, 539, (1962) as follows:

> The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside the halls of legislation.

The statute at issue does not provide for grades or steps based upon training, education, experience, or other fact or thing to be used in the salary determination. The statute vests unbridled discretion in the judge and contravenes the separation of powers doctrine.

The Circuit Judge argues that, even if the statute is unconstitutional, he has the inherent authority to set the salaries. The argument assumes that there is no earlier act which validly sets the salaries of these employees.

The separation of powers doctrine necessarily implies that a court has the constitutional authority to order these acts done which are necessary and essential for the court to operate. However, that constitutional authority does not extend past ordering acts which are necessary and essential for the court to operate. *Turner, Ex Parte,* 40 Ark. 549 (1883).

The only evidence on the point is a rote phrase contained in a letter from the circuit judge to the quorum court stating that the amounts which he set were necessary and essential. This one conclusory phrase is not substantial evidence of absolute necessity. It is not sufficient to empower the circuit judge to exercise the constitutional authority to

require these acts done which are necessary and essential for a court to operate.

The writ of mandamus directing the county officials to pay salaries in the amounts fixed by the circuit judge is dissolved because the statute is unconstitutional, and there is no substantial evidence showing that two probation officers are absolutely essential to the operation of the court.

Writ dissolved.

HICKMAN, J., concurs.

PURTLE, J., dissents.

DARRELL HICKMAN, Justice, concurring. The majority concludes that the judgment below must be reversed for two reasons: (1) judges cannot legislate by setting salaries, *Beaumont* v. *Adkisson,* 267 Ark. 511, 593 S.W.2d 11 (1980); *Mears* v. *Adkisson,* 262 Ark. 636, 560 S.W.2d 222 (1978); and (2) even if the act is unconstitutional, the court's order alone is not sufficient to show that the salaries demanded for two probation officers were essential to the administration of justice. See *Union County* v. *Union County Election Comm.,* 274 Ark. 286, 623 S.W.2d 827 (1981). That ought to end the matter. Yet most of the opinion dwells on an issue I think we need not answer. That is whether probation officers are county or state employees and the power of the general assembly, through what amounts to local legislation, to impose on counties all expenses for circuit court employees with no recourse at all for the counties.

All the authority the majority cites to support the proposition that the state legislature can require the counties to pay the salaries and expenses of the courts is pre-Amendment 55 and pertains to employees and expenses obviously necessary for the administration of justice. For example, the older cases state that a court reporter is undoubtedly necessary for any court of record. *See McLellan* v. *Pledger,* 209 Ark. 159, 189 S.W.2d 789 (1945). A court house or a place to hold court is also essential. *Turner, ex parte,* 40 Ark. 549 (1883).

But there have been changes in our judicial system so

that now judges have secretaries, probation officers, deputy probation officers, case coordinators and bailiffs. That is, some judges do. Some are not so fortunate, because invariably the ability of a particular judge to get these assistants depends upon his influence with legislators serving the county or counties of the judge.

Before Amendment 55 it was customary, indeed necessary, for such local legislation to be approved by the local county judge, who had to insure that funds were available to pay local employees of the judges. That mutuality of respect and trust has obviously deteriorated and this case is a good example of what exists now: quorum courts, with the power over all the county expenses, in conflict with judges who have obtained special legislation for their individual needs.

I would not so quickly conclude that these probation officers are not county employees and that this is not a local matter. This particular circuit is composed of two counties, the largest in the state, Pulaski, and one of the smallest, Perry. There are ten judges serving the circuit. How many employees each has we do not know. Does Pulaski County pay the salaries of all the employees? The record is silent to these relevant facts. Until recently the court reporters were paid locally, each county bearing a part of the responsibility of the salary of the court reporters. Now they are paid by the state. Act 16 of 1981.

Undoubtedly, these employees are "local" or county employees according to the record. They are paid entirely from local funds; the state does not pay them one dime. Furthermore, the legislation was labeled "local," thereby relieving from responsibility all legislators except those from Pulaski County. So has the state decided this is indeed a matter of state interest? Our prior cases might not control if this issue is squarely before us. Amendment 55 § 4 expressly provides that quorum court shall have the power to fix the salaries of county employees. We should not rush to judgment on this issue. The majority opinion does not mention *Littleton* v. *Blanton,* 281 Ark. 395, 665 S.W.2d 239 (1984), which has altered dramatically our approach to local legislation. Until the state, in legislation that is not local,

declares these employees to be state employees or a matter of state interest and orders the counties to pay their salaries, fully aware of its actions, or until we have a more complete record to decide the issue, I would withhold judgment.

There are some other things which ought to be said. We do not have many questions on the separation of powers issue. Either the separate branches of government try to avoid infringing on the powers of each other and, in the main, respect the roles of each other, or the disputes are allowed to pass without litigation. Most cases are like this one where both parties have good arguments but the disagreement seems trivial. The trial judge's request seemed reasonable and no reason is given by the quorum court why it was refused. The quorum court appropriated just enough money to avoid a finding that it had refused to fund a position apparently necessary to the function of the court. Did it treat this judge's request the same as other judges? We do not know. Perhaps the quorum court should address itself to its local legislators if it objects to legislation such as this. Perhaps the judges should make certain that such legislation is within the means of the local government and actually necessary before they seek it. With Amendment 55 a local legislative body now exists with new power and responsibility over local officials and the expenditure of money. That body is anxious to exercise the power and responsibility. Judicial officers who, before Amendment 55, were able to obtain their needs through the county judge and local legislators now find themselves, just as all local officials do, having to humbly request funds from the quorum court. Sometimes the quorum courts do not act maturely.

It does not serve the best interests of the judiciary, local government, or state government to allow the conflict between local authorities and judges to continue. I believe a solution lies in encouraging the legislature and the judiciary to approach the problems of the circuit and chancery courts in a uniform manner. As this case illustrates, now the matter is approached on a piecemeal basis with local legislation. This will not stop until the legislature stops treating each court individually. Perhaps that will not happen until the

judges stop asking. The counties, particularly Pulaski, which has an abundance of trial judges and court employees, should join in this effort, not in an attempt to avoid their rightful burden of the cost of local justice, but to find a fair resolution of a problem that will not improve if ignored.

There should be uniform treatment of the courts statewide. The legislature should determine how many employees are needed for each circuit and chancery court, declare it so, and pay them or pay part of the expense and order the counties to pay the remaining amount. Any other employees deemed necessary by the judges should be obtained and paid for locally. The needs of the judiciary would thus be met and judges would not have to beg. The quorum courts would have to pay certain expenses locally and would do so without quibbling. The friction between the two would stop. The General Assembly has the power to do this because it decides the number and geography of the circuit and chancery courts. In 1977 reapportionment equalized case loads and the geographical areas of the circuits. Act 432 of 1977.

Our decision has resolved nothing of importance; but, as a result a great deal could and should be resolved.

JOHN I. PURTLE, Justice, dissenting. In my opinion this court has lately been headed in the right direction on matters relating to special and local legislation. I agree with the opinions in *Mears* v. *Adkisson,* 262 Ark. 636, 560 S.W.2d 222 (1978) and *Beaumont* v. *Adkisson,* 267 Ark. 511, 593 S.W.2d 11 (1980). I think the trial court decided the present case consistent with *Mears* and *Beaumont.* We all agree that the General Assembly may lawfully delegate some of its power. Our differences arise on the question of whether Act 591 of 1981 exceeds the bounds of lawful delegation. The majority think it does and I think it does not.

The power here delegated is about as little as can be found and still qualify as delegation. The only power delegated to the circuit judges by Act 591 is the place on the salary scale where their employees are to be placed. There is an upper and a lower limit. This is the same type of power

granted to other agenices. Discretion is given to state agencies to place their employees at appropriate levels of the pay scale provided by the legislature. In *Beaumont* there was no ceiling on the salaries or the number of employees. Also, the delegation was only to a part of the circuit judges within the Judicial District. In *Beaumont* we stated: "The only way that Act 629 could be legal is if it were held to be an act relating generally to all the circuit courts in the Sixth Circuit and it is determined to be essential to the administration of justice." Act 591 does apply to all courts within the Sixth Circuit.. In these modern days there is no doubt in my mind that probation officers and bailiffs are essential to the administration of justice. Without them it could become nearly impossible to conduct orderly trials and keep track of those serving probation and suspended sentences.

Amendment 55, Section 1 (a) to the Constitution of the State of Arkansas provides that Quorum Courts "may exercise local legislative authority not denied by the Constitution *or by law*." [Emphasis added.] In the present case the legislature has provided by law that the circuit judges determine the level of pay for certain officers. Act 742 of 1977 [Ark. Stat. Ann. §§ 17-3101 et seq. (Repl. 1980)] implemented Amendment 55 and specifically states that Quorum Courts must operate within the limitations established by law. More specifically Quorum Courts "shall perform such legislative duties as may be *prescribed by law*." [Emphasis added.] Ark. Stat. Ann. § 17-3601 (b). The county in this case had been directed by law to set the salaries here in question as determined by the circuit judge. County governments are prohibited from exercising any power in any manner inconsistent with state law. Ark. Stat. Ann. § 17-3805(m). Therefore, the Quorum Court ordinance setting these salaries at levels other than what the judge ordered is contrary to state law and is void.

We dealt with the "local and special" issue in *Littleton* v. *Blanton,* 281 Ark. 395, 665 S.W.2d 239 (1984) when we stated:

> The Legislature has traditionally met the growing judicial needs of an area by statutes which apply only to

> individual counties, judicial districts or even divisions within districts. But these statutes have not been held to be "local or special" within the meaning of Amendment 14, since they were part of a judicial system for the entire state . . . We will continue to hold that statutes designed to meet the judicial needs of an area on a non-discriminatory basis are a part of a judicial system for the entire state and are not local and special within the meaning of Amendment 14, even though such statutes may apply only to individual counties, judicial districts or divisions within districts.

We held in *Littleton* that an act is not local or special unless the class it establishes has no reasonable relation to the purpose or subject matter of the act or it exempts its operation from persons or areas which would fall naturally within the area of the act. It is my opinion that the class created by the Act here in question has a reasonable relation to the subject matter of the Act and makes no exemptions otherwise falling within its ambit.

I do not find it necessary to consider whether the circuit courts have inherent power to order such payments as being necessary to the administration of justice because the General Assembly enacted a state law authorizing the circuit judges to establish the salary of those employees. The upper and lower limits were established. The judges were authorized to fix the salary within the delegated authority. The Quorum Court was defying a state law and should not be allowed to do so. The Sixth Judicial District consists of Perry and Pulaski Counties. Suppose the counties cannot agree on a salary?

For the reasons set out above and those contained in the majority opinion I would affirm the trial court.

James FREGO *v.*
JONESBORO CIVIL SERVICE COMMISSION

84-222 684 S.W.2d 258

Supreme Court of Arkansas
Opinion delivered February 18, 1985

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

*Judy A. Henson,* for appellee.

ROBERT H. DUDLEY, Justice. This appeal involves construction of the rules and regulations of the Jonesboro Fire Department and the Jonesboro Civil Service Commission. Jurisdiction to interpret rules of administrative agencies and regulatory bodies is in this Court. Rule 29(1)(c).

Section 49 of the regulations of the Jonesboro Fire Department provides for testing fire department lieutenants on their knowledge of the location of streets and fire hydrants. It further provides that lieutenants who fail to maintain an average yearly score of 70% are given a one-year grace period to bring up this average. If a lieutenant does not bring his average to 70% within that year, he will be demoted. Appellant, Lieutenant James Frego, has been employed by the Jonesboro Fire Department for over fifteen years. In 1980, he received written notice from the Fire Chief that his 1979 average on the streets and hydrants exam was 56%, his 1980 score was 68%, and that he must maintain a 70% average to maintain the rank of lieutenant. In 1981, he brought his average up to 77%, but in 1982 his average dropped to 59%. The Chief notified him that if he did not bring his average up to 70% by December, 1983, he would be reduced in rank from lieutenant to hoseman. His 1983 exam score was only 41%. The Chief gave appellant written notice that he would be reduced in rank in January, 1984. Appellant appealed to the Jonesboro Civil Service Commission. After a hearing the Commission voted unanimously to uphold appellant's demotion. Upon appeal, the circuit court affirmed the decision of the Commission. We affirm the circuit court.

Appellant first contends that the circuit court erred in construing the rules and regulations of the fire department and Civil Service Commission. We find no merit in the argument.

The elements of the fire department regulation providing for demotion for failure to maintain a 70% average have been set out.

Next, Section 13 of the Civil Service regulations

authorizes the Chief to reduce appellant in rank. "A member . . . may be . . . reduced in rank . . . for cause, and the person so reduced . . . shall be served with the reason . . . in written form by the Chief of the department."

Appellant argues that the Chief is prevented from reducing him in rank since an article of the Civil Service regulations provides that the Chief shall make day to day rules for the operation of the department. Again, the argument is without merit. The regulation giving the Chief authority to make day to day rules is complementary and not inconsistent with the regulations giving him authority to reduce members of the department in rank.

Appellant contends that the fire department regulations are invalid because Ark. Stat. Ann. § 19-1604 (Repl. 1980) requires that city councils adopt regulations by ordinance, but the Jonesboro City Council only adopted the rules by motion. The argument is without merit because the statute is open ended as to the method of adoption. In parliamentary practice adopt means "to accept, as a report." Webster's New International Dictionary, Second Edition (1953). There was compliance with the statute when the city accepted the regulations by motion.

Appellant contends that the Civil Service Commission cannot enforce fire department regulations since the commission did not adopt those regulations. The answer to that argument is that Ark. Stat. Ann. § 19-1603 give the Civil Service Commission the authority to enforce fire department regulations adopted by the city council.

Appellant next argues that the ordinance creating the Civil Service Commission was adopted on April 4, 1983, and that it repealed any conflicting regulations. From that basis, he argues that the fire and hydrant exam is in conflict with the ordinance creating the Civil Service Commission, and that he cannot yet be demoted because, after it was re-adopted, he was entitled to one year to take the exam, to April 4, 1984, and one year of grace, to April 4, 1985. The argument is of no avail because the regulation providing for the exam and the ordinance creating the commission are not

in conflict. The ordinance did not repeal the regulation.

Appellant last argues that he was denied due process because the transcript of his hearing before the Commission was not "stenographically recorded." See Ark. Stat. Ann. § 19-1603 (Repl. 1980). The answer to that argument is that appellant was not denied due process since the circuit court allowed appellant to supplement the record with the exhibit which, he contends, was left out of the original transcript. As a result, there is no material omission from the original transcript which could have caused appellant a denial of due process.

Affirmed.

Eugene James "Yankee" HALL
*v.* STATE of Arkansas

CR 84-168 684 S.W.2d 261

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*Robert A. Newcomb,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This is an appeal from a denial of post conviction relief sought pursuant to Ark. R. Crim. P. 37. Our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29(1)(e).

The two questions presented below were (1) whether the appellant was denied the effective assistance of counsel and (2) whether the state has lived up to its plea bargain. We hold the trial court was correct in finding for the state on both points, thus we affirm.

The appellant was charged with capital felony murder and with attempted murder arising from a separate incident. The first charge was reduced to first degree murder and the attempt charge was dropped. In exchange for the charge reduction and for dropping the attempt charge, and the

appellant now claims other promises, the appellant agreed to and did testify in other trials against other persons charged in connection with the murder to which he pleaded guilty.

*1. Counsel Effectiveness*

The sole claim of the appellant in this respect is that his counsel informed him he would be eligible for parole in seven to ten years. He says had he known his sentence to life imprisonment would not permit him to be paroled he would not have pleaded guilty. Both of the lawyers who represented the appellant at his trial said at the Rule 37 hearing they discussed with the appellant the possibility he could be eligible for parole if his life term were commuted to a term of years. Neither could say he had told the appellant that one sentenced to an uncommuted life term would be ineligible for parole, but each said he had not told the appellant he could be eligible for parole on an uncommuted life sentence. One of the lawyers testified the appellant "was aware" that there was no parole eligibility with a life sentence.

To reverse the trial judge's denial of post conviction relief under Rule 37 we would have to find the court's decision was clearly against the preponderance of the evidence. *Knappenberger* v. *State,* 283 Ark. 210, 672 S.W.2d 54 (1984); *Williams* v. *State,* 273 Ark. 371, 620 S.W.2d 277 (1981). The only testimony that the appellant was unaware his life sentence would not carry parole eligibility absent commutation came from the appellant. Based on the record of the hearing the court was free to hold that the preponderance of the evidence showed that while appellant's lawyers speculated with him about commutation and parole eligiblity, the appellant was not misled.

*2. Bargain Keeping*

The appellant contended at the Rule 37 hearing he had been promised (a) that he would serve his sentence at the diagnostic unit or other special place and not be placed in the general prison population at the Cummins unit, (b) that various persons would write letters for him recommend-

ing early parole, and (c) that the then Pulaski County sheriff would commute his sentence upon becoming governor.

The record shows that none of these alleged promises were included in the written plea agreement. The recorded agreement showed only that the appellant's guilty plea was made in exchange for reducing the charge from capital to first degree murder and dropping the attempt charge. It also stated the appellant's sentence would be served "in the Arkansas Department of Correction."

We agree the state must keep any bargain it has made, *Santobello* v. *New York,* 404 U.S. 257 (1971), and if it does not the guilty plea may be withdrawn. *Mabry* v. *Johnson,* ___ U.S. ___, 81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984). However, we cannot say the court's finding on this point was clearly against the preponderance of the evidence.

While the record demonstrates concern by the appellant, his lawyers and law enforcement officials about his safety as a prisoner, the promises and their status as quid pro quo were testified to only by the appellant. One of his lawyers testified that, while there was a desire on the part of the appellant that he be "moved out of the state" and thereafter his wish became that he be "confined to the Diagnostic Unit in Pine Bluff," both of those prospective agreements "fell through" before the agreement was entered.

The sheriff testified he had made no promise to commute the appellant's sentence if he became governor. He also testified that he had promised no letter to the parole officials on the appellant's behalf.

Otherwise in regard to the prospective letters, one of the appellant's counsel testified there were no representations made as far as letter writing was concerned.

We have reviewed the entire record of the Rule 37 hearing. Taken as a whole it demonstrates the written plea agreement adequately reflected the intent of the appellant

and the state. Certainly we cannot say the evidence clearly preponderates to the contrary.

Affirmed.

HOLT, C.J., not participating.

Sammy Joe ELMORE *v.* STATE of Arkansas

CR 85-25 684 S.W.2d 263

Supreme Court of Arkansas
Opinion delivered February 18, 1985

*John Wesley Hall, Jr.,* for petitioner.

*Steve Clark,* Att'y Gen. by: *Michael E. Wheeler,* Asst. Att'y Gen., for respondent.

PER CURIAM. Petitioner was found guilty by a jury of attempted capital murder and fleeing. He was sentenced to terms of ten and three years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Elmore* v. *State,* 13 Ark. App. 221, 682 S.W.2d 759 (1985). Petitioner has now filed a petition for postconviction relief pursuant to A.R.Cr.P. Rule 37 on the allegation that his trial attorney, Bob Scott, was ineffective.

Petitioner alleges that counsel failed to subpoena witnesses, did not prepare for trial adequately, and was ineffective in the questioning of witnesses. He also contends that there was a conflict of interest because counsel intended to file a civil suit in petitioner's behalf, the outcome of which was likely to be affected by the outcome of the criminal proceeding.

To prevail on an allegation of ineffective assistance of counsel, the petitioner has the heavy burden of overcoming the presumption that counsel is competent. *Travis* v. *State,* 283 Ark. 478, 678 S.W.2d 341 (1984). The presumption cannot be overcome without factual substantiation for the allegation sufficient to show that counsel's conduct undermined the adversarial process and resulted in actual prejudice to the degree that petitioner was denied a fair trial. *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052 (1984). Petitioner has not met that burden.

Petitioner offers no proof that the civil suit affected counsel's conduct at trial. He also fails to provide in the petition specific instances of poor trial performance beyond the general statement that the questioning of witnesses was inadequate. Petitioner's allegation that counsel did not subpoena witnesses would be deserving of an evidentiary hearing, but petitioner fails to state in the petition what the witnesses' testimony would have been. As a result, we cannot determine whether the witnesses were important to the defense. This Court will not peruse the record in an attempt to determine what factual grounds, if any, exist for an allegation. *Hill* v. *State,* 278 Ark. 194, 664 S.W.2d 282 (1983).

Petitioner also contends that the prosecutor offered to recommend a suspended sentence on the fleeing charge and drop the attempted capital murder charge if petitioner would enter a guilty plea. He alleges that counsel never communicated the plea offer to him. The affidavit of the deputy prosecutor is attached to the petition verifying that he discussed the negotiated plea with counsel but counsel refused it.

We have held that a plea agreement is an agreement between the accused and the prosecutor, not an agreement between counsel and the prosecutor. *Rasmussen* v. *State,* 280 Ark. 472, 658 S.W.2d 867 (1983); *see also* A.R.Cr.P. 25.2. As such, counsel has the duty to advise his client of an offer of a negotiated plea. Before this Court will order an evidentiary hearing in circuit court, however, the petitioner must allege that he would have accepted the plea. Accordingly, the petition is denied without prejudice to the filing of a subsequent petition addressing the failure to communicate a plea bargain. In all other respects the petition is denied with prejudice.

Petition denied without prejudice in part and with prejudice in part.

HAYS, J., would deny.

Vernell FURR *v.* STATE of Arkansas

CR 85-23 685 S.W.2d 149

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Herman H. Hankins, Jr.* and *Steven G. Beck,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. Whether or not there is a constitutional and statutory right to counsel at a revocation hearing is the issue presented by this appeal. We find that where imposition of sentence is suspended and a defendant is placed on probation, there is a right to counsel at a subsequent revocation hearing. The case was transferred by the Court of Appeals under Sup. Ct. R. 29(4)(b).

The appellant, Vernell Furr, pleaded guilty on July 11, 1983, to possession of a controlled substance with intent to deliver. His plea was taken under advisement by the court, which deferred imposition of sentence for a period of five years subject to certain conditions. A motion to revoke the probationary period and impose sentence was filed by the State on November 8, 1983. Although formal notice to the appellant of a hearing on the revocation was filed the same day, the record does not reflect that the appellant ever received the notice. On June 11, 1984, the appellant was arrested pursuant to a bench warrant. He was brought before the court on June 15, 1984, and, without being advised of his right to counsel and without the assistance of counsel, was questioned by the court. The appellant admitted that he had violated the conditions of his probation, but attempted to offer mitigating circumstances. The trial judge sentenced the appellant to the maximum statutory period, a term of 10 years imprisonment.

Ark. Stat. Ann. § 41-1209 (Repl. 1977) provides in pertinent part:

> (2) A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be conducted by the court that suspended imposition of sentence on defendant or placed him on probation within a reasonable period of time . . . *The defendant shall be given prior written notice* of the time and place of the revocation hearing, the purpose of the hearing, and the condition of suspension or probation he is alleged to have violated. Except as provided in subsection (3), *the defendant shall have the right* to hear and controvert evidence against him, to offer evidence in his own defense, and *to be represented by counsel.* [Emphasis added.]

The burden is on the State to demonstrate that the appellant was informed of the revocation hearing and given an opportunity to contact an attorney. *Akins* v. *State,* 4 Ark. App. 235, 628 S.W.2d 880 (1982). Here there is evidence of the filing of notice but no proof that it was received by the appellant as required by § 41-1209(2), *supra.* The record further reflects that the appellant was not informed while in court of his statutory right to be represented by counsel.

The appellant's statutory rights are reinforced by the sixth amendment of the United States Constitution. The U.S. Supreme Court addressed the issue of right to counsel in *Mempa* v. *Rhay,* 389 U.S. 128 (1967) finding that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The Court held that the time of sentencing is a critical stage in a criminal case and counsel's presence is necessary. *See* Annotation, *Parole or Probation Revocation,* 36 L.Ed. 2d 1077 § 23(a) p. 1117 (1974); Annotation, *Probation — Revocation — Right to Counsel,* 44 ALR3d 306 § 2 p. 311 (1972). The commentary after § 41-1209 cites *Mempa* for the proposition that indigent defendants are entitled to appointed counsel if sentencing is to follow revocation. *See also Hawkins* v. *State,* 251 Ark. 955, 475 S.W.2d 887 (1972).

The right to counsel may be waived, but the waiver must be made knowingly, voluntarily, and intelligently. *Leak* v. *Graves & State,* 261 Ark. 619, 550 S.W.2d 179 (1977).

Here the only potential evidence of waiver is the fact that appellant waived his right to counsel when he initially pled guilty. Almost one year passed between the appellant's plea of guilty and his revocation hearing. Obviously, it cannot be said that the waiver of counsel when the plea was entered constitutes an intelligent waiver to all further proceedings. Such a rule would circumvent the appellant's right to counsel during the most critical aspect of the criminal proceedings against him, revocation of his probation and sentencing nearly a year later.

Under the circumstances of this case, the trial court had a duty to advise appellant, either by the service of notice of the revocation hearing, or in open court, of his right to be represented by counsel. When the court failed to do so it committed prejudicial error.

The State's argument that the appellant's failure to object to the lack of counsel at the trial level precludes this argument on appeal is without merit. In *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980) this court stated four exceptions to the basic requirement of an objection to the trial court. The second exception which "arises when the error is made by the trial judge himself at a time when defense counsel has no knowledge of the error and hence no opportunity to object" is applicable here. The very fact that the appellant was not aware of his right to object further demonstrates the necessity for counsel at a hearing of this nature. The appellant had the right to be represented by counsel. Accordingly, the sentence is reversed and remanded for further proceedings consistent with this opinion.

Reversed and remanded.

# Randall K. LYNCH *v.* MISSOURI-PACIFIC RAILROAD COMPANY

84-232 684 S.W.2d 817

Supreme Court of Arkansas
Opinion delivered February 25, 1985
[Rehearing denied April 1, 1985.]

*W.H. Armstrong* and *Bobby E. Shepherd,* for appellant.

*Herschel E. Friday* and *Donald H. Bacon,* for appellee.

GEORGE ROSE SMITH, Justice. This is a suit by Randall K. Lynch, now age 25, for personal injuries and property damage sustained when his pickup truck was struck by a Missouri-Pacific train at a crossing in Smackover. At the end of the trial the judge directed a verdict for the defendant, on the ground that Lynch had executed a valid release of his claim. The only question on appeal is whether there was any issue of fact concerning the validity of the release. Our jurisdiction rests on Rule 29 (1) (o).

The accident happened on a Thursday morning in

September, 1981. As Lynch was crossing the track his truck was struck by a train coming from his right at 20 to 25 miles an hour. Lynch was knocked temporarily unconscious and was taken to a hospital. His principal injury was a torn ligament that caused a shoulder separation — a painful injury. He was released that morning to go home, with instructions to return that night for surgery the next morning. The operation, with a general anesthetic, was performed on Friday morning. Lynch remained in the hospital another night and went home Saturday.

On Monday the accident was being investigated by a Missouri-Pacific claim agent, Dennis Lane. Taking a court reporter with him, Lane went to Lynch's home to obtain a statement, finding Lynch at home alone. The interview was taken down and transcribed by the reporter. Lynch was apologetic about the accident. He said that at the crossing he had looked to his left to see who was at work at the building where he was employed as an electrician. He did not look to his right. "I usually look, but that morning I guess I just took it for granted because I had went across it so many times." He did not see the train. "Like I said, it was my fault all the way. If I had looked it would have never happened." Near the end of the interview he said:

> But, you know, people have said well, you know, you ought to try to sue the railroad. Here is the way I look at it. It was my fault all the way, and I couldn't live with myself if I tried to do something like that. . . . And there is no way whatsoever, way, form or fashion that I would do that.

The claim agent testified that after the statement was concluded and the reporter had stopped taking it down, he asked Lynch if he was interested in making a settlement. The agent's offer of $500 was accepted and paid, without any dickering. Mrs. Lynch had come in; she signed the release along with her husband. At Lane's request they each wrote on the release, in longhand, "I have read this and understand it," and signed that also. The $500 check was deposited a couple of days later.

At the trial Lynch testified differently, saying that the train's whistle was not blown and that he had looked to his right, but his vision was obscured by vegetation. As to the release, he testified that he remembered letting a Missouri-Pacific agent into his house, but he remembered nothing else about the interview. He admitted that, as shown by the reporter's transcript, he had correctly given the date of his birth, his Social Security number, the dates of his children's birth and other information. He admitted the genuineness of his wife's signature and his own.

There is no proof that Lane was guilty of misrepresentation or undue influence, as alleged in the complaint. The only question is whether there is substantial evidence that would have supported a verdict finding, in the language of a case relied on by the appellant, that when Lynch signed the release "his physical or mental condition was such that. . .[he] was incapable of appreciating the character of the instrument and the consequences of executing it." *St. Louis, I.M. & S. Ry.* v. *Bearden,* 107 Ark. 363, 155 S.W. 499 (1913).

We find no such evidence. Lane testified that Lynch did not appear to be drowsy, in pain, or uncomfortable. The court reporter said he seemed normal. The transcribed interview, comprising 19 typewritten pages, shows that Lynch understood the interview and took full responsibility for the accident. There is no medical or other testimony that Lynch was incapable of transacting business that day, despite his injured shoulder. His doctor did testify that a general anesthetic may cause a temporary loss of memory, but the interview shows that Lynch had no such loss at the time. He had taken a pain medicine containing codeine, but there is no testimony that it incapacitated him. The $500 consideration was not grossly inadequate if Lynch was wholly or mostly at fault. Moreover, inadequacy of consideration alone is not ordinarily a sufficient basis for avoiding a release. *Harmon* v. *Harrison,* 201 Ark. 988, 147 S.W.2d 739 (1941).

The question is not whether Lynch told the truth when he disclaimed any recollection of the settlement. That is

immaterial. If the release was valid when executed, as the undisputed proof shows that it was, its validity could not be affected by Lynch's later loss of memory. Otherwise even the most solemn written instrument would not be safe from an attack based simply upon a loss of memory.

Affirmed.

Fred C. NEWMAN *v.*
FIRST NATIONAL BANK, Harrison, Arkansas, et al

84-221 685 S.W.2d 147

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Bill F. Doshier* and *Dan R. Bowers,* for appellant.

*Walker & Campbell,* by: *Gail Inman-Campbell,* for appellee.

DARRELL HICKMAN, Justice. The issue is whether the appellant stated a cause of action based on an oral agreement between his uncle and aunt to execute joint or reciprocal wills and as evidenced by his uncle's will. The chancellor allowed the appellant to amend his complaint twice and finally concluded tht the appellant failed to state a cause of action. We agree.

The appellant, Fred C. Newman, is the nephew and sole heir of John R. Newman, who died in February, 1972. His wife, Clyde Newman, died in March, 1983, and this lawsuit was filed in chancery court to enjoin the probate of her will. It was alleged that John and Clyde made an agreement in 1949 to execute reciprocal wills in which it was agreed that upon the death of one, the survivor would inherit all the property of the deceased, and upon the death of the survivor, one-half of the property would go to John's collateral heirs and one-half would go to Clyde's collateral heirs. The complaint alleged that John had executed his will in accordance with the agreement; Clyde, however, breached the agreement by executing another will. The appellant argues that Clyde should be held to the agreement.

The trial court held that the will of John Newman, essential to appellant's claim, was evidence that the appellant's claim must fail. (The will is reproduced as an appendix to this opinion.) It does not provide for the collateral heirs, which include the appellant, to inherit *unless* both John Newman and Clyde Newman died of a common disaster, which did not occur. Indeed, it is alleged that John Newman died in 1972 and Clyde Newman ten years later.

We feel the trial court was right in finding that the language of the will was clear, and oral evidence is not admissible to alter that intent. *Vaught* v. *Vaught*, 247 Ark. 52, 444 S.W.2d 104 (1969).

The appellant attempts to take one sentence in John Newman's will out of context to support his case. That sentence is in Paragraph 3 and it reads:

. . .I hereby direct that any property which my wife and

> I owned jointly at the date of such common disaster, or which I have acquired by reason of having survived my wife, shall be equally divided among my collateral heirs and the collateral heirs of my wife, . . . .

This interpretation, of course, overlooks the obvious qualification of this statement, which precedes it and states that this provision is effective *if* both parties die of a common disaster, a fact the appellant concedes in his pleadings did not occur.

The appellant persists, however, by stating that the complaint should not be dismissed because it was alleged that an oral agreement was made which did provide for the collateral heirs to get one-half each on the death of the last party. This, of course, would be clearly contrary to the intent of the testator in his will which was offered as proof of the agreement. This allegation is nothing more than an attempt to alter the plain and unambiguous language of the will with oral testimony. Furthermore, the trial court correctly observed that even if there were an oral agreement, the appellant obviously cannot prevail because John's will breaches the alleged oral agreement. To be in accordance with the agreement, his will should have stated that upon the survivor's death, their collateral heirs would share equally. Since it does not, his will violated the very agreement asserted, a fact which defeats the appellant's argument. *Allen* v. *First National Bank of Batesville,* 230 Ark. 201, 321 S.W.2d 750 (1959).

Therefore, no matter which route the appellant takes, he does not have a cause of action, and the trial court correctly dismissed the suit.

Affirmed.

CITIZENS BANK, Bentonville, Arkansas; Now First National Bank, Bentonville, Arkansas *v.* Paul CHITTY

84-223 684 S.W.2d 814

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Ralph E. Williams* and *Mark W. Corley,* for appellant.

*Croxton & Boyer,* for appellee.

JOHN I. PURTLE, Justice. A Benton County Circuit Court jury awarded appellee the sum of $8,000 on his complaint against the appellant for $9,000. On motion of appellant the trial court reduced the judgment by the amount appellee had collected from the drawer of the bad checks, Arthur L. Wagner, of Springfield, Missouri. Appellant appeals from the jury verdict on the ground that the trial court gave an erroneous instruction. The appellee cross appeals from the action of the trial court in reducing the judgment. We hold that the instruction was not prejudicial and that the court erred in reducing the jury verdict.

Arthur L. Wagner wrote appellee, Paul Chitty, three checks in 1981. All three were dishonored, the first two for insufficient funds and the third because the account was closed. The sequence of events is important in understanding the facts. The first check, in the amount of $4,750, was written on August 18, 1981, and deposited in appellee's account in the appellant bank on August 25, 1981. The second check, in the amount of $4,500, was dated September

9, 1981. The first check was returned to the appellant bank on September 10, 1981, because of insufficient funds. The first check was sent back through banking channels for collection on September 11, 1981. On this same day Wagner wrote appellee a third check in the amount of $9,000. The second check was deposited by appellee in the appellant bank on September 14, 1981. The third check was deposited on September 16, 1981. On October 5, 1981, the appellant learned through its wire service that the second check was being returned for insufficient funds. The appellant also learned by wire service on September 24, 1981, that the drawer's account had been closed. The first two checks were charged back to appellee's account on October 7, 1981, and the third on October 15, 1981.

The appellee payee filed suit for damages against the appellant bank in the amount of $9,000 plus costs and prejudgment interest. The complaint alleged negligence in breach of a fiduciary duty owed to the depositor (appellee). The bank filed a general denial and attempted to reserve the right to counterclaim or cross-claim. However, the answer was not amended before trial.

Prior to trial the appellee had expended over $2,000 in attempting to obtain satisfaction from the maker of the bad checks. Proof of collection costs was introduced at the trial. Upon a post-trial motion of appellant, the trial court amended the judgment to give the bank credit for the $5,703 which appellee had collected from the maker of the bad checks.

Both parties appeal. The bank contends it was prejudicial error to give appellee's instruction #8. The appellee contends that the court erred in giving the bank credit for the amount collected from the maker of the bad checks.

The instruction upon which the appellant relies for reversal reads as follows:

RIGHT OF CHARGE-BACK OR REFUND

If a collecting bank has made a provisional settlement with its customer for a check and said check is

> dishonored, the collecting bank may revoke the settlement given by it and charge back the amount of any credit given for the check to its customer's account or obtain a refund from its customer if, by its midnight deadline or within a longer, reasonable time after it learns the facts of the dishonored check, send notification of the facts to the customer. The right to revoke, charge back, or obtain a refund from the customer, terminates if and when a settlement for the check received by the bank is or becomes final.

The objection to the instruction was that it related to the bank's action in making charge backs to appellee's account and that the issue of charge back was not before the jury. In looking at the complaint it alleges a breach of a fiduciary duty in failing to notify appellee that the first check was returned for insufficient funds. Thus, appellee alleges, the bank's negligence in not notifying him resulted in damages in the amount stated in the complaint. Admittedly, there was no mention of an illegal charge back in the complaint. The challenged instruction did not inform the jury that the amount of the charge was to be considered in arriving at a verdict on damages. It did inform the jury that the bank could make a charge back if it acted by its midnight deadline or within a longer reasonable time, provided it notified the customer. Therefore, the court was simply instructing the jury on the bank's duties to its customer. The verdict was not in an amount of any or all of the checks which were charged back to the customer's account. The instruction was not contrary to appellee's theory of negligence.

Ark. Stat. Ann. § 85-4-103 (1) (Add. 1961) states that a bank may not disclaim its responsibility for "failure to exercise ordinary care or . . . limit the measure of damages for such lack or failure . . . " "The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as approximate consequence." Ark. Stat. Ann. § 85-4-103 (5). Thus it may be seen that the amount of

recovery is limited to the amount of the item[s] in the absence of bad faith. Also, the damages are decreased by the amount which would not have been recovered had the bank exercised ordinary care.

According to the definitions set out in Ark. Stat. Ann. § 85-4-104 (l) (h), "midnight deadline" is midnight on the next banking day following the banking day on which the item is received. A bank must use ordinary care in sending notice of dishonor after learning that an item has not been paid or accepted and the burden is on the bank to establish the reasonableness of notice provided beyond its midnight deadline. Ark. Stat. Ann. § 85-4-202 (l) (b) and (2) (Add. 1961 and Supp. 1983). In *First National Bank of Springdale* v. *Hobbs,* 248 Ark. 76, 450 S.W.2d 298 (1970), this court affirmed a judgment against the bank which had paid checks on an unauthorized signature. Hobbs sued the bank for checks totaling $31,001.49 and obtained a judgment for $12,495.33. The judgment was upheld on the grounds that there was evidence upon which the jury could have found that the bank failed to use ordinary care. Likewise in the present case there was evidence before the jury from which it could find that the bank failed to use ordinary care in handling the three dishonored checks.

Rule 15 (b) of the Arkansas Rules of Civil Procedure states in part: "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." The complaint here specifically pled lack of ordinary care in the handling of the first check. The parties stipulated facts about the dates the three checks were written, deposited, returned and charged back to appellant's account. The first check was deposited to appellee's account on August 25, 1981, and the charge back occurred on October 7, 1981, the same date check number two was charged back, although it had been deposited on September 14, 1981. The third check was deposited on September 16, 1981, and charged back on October 15, 1981, although the bank received notice it had been dishonored by the paying bank on September 24, 1981. The jury had before it evidence and instruction relating to "midnight deadline," "reasonable

time," "charge back," and "ordinary care." It could have found that appellee was damaged in the amount of any item less an amount which would have been lost even if appellant has used ordinary care. The drawer of these three items was apparently still around and in business when at least two of the items were handled and possibly when the third was handled. Under the facts presented here the jury may have found the $8,000 was the amount of the item[s] less the amount which would have been lost even had the bank exercised ordinary care. The consequential damage instruction was requested by the appellee and not objected to by the appellant. The pleadings never identified damages as anything but "damages." The prayer was simply that appellee recover "the sum of $9,000, plus accured interest." We agree that under the facts presented the appellee was not entitled to consequential damages because there was not even an implication that the bank acted in bad faith.

Cross appellant argues the court erred in amending the judgment to give the bank credit for the amount appellee had collected from the bad check writer. We agree with this argument because the judgment was supported by the evidence and there had been no amendment to the general denial answer filed by the bank. Rule 13 (a) of the Arkansas Rules of Civil Procedure states in part: "A pleading shall state as a counterclaim any claim which, at the time of the filing of the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The subrogation claim by the bank arose out of the same transactions as the allegations of the complaint and there were no other parties necessary. Therefore, failure to assert the counterclaim prevented the court from reducing the judgment by the amount already collected by the appellee at the time of trial.

Affirmed on direct appeal and reversed on cross appeal.

Donna Fay MORGAN and Fletcher Eugene MORGAN *v.* NATIONAL PIZZA COMPANY d/b/a PIZZA HUT

84-234 684 S.W.2d 812

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*W. Bruce Leasure,* for appellant.

*Rose Law Firm,* by: *Phillip Carroll,* for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the order of the Pulaski County Circuit Court setting aside a judgment rendered on a writ of garnishment. It is argued the trial court erred in quashing the service and setting aside the judgment and that such action was the result of bias and

insufficient evidence. We find no prejudicial error by the court.

The appellants obtained a judgment against the Gwatneys in the amount of $2,200. The Gwatneys failed to satisfy the judgment. Appellants thought one of the Gwatneys was employed by a "Pizza Hut" on Camp Robinson Road. A call to the Secretary of State's office indicated the owner was Pizza Hut of America, Inc., with headquarters in Wichita, Kansas. A call to Wichita indicated each Pizza Hut was individually franchised. Appellants were advised that the local Pizza Hut should be contacted. The Camp Robinson Pizza Hut informed appellants that its headquarters was on Foxcroft Road in Little Rock. Thereafter appellants placed allegations and interrogatories as well as a writ of garnishment in the hands of a process server who was directed to proceed to Foxcroft Road for the purpose of serving the papers. An affidavit of service was executed on May 4, 1984, in which it was stated that service was had upon Marty Couk at the Foxcroft address.

A second set of garnishment papers was served on C.T. Corporation, agent for service of process for Pizza Hut of America, Inc., on June 18, 1984. There was no response to either of these two sets of documents. Judgment was entered against Pizza Hut on July 3, 1984. The appellants obtained a writ of execution on August 10, 1984, which directed the sheriff to execute against the estate of Pizza Hut on Camp Robinson Road.

An attempt to execute on the Camp Robinson Pizza Hut property brought out the real owner, National Pizza Company, which sought immediate relief on September 4, 1984. The relief sought and obtained was to set aside the judgment against the garnishee. The written order was filed on September 6, 1984.

The order setting aside the judgment against the garnishee stated, among other things, that service of process was not obtained on Marty Couk. The evidence on this issue was very disputed. The court found that Marty Couk was not the proper person to serve even if he had been served. The

court also found Mr. Peterson was in the office at the time of the alleged service and that he was the proper person for service. The court considered the testimony of the process server that he served Couk although he did not remember doing so. Couk and Peterson testified that Couk was not served, was not at the office at the time, and was not the agent for the appellee or in charge of its office.

The jurisdictional statement in appellant's brief implies that all appeals from an order dismissing a garnishment are appealable to this court. There must be other grounds before this court will exercise jurisdiction. The order appealed from is appealable pursuant to Ark. R. App. P. 2 (a)(5). However when the words *Supreme Court* appear in the rules of appellate procedure, one must substitute the words *Court of Appeals* in cases where the appellate jurisdiction is in that court under Ark. Sup. Ct. R. 29. See Per Curiam of May 5, 1980, 269 Ark. 980, wherein we amended Ark. R. App. P. 1. Our jurisdiction is exercised here pursuant to Ark. Sup. Ct. R. 29 (1)(c) because this appeal involves the interpretation or construction of Ark. Stat. Ann. § 27-347 (Repl. 1979).

The appellant correctly states the question to be decided is whether the requirements of Ark. Stat. Ann. § 27-347 were met. The statute in question requires service to be had upon the person *in charge* of the office of business. The trial court made a factual determination that the person *in charge* was not served in this instance. We will not reverse unless the decision of the trial court was clearly erroneous. *Walker* v. *Hooker,* 282 Ark. 61, 667 S.W.2d 637 (1984). We have previously held that the person *in charge* must be served. *American S&L Assn.* v. *Enfield, Judge,* 261 Ark. 796, 551 S.W.2d 552 (1977). It was almost undisputed that the person *in charge* of appellee's office was not served with process.

Having found the appellants failed to comply with the mandatory provisions of Ark. Stat. Ann. § 27-347, it is not necessary to discuss the other points relied on for reversal.

Affirmed.

FORD MOTOR CREDIT COMPANY *v.*
The Honorable Judith ROGERS, Chancellor,
Pulaski Chancery Court, Third Div.

84-290 685 S.W.2d 145

Supreme Court of Arkansas
Opinion delivered February 25, 1985
[Rehearing denied April 1, 1985.]

*Griffin Smith* and *W.R. Nixon, Jr., P.A.*, for petitioner.

*Steve Clark,* Att'y Gen., by: *Kay J. Jackson Demailly,* Asst. Att'y Gen.; and *Boswell, Smith & Clardy,* by: *David E. Smith, Joseph L. Tresp,* and *Meredith Wineland,* for respondent.

ROBERT H. DUDLEY, Justice. Amendment 60, which amended Article 19, § 13 of the Constitution of Arkansas, became effective on December 2, 1982. On July 11, 1983, this court interpreted Amendment 60 as having a two-fold limitation on the maximum amount of interest a lender can charge on a consumer loan or credit sale — the lesser of 17% or 5% over the Federal Reserve Discount Rate. *Bishop* v. *Linkway Stores,* 280 Ark. 106, 655 S.W.2d 426 (1983). A petition for rehearing was denied on September 12, 1983. Petitioner, Ford Motor Credit Co., interpreted Amendment 60 as permitting a maximum of 17% interest on consumer contracts and purchased thousands of installment contracts bearing the 17% rate between December 2, 1982 and July 11, 1983. A March 4, 1983 contract between Plaintiff, Ross Nesheim, and Union Lincoln Mercury in Little Rock provided for the purchase of a used 1979 Mercury Marquis automobile to be financed at 17% annual percentage rate. According to the decision, the maximum lawful annual percentage rate was 13.5%, which was the 8.5% Federal Reserve Discount Rate plus 5%. On September 14, 1983, two days after the petition for rehearing was denied, petitioner notified Nesheim and 6,000 other customers of our ruling of Ford Motor Credit's intention to correct the contract to comply with the ruling. On October 25, 1983, Ford Motor Credit sent a follow-up letter advising that the change lowered the annual percentage rate, balance due, and the monthly payment amount.

On October 25, 1983, Nesheim filed his complaint for a class action under ARCP 23 against petitioner to recover Amendment 60's penalties on his contract and on the contracts of all other consumers similarly situated. Petitioner, Ford Motor Credit, asserted that ARCP 23 could not be constitutionally applied to allow this case to be maintained as a class action. On October 16, 1984, the chancellor

ruled that common questions of law or fact predominated, that a class action was superior to other forms of relief, and granted the request for class certification under ARCP 23.

Ford Motor Credit Co., pursuant to Rule 29(1)(f), seeks a writ of prohibition directed to the trial court. It contends, that, in cases which involve a class based on separate claims with common questions of law or fact, the chancery court does not have authority to certify this case as a class action because ARCP 23 cannot be constitutionally applied since it fails to provide for mandatory notice to class members which, it argues, offends due process. We hold that petitioner has no standing to question the constituionality of ARCP 23 and, accordingly, we decline to issue the writ.

Those persons who have allegedly been denied due process are those absent class members who will receive directory rather than mandatory notice of the action. Their right to due process is a personal right, and it may not be asserted by their adversary, Ford Motor Credit Co. In *Cox* v. *Stayton,* 273 Ark. 298, 619 S.W.2d 617 (1981), we wrote:

> Constitutional rights, including the guarantee of due process, are personal rights and may not be asserted by a third party. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), and *Barrows* v. *Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed.2d 1586 (1953). A very narrow exception exists where the issue presented to the court would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome that the rights of the other party would be vigorously asserted and, thus, adequately represented. *Eisenstadt* v. *Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), and *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

This petition does not fit within the narrow exception set out above because the issue of due process can be raised later by the absent class members. In the event the class loses at the trial on the merits, an absent class member can contend that the judgment on the merits is not entitled to res

adjudication effect because of the directory, rather than the mandatory, notice provision of ARCP Rule 23.

Writ denied.

NEWBERN, J., not participating.

Jeffery MOSIER *v.* STATE of Arkansas

CR 84-148 684 S.W.2d 810

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*James H. Phillips,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint E. Miller,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, Jeffery Mosier, was found guilty of an aggravated robbery, rape, and theft of property. We need not state the proof in detail because the sufficiency of the evidence to support the convictions is not questioned. Mosier contends the trial court erroneously refused to give his requested instructions on the defense of voluntary intoxication and erroneously refused to grant a mistrial when a recording of appellant's confession contained references to other criminal activity. We find no reversible error and affirm the convictions. Jurisdiction is in this Court under Rule 29(1)(b) because a cumulative sentence of more than 30 years imprisonment has been imposed.

The trial court correctly refused to give the requested instruction on voluntary intoxication as a defense because the proposed instruction gave contradictory burdens of proof and would have misled the jury. On the one hand, it provided "In asserting the defense, he is required only to raise a reasonable doubt in your minds," but on the other hand, it would have told the jury "[appellant] has the burden of proving an affirmative defense by a preponderance of the evidence." There was no error in refusing to give an instruction which would have misled the jury.

We are aware that some confusion surrounds the

defense of voluntary intoxication. See Liebman, *Voluntary Intoxication as a Defense to Crime,* Ark. L. Notes 29 (1983). We may choose to re-examine our position when we have adversary briefs on the subject.

Appellant next argues that the trial court erred in refusing his motion for a mistrial. One of the state's witnesses, a police officer, played appellant's recorded inculpatory statement, in which appellant admitted to the unrelated wrong of "hanging around and dealing with some fellows that's selling and buying stolen property" and to attempting to avoid trial on unrelated burglary and theft charges. At the time of playing of the statement, the appellant did not object to this evidence of other wrongs or crimes. See Rule 404(b) Ark. Unif. Rules of Evid. Then, toward the end of the tape, the appellant finally objected to the evidence of other wrongs which had long been before the jury.

The trial judge ruled that the objection was well taken, although too late, and ordered the objectionable part of the tape deleted before he admitted the tape into evidence, and ordered the police officer to read the balance of the statement from a transcript. After that, the appellant moved for a mistrial. His counsel admitted he had earlier read the transcript of the statement, and that he knew it contained the evidence of other wrongs. Yet, he did not make a timely objection. The trial judge ruled that the motion for a mistrial was not timely. We agree. The trial judge may well have thought that the failure to object to the evidence in the statement and then later moving for a mistrial on the basis of that same unobjected-to evidence, was a deliberate trial tactic, for two reasons. First, most of the evidence was already before the jury, without objection, by another witness. Second, appellant's counsel indicated that his strategy was to let the jury know that his client had associated with criminals and, because of his fears of them and not for the purpose of committing a robbery, he was carrying a pistol. The trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and this court will not reverse except for an abuse of that discretion or manifest prejudice to the complaining party.

*Berry* v. *State,* 278 Ark. 578, 647 S.W.2d 453 (1983). A trial judge does not abuse his great discretion in granting or refusing a motion for mistrial where counsel appears, as a matter of trial strategy, to have allowed testimony into evidence without objection, and then later moves for a mistrial on the basis of that same evidence.

Affirmed.

Calvin Gene GIRDNER *v.*
STATE of Arkansas CITY OF KENSETT

CR 84-169 684 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*F.W. Jeffcoat* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. In a non-jury trial Girdner was convicted of DWI, second offense, and was sentenced to one year imprisonment, a $1,000 fine, and revocation of his drivers license for one year. His appeal comes before us under Rule 29(1)(c) as one of the series of cases in which we construe and interpret the Omnibus DWI Act of 1983, Ark. Stat. Ann. § 75-2501 — § 75-2514 (Supp. 1983) We affirm the judgment.

In his first argument for reversal Girdner contends that the breathalyzer test results should not have been admitted into evidence because the breath test administrator failed to observe him for twenty minutes. There was testimony that the arresting officer, together with the breath test administrator, observed the appellant for 20 minutes and that he did not ingest anything during the period. The result of the test was properly received in evidence. *Williford* v. *State,* 284 Ark. 449, 683 S.W.2d 228 (1985).

Girdner argues that the test result should be inadmissible because he asked for another blood test but was refused one. See Ark. Stat. Ann. §75-1045(c)(3) (Supp. 1983);

*Williford* v. *State, supra.* The two police officers disputed Girdner's testimony and denied that he asked for an additional test. Their testimony constituted substantial evidence from which the trial judge could have concluded that Girdner did not ask for a different test. It is for the trial court, not the appellate court, to weigh the evidence and resolve the credibility of the witnesses. *Abdullah* v. *State,* 281 Ark. 239, 663 S.W.2d 166 (1984).

Girdner next contends that the act is unconstitutional because it allows the police officer, rather than the prosecuting attorney or grand jury, to file the misdemeanor charge. There is no merit in the argument in this misdemeanor case. *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318 (1984); *reh'g. den.* 283 Ark. 434, 681 S.W.2d 395 (1984); *Sparrow* v. *State,* 284 Ark. 396, 683 S.W.2d 218 (1985); *Southern* v. *State,* 284 Ark. 572, 683 S.W.2d 933 (1985).

Girdner next argues that the act is unconstitutional because a machine, rather than a trier of fact, convicted him. Thus, he argues, without citation of authority, that he has lost his constitutional right to trial by a jury of his peers. The argument is without merit because appellant's basic premise that the machine convicted him is fallacious. Although Ark. Stat. Ann. § 75-2503(b) (Supp. 1983) provides that it is unlawful to operate a motor vehicle if there is a blood alcohol level of .10% as determined by a chemical test, the statute only defines the level of blood alcohol content at which a person is prohibited from driving. It is still up to the jury to determine whether the person was operating a motor vehicle and whether his blood alcohol content was in fact .10% or more. *Lovell* v. *State, supra.*

Affirmed.

Geneva MAYER *v.* STATE of Arkansas

CR 84-104 685 S.W.2d 143

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Maddox & Miller,* by: *David Maddox,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael F. Wheeler,* Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Geneva Mayer brings this appeal from a life sentence imposed upon a conviction of first degree murder of her eight month old daughter, Amy Gail Mayer. The child's frozen body was discovered in a remote, wooded area on December 14, 1982. Three assignments of error are raised. We affirm the judgment.

After the jury was seated, but before any witness was called to testify, the defense prospectively objected to the production of any evidence tending to prove the death of Amy Gail Mayer, on the ground that the information fails to allege her death. Appellant submits the information fails to mention murder or that death had been caused by the accused and, thus, the information charged only child abuse or abandonment.

Admittedly, the wording of the information fails to state that appellant caused the death of Amy Gail Mayer.A part of the information reads:

> The said accused on the 13th day of December, 1982, did unlawfully: with the premeditated and deliberated purpose of causing the death of her eight month old child, Amy Gail Mayer, abandon the said child with the purpose of causing the death of said child. Same being a class Y felony.

Even so, there was never any doubt that murder, and not child abuse or neglect, was the charge and that being so, the accused was not misled nor her defense impaired. It is enough if the information sufficiently informs the defendant of the charge or charges so that a defense can be prepared. *Beard* v. *State,* 269 Ark. 16, 598 S.W.2d 72 (1980). Here, it was the appellant who led officers to the lifeless body of her daughter soon after her disappearance. The information filed against her on December 17, 1982 refers to murder in the first degree at one point and to the death of Amy Gail Mayer at another. Moreover, at plea and arraignment on December 20, 1982, the appellant and defense counsel were told the charge was first degree murder. Several days later appellant filed a motion for discovery which mentioned the charge against her as being first degree murder. Clearly, there was no misconception by the defense as to the specific charge being brought. We find no error in the ruling of the trial court on this point.

Appellant next contends the trial court was biased against her and she was thereby denied a fair trial. The argument mingles references to procedural and evidentiary rulings by the trial court. One instruction cited is the denial of a motion to recuse based upon the fact that during a bail hearing, the trial judge asked whether other charges might be filed against the defendant. While we have examined each point, we see no reason to deal with this argument item by item. In some instances there was not even an objection, in others, the ruling addressed the sound discretion of the trial judge. Suffice it to say we find no basis to conclude that the trial judge showed prejudice against the appellant. His

inquiry about other charges was in connection with a hearing to determine whether a $25,000 bail was adequate, and was prompted no doubt because of news reports alluding to an investigation of an earlier fire in which two children of appellant died. We regard the inquiry by the trial court as to the possibility of other charges as entirely appropriate to the purpose of the hearing and it follows that no bias may be inferred from such a question.

The final point challenges the sufficiency of the evidence. The proof, while circumstantial, meets the test of substantiality. Evidence is said to be substantial if the jury could have reached its conclusion without having to resort to speculation or conjecture. *Osborne* v. *State,* 278 Ark. 45, 643 S.W.2d 251 (1982); *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981).

Geneva Mayer maintained throughout the case that her daughter was kidnapped. She said she and the child were at home alone on the afternoon of December 12, 1982. In the late afternoon, she went to the back yard for firewood. Returning to the house with an arm load of wood, she was grabbed from behind, her arm pinned behind her back. Two men wrestled her into a bedroom, tied her hands and feet with telephone wire and left her on the bed. As they were leaving, she heard one of the men say, "Get the baby." Geneva Mayer managed to free her feet and reach a neighbor's house, her hands still tied behind her.

There was testimony pro and con concerning one's ability to tie his own hands behind his back, whether Mrs. Mayer demonstrated the degree of anguish expected in such cases, whether the arm load of wood showed evidence of being dropped or simply laid on the ground, and whether the amount of wood already in the house necessitated getting more wood.

Refuting Mrs. Mayer's assertions that she had not left home prior to the attack, the state produced testimony that a car closely resembling the Mayer vehicle was seen in the early afternoon on that day on a road leading to the area

where the infant was found. There was testimony from a hunter who saw a car of similar markings on a deadend road near where the child was found. The time was around 5:00 p.m. The driver was a woman.

The most telling evidence came from the appellant herself. Under her account of the kidnapping, she had no basis for knowing where her baby might be, yet she was able to lead officers to the exact, distant location, attributing this extraordinary perception to a dream or vision. We think it was for the jury to determine whether her knowledge was due to a divination of some kind, or to a more plausible explanation. We think the proof was sufficient. *Chaviers* v. *State,* 267 Ark. 7, 588 S.W.2d 434 (1979).

Finally, under A.R.Cr.P. Rule 36.24, and our Rule 11(f), we find the treatment of other objections of appellant's which were overruled, as well as rulings adverse to appellant, do not constitute reversible error.

The judgment is affirmed.

Johnny Lee HILL *v.* STATE of Arkansas

CR 84-149 685 S.W.2d 495

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Gregory E. Bryant,* for appellant.

*Steve Clark,* Att'y Gen., by: *Alice Ann Burns,* Deputy Att'y Gen., for appellee.

STEELE HAYS, Judge. The appellant was charged and convicted on two counts of rape, two counts of aggravated robbery and two counts of kidnapping. He was convicted by a jury and received a total of 135 years. The appellant raises three issues on appeal, none of which have merit.

The charges stemmed from a criminal episode that occurred sometime shortly after midnight on August 15 1981. The three female victims were accosted at gunpoint by two men as they were getting out of their car in a parking lot near a Little Rock nightclub. The two men, one holding a gun, the other a knife, robbed them of their purses and jewelry. The victims were then abducted and forced to drive to an isolated field where the assailant who had been holding the gun, forced them to engage in sex with them.

The robbery was reported immediately, but the victims said nothing about the rapes, attributing their reluctance to the fact that one of them was getting married the next day. When the appellant was picked up approximately a year later, they decided to pursue prosecution of the sexual assault.

Appellant first argues the trial court erred by not declaring a mistrial after the defendant was seen by members of the jury while wearing handcuffs. On returning from a lunch break, the bailiff and the appellant, who was handcuffed, were allegedly seen by some of the jurors as they passed through the corridor. Appellant requested a mistrial which was denied.

We have held it is not prejudicial per se when the defendant is brought into a courtroom handcuffed. *Johnson* v. *State,* 261 Ark. 183, 546 S.W.2d 719 (1977). In *Johnson,* we found the appellant was charged with being an escapee from the penitentiary, was an inmate at the time of trial and all of this would become known to the jury during the trial. Citing *Gregory* v. *United States,* 365 F.2d 203 (8th Cir. 1966), we said we would not presume prejudice when there was nothing in the record to indicate what impression may have been made on the jurors and where the appellant did not offer any proof of prejudice. In a more recent 8th Circuit decision, *United States* v. *Carr,* 647 F.2d 867 (1981), the 8th Circuit defendant was allegedly seen by several members of the jury panel while in handcuffs and a waist chain before trial. The court said, "a brief and inadvertent exposure of defendants to jurors is not inherently prejudicial. The defendant must bear the burden of affirmatively demonstrating prejudice." The court said the defendant's allegation that several prospective jurors "likely" saw him was an unsubstantiated allegation and did not satisfy his burden of affirmatively showing he was prejudiced. The court said he did not ask for a hearing or offer to prove the prejudicial effect of the encounter. Under these circumstances the court was not willing to presume any prejudice.

In this case, from the record of the in-chambers conference on the mistrial motion, it is not evident there was

anything but a brief, inadvertent sighting by some of the jurors. The appellant offered no proof of any jurors having actually seen the appellant, nor was any voir dire requested to substantiate any allegation of prejudice. There was no affirmative showing of prejudice by the appellant. There was no alternative route to the courtroom from the lock-up area that was not visible to the public; the defense attorney had already told the jury that the defendant had been and was currently incarcerated; the bailiff testified he continued on with the appellant because, he thought it would distract more if he pulled back after he once walked in and saw the jurors; the bailiff was instructed to avoid the error in the future; and most significantly, the bailiff testified the appellant had attempted earlier to get out of the holding cell and for security reasons the bailiff felt it was necessary to handcuff him.

Appellant next submits prejudicial error occurred when the prosecutor commented on his failure to deny his guilt. Appellant took the stand in his behalf and on direct was questioned about how he happened to be brought up on the charges for this trial. He said he had been picked up by the police in Oklahoma, was told he was wanted for these charges in Arkansas, did not know anything about the rapes or robberies at that time, was extradited back to Arkansas and came back willingly. On cross, the prosecutor asked a series of questions about that testimony. Appellant admitted he knew he was wanted in Arkansas for these charges before he was picked up in Oklahoma. The following exchange took place:

> Q. And when you got down to the [Little Rock] Police Department that's the first time you found out what all this was about, why they wanted you?
>
> A. No, that wasn't the first time I found out.
>
> Q. When did you first find out?
>
> A. I found out when I was up in Lawton, Oklahoma but I didn't have no money to come back and I said I wasn't going to hide, wasn't going to give no false ID or

nothing. Whenever they stopped me that's when I'm coming back to face this.

Q. So you knew about it before you got picked up, right?

A. Yes, I did.

Q. And the reason you didn't try to clear it up was because you didn't have any money?

A. 'Cause I didn't have no money to come back on. 'Cause I knew I hadn't done these charges.

Q. Did you ever go to any local authorities up there and tell them about it?

A. No, I did not.

Q. Did you call back down here and tell the police where you were?

A. No, I did not.

Q. You didn't think they would have come and gotten you and helped you get back down here?

A. I didn't have no idea.

Q. Okay, But you knew about it and didn't say anything?

DEFENSE: Your honor, I'm going to object to that question I believe Mr. Hill has the right to remain silent.

We need not decide whether this line of questioning is proper under the "tacit admission" rule [see McCormick Evidence § 161 (2nd ed. 1972)] as the appellant is precluded from raising the argument. The question appellant objected to had already been asked in various forms without an objection. Failure to object at the first opportunity to do so

waives any right to raise the point on appeal. *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981). Additionally, once the appellant takes the stand he has waived his right not to be a witness against himself and is subject to cross-examination, as any other witness. *Horne* v. *State,* 253 Ark. 1096, 490 S.W.2d 806 (1973) (cross-examination about appellant's refusal to make statements or admissions to the sheriff); *Spillers* v. *State,* 268 Ark. 217, 595 S.W.2d 650 (1980). Here, the appellant had raised the subject on direct, hence, this was a proper line of questioning by the state. Ark. Unif. R. Evid. 611(b).

As a final point, appellant argues the testimony was insufficient to sustain a verdict of guilt. By the victim's account three individuals were involved in the episode. The argument goes only to the identity of the appellant as being the one of the three who committed the rapes, or in any case to sufficient proof of his involvment in the incidents at all.

The strongest evidence adduced at trial was from Anthony Pike, an accomplice, and two of the victims. It is the rule that a felony conviction cannot be had on an accomplice's testimony alone, it must be corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Stat. Ann. § 43-2116; *Bennett* v. *State,* 284 Ark. 87, 679 S.W.2d 202 (1984). We said in *Bennett,* "The corroborating evidence need not be sufficient in and of itself to sustain a conviction, but it need only, independently of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the crime." On appeal the evidence will be viewed in the light most favorable to the appellee and the verdict will be affirmed if there is substantial evidence to support it. The evidence is substantial if the jury could have reached its conclusion without having to resort to speculation or conjecture. *Heard* v. *State,* 284 Ark. 457, 683 S.W.2d 232 (1985); *Boone* v. *State,* 282 Ark. 274, 668 S.W.2d 217 (1984). We need only consider testimony lending support to the jury verdict and disregard any testimony that could have been rejected by the jury on the basis of credibility. *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1979). As to any individual witness, the jury may accept or reject any or all of a witness' testimony.

*Bennett, supra, Hamilton* v. *State,* 262 Ark. 366, 556 S.W.2d 884 (1974).

There was substantial evidence in this case to corroborate the accomplice's testimony. Two of the victims testified and stated they had positively identified the appellant. Four days after the rape, one of the victims identified Dale Hayes, another accomplice, in a picture lineup, as the man with the gun, and at the same time tentatively identified the appellant. A few days later the same victim identified Hayes and Pike from an actual lineup. A year later she identified appellant in a physical lineup as one of the three, the one with the gun. She testified that after the lineup, she reconsidered her earlier identification by picture only. She said, "After seeing all three of them physically there was no doubt in my mind. . . There's no doubt in my mind. He is the one."

The other victim who had made no earlier identification viewed a physical lineup a year later and positively identified appellant. She said she remembered the gunman because his eyes "kind of bug out." The appellant said he was known as "Popeye" because of his eyes.

These two victims testified the parking lot was well lighted, the light was on in the car during the robbery, and there was a full moon.

The appellant's defense was that he knew nothing of the crimes and had spent the evening and night with his girlfriend. However, in addition to the victims' testimony, a mutual friend of the appellant and Pike testified that on the night of the episode he had loaned his car to Pike around midnight and sometime after two in the morning Pike returned the car in the company of appellant and Hayes.

There was also testimony of one of the police officers working on the case that one of the victim's purse was recovered from a drainage ditch beside appellant's residence.

Affirmed.

Lowell Wayne GEORGE *v.* STATE of Arkansas

CR 84-182 685 S.W.2d 141

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Larry D. Vaught,* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci Talbot,* Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This appeal is from a decision denying a writ of habeas corpus. It involves interpretation of statutes pertaining to the writ, thus our jurisdiction arises from Arkansas Supreme Court and Court of Appeals Rule 29 1. c.

In his habeas corpus petition to the circuit court, George alleged he was being held pursuant to an illegal sentence. In an "appendix" to his petition these facts were stated. While on probation after conviction for burglary in Texas, George received permission to visit his brother in Desha County, Arkansas. While in Arkansas he was convicted of second degree murder. He was given a fifteen-year sentence in 1981. While free on an appeal bond he was advised by the sheriff to go to the Desha County courthouse for a hearing on a violation of his Texas probation requirements. The Desha County circuit judge said he was releasing George and turning him over to the sheriff of Anderson County, Texas. He was then sentenced in Texas to five years confinement for his probation violation. He was subsequently paroled in Texas. He returned to Desha County to visit his brother and was arrested and committed to the Arkansas Department of Corrections based on the commitment order issued upon his Arkansas conviction which had since been affirmed.

The circuit judge denied the petition because it failed "to state a ground for relief under the Arkansas habeas corpus law." The order denying the petition was entered before the state responded, and no hearing was held.

In his appeal to this court, George raises questions whether the Desha County circuit court had lost its jurisdiction to commit him because of his having been released to Texas authorities.

*1. Denial of Hearing*

From the order he entered, it appears the circuit judge denied the petition because he found nothing in it alleging a basis for habeas corpus. The appellant contends he should nonetheless have been given a hearing. The appellant has cited no authority for this position, and we do not find his unsupported argument convincing. While our statutory habeas corpus scheme contemplates a hearing in the event a writ is issued, we find nothing requiring a hearing be given any petitioner regardless of the content of the petition. *See* Ark. Stat. Ann. §§ 34-1701, et seq. (Repl. 1962).

*2. Illegal Sentence*

The central question is whether the petition stated any facts showing that the sentence and the commitment became illegal, assuming the circuit court of Desha County had "released" the petitioner to Texas authorities. In terms of Ark. Stat. Ann. § 34-1703 (Repl. 1962), the question is whether there is a showing of probable cause that the petitioner is being detained unlawfully. One is held without lawful authority when it is shown the commitment is invalid on its face or the court lacked jurisdiction. *Stover* v. *Hamilton,* 270 Ark. 310, 604 S.W.2d 934 (1980); *Mitchell* v. *State,* 233 Ark. 578, 346 S.W.2d 201 (1961); *Rowland* v. *Rogers,* 199 Ark. 1041, 137 S.W.2d 246 (1940). The same fundamental question would be reached if we applied the second sub-part of Ark. Stat. Ann. § 34-1733 (Repl. 1962) which says a prisoner can be discharged "[w]here, though the original imprisonment was lawful, yet, by some act, omission or event which has taken place afterward, the party has become entitled to his discharge."

For his contention that the Desha County circuit court lost its jurisdiction and thus committed him illegally, the appellant cites *Shields* v. *Beto,* 370 F. 2d 1003 (5th Cir. 1967). There the petitioner was released on a furlough from a Texas prison, having served one year of a cumulative forty-year sentence. Instead of taking the furlough, the petitioner waived extradition and was sent to Louisiana where he served a sentence and was ultimately paroled and then released from parole. Some twenty years later the petitioner was convicted on a bad check charge in Texas. He was sentenced to two years imprisonment to which were added the thirty-nine years left unserved on his previous Texas sentence. The federal Court of Appeals held,

> . . .that the extraditing of Shields to Louisiana authorities and the release by Texas of the prisoner before expiration of his sentence constituted a waiver of jurisdiction over Shields, especially where the surrendering sovereign (Texas) showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action

taken by it following his release in Louisiana. [370 F.2d at 1006]

In the *Shields Case* the court distinguished *Thompson* v. *Bannan,* 298 F. 2d 611 (6th Cir. 1962), where it was held that release or surrender of a convict who had not yet begun his sentence did not incapacitate the surrendering state from committing the petitioner thereafter. While the statement that "a prisoner may not be required to serve his sentence in installments," *White* v. *Pearlman,* 42 F. 2d 788 (10th Cir. 1930), has a nice ring to it, the distinction between surrender to another jurisdiction of a person awaiting incarceration and surrender of one who has begun serving a sentence is troublesome if it is to be the basis for saying whether jurisdiction is waived. While the court in *Shields* v. *Beto* did not discuss or even intimate an estoppel theory, it would have been appropriate to have done so. The passage of a long period of time with no evidence of an attempt at extradition or other effort to reassert itself makes it seem patently unfair to tack thirty-nine years of a very stale forty-year sentence on a new two-year sentence.

George might have been successful in resisting extradition to Arkansas. But that is not the question here, as he voluntarily reentered Arkansas knowing he had not served his Arkansas sentence. *See also Grieco* v. *Langlois,* 181 A. 2d 230 (R.I. 1962). *Cf. State* v. *Knapp,* 599 P. 2d 855 (Ariz. App. 1979).

While one effect of the Arkansas commitment may be to place George in violation of his Texas parole obligations, that is not a consideration in determining whether the Desha County circuit court had the power to commit him. *U.S.* v. *Marrin,* 227 F. 314 (E.D. Pa. 1915).

While this opinion makes much ado over the issues raised and yet holds the petitioner was not entitled to a hearing, we are convinced, and our further holding is, that had every allegation in the petition been proven the petitioner would not have been entitled to the writ.

Affirmed.

William NATZKE *v.*
CITY OF FAYETTEVILLE (STATE of Arkansas)

CR 84-183 684 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Linzay & Froelich,* by: *Lee H. Linsay, Jr.,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant was convicted of DWI under Act 549 of 1983. On appeal his single assignment of error is that the act violates the separation of powers doctrine under the Arkansas Constitution. That argument has been considered and rejected. *Sparrow* v. *State,* 284 Ark. 396, 683 S.W.2d 218 (1985) and *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318 (1984).

The judgment is affirmed.

Thomas PRIDE *v.* STATE of Arkansas

CR 85-18 684 S.W.2d 819

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Darrell F. Brown,* for appellant.

No response.

PER CURIAM. Petitioner was found guilty by a jury of aggravated robbery and sentenced to a term of ten years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Pride* v. *State,* CACR 83-190 (June 6, 1984). Petitioner now seeks to proceed in circuit court pursuant to Criminal Procedure Rule 37.

After the State had rested its case, the trial judge told the jury:

> Ladies and gentlemen of the jury, we are going to follow a little different procedure than we normally do because it is getting fairly close to the noon hour and I've been pressed into last minute service to make a speech before the Kiwanis Club today at noon and I know they can't wait to hear all of these words of wisdom flowing from me and you can imagine about how long I have had to get prepared for that, so what we're going to do is, I'm going to give you the instructions and tell you the law in the case and the attorneys will then make their closing arguments and I will put you then in noon recess and then when you get back from recess, you can go right on into the jury room and begin your deliberations.

Petitioner alleges that these remarks conveyed the impression that the trial was of small consequence and that the judge had made up his mind on the guilt or innocence of the accused. He contends that counsel should have objected and requested a cautionary instruction to negate the prejudicial effect.

We cannot agree with petitioner's assessment of the effect of the court's words. The court simply informed the jury that there would be a slight departure from the usual procedure. The judge's comments indicated only that he was concerned with being late for his speech; there is nothing to show that the comments were, or could reasonably have

been, construed as a comment on the significance of petitioner's trial or his guilt or innocence.

Petitioner next contends that counsel should have objected to the court's failure to include an instruction on the lesser included offenses of robbery and theft. The court found on appeal that the facts warranted a conviction for aggravated robbery. As there was sufficient evidence to find petitioner guilty of aggravated robbery, counsel was not remiss in failing to request other instructions. *See Smith* v. *State,* 277 Ark. 403, 642 S.W.2d 299 (1982).

Petitioner also argues that there was insufficient evidence that he was armed with a deadly weapon and that the trial court abused its discretion in failing to reduce the finding of the jury and impose a lesser sentence. Attacks on the sufficiency of the evidence are direct attacks on judgment which must be made at trial and on the record on appeal. *McCroskey* v. *State,* 278 Ark. 156, 644 S.W.2d 271 (1983). Rule 37 was not designed as another opportunity to challenge the weight of the evidence. Rule 37.1.

Petitioner also makes the conclusory allegation that the ten year sentence was cruel and unusual punishment, but the claim is one which should have been made at trial. Issues not raised in accordance with the controlling rules of procedure are waived. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980).

Petitioner alludes to "extrajudical communications" between and among jurors and nonjurors which denied him a fair trial and faults counsel for not bringing the communications to the court's attention. He does not, however, describe the nature of the communications or state their extent. Counsel is presumed effective. *Travis* v. *State,* 283 Ark. 478, 678 S.W.2d 341 (1984). The burden of overcoming that presumption rests on the petitioner who must establish with factual support for his allegations that counsel's conduct undermined the adversarial process and resulted in prejudice sufficient to deny him a fair trial. *Strickland* v. *Washington,* ___U.S.___, 104 S. Ct. 2052 (1984). Petitioner asks for permission to inquire of the jury

in an apparent attempt to find grounds for the allegation so that he can amend this petition. In the light of petitioner's failure to provide factual support for the allegation that there were extrajudicial communications, we find no grounds pursuant to Unif. Rules of Evid. 606, Ark. Stat. Ann. § 28-1001 (Repl. 1977), for questioning the jury.

Petition denied.

Henry GUNN *v.* STATE of Arkansas

684 S.W.2d 265

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*John L. Kearney,* for appellant.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant, Henry Gunn, Jr., by his attorney, John L. Kearney, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed, without fault on the part of the appellant. His attorney admits that the record was tendered late due to an error on his part. We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See Per Curiam opinion, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

Edward L. WING *v.* STATE of Arkansas

684 S.W.2d 265

Supreme Court of Arkansas
Opinion delivered February 25, 1985

*Darrell E. Baker, Jr.*, for appellant.

No response.

PER CURIAM. Appellant, Edward L. Wing, by his attorney, Darrell E. Baker, Jr., Deputy Public Defender for Washington County, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and it was no fault of the appellant. His attorney admits that the record was tendered late due to an error on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

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

Wanda GUTHRIE *v.* TYSON FOODS, INC.

84-219 685 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*William A. Storey,* for appellant.

*Bassett Law Firm,* by: *William Robert Still, Jr.,* for appellee.

JACK HOLT, Jr., Chief Justice. This is a tort case in which a motion to dismiss for failure to state facts upon which relief could be granted was sustained. Our jurisdiction is based on Sup. Ct. R. 29 (1) (o).

The complaint alleged that the appellee had excavated a hole on its premises and had negligently and carelessly left it unguarded. It was further alleged that the appellant had been injured by stepping into the hole while she was walking across the appellee's premises "after working hours." The complaint did not allege that the appellant was employed by Tyson, nor did it otherwise allege by what right the appellant was on the appellee's premises.

After reviewing briefs supporting and opposing the motion to dismiss, the trial court sustained the motion on the basis that statements by both sides and exhibits to the briefs showed the appellant to be a Tyson employee and thus her exclusive remedy would be a worker's compensation claim. It was improper for the trial court to look beyond the complaint to decide a motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(6), unless he was treating the motion as one for summary judgment according to the last sentence of Rule 12 (b). Even had he treated the motion as one for summary judgment it would have been incorrect to base the decision on allegations in briefs and attached exhibits. Ark. R. Civ. P. 56 (c) provides the court may consider "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any."

The result reached by the court was, however, correct. No fact stated in the complaint showed the appellant to have been other than a trespasser. The duty owed by a landowner to a trespasser or licensee is to refrain from wantonly or wilfully causing injury. *Husted* v. *Richards,* 245 Ark. 987, 436 S.W.2d 103 (1969). *See,* Note, 33 Ark. L. Rev. 194 (1979). The complaint in this case alleged simple negligence at best.

Although the language of Ark. R. Civ. P. 8 (a) is similar to Fed. R. Civ. P. 8 (a), we require a statement of "facts" showing the pleader is entitled to relief. *Harvey* v. *Eastman Kodak Co.,* 271 Ark. 783, 610 S.W.2d 582 (1981); H. Brill, Faculty Note, 34 Ark. L. Rev. 722 (1982). *See also, Chiles* v. *Fort Smith Comm'n Co.,* 139 Ark. 489, 216 S.W. 11 (1919), for an example of a complaint showing injury on defendant's premises and the right of plaintiff's decedent to be there.

Although the reason given by the court for sustaining the motion to dismiss was incorrect, the result was correct, as the appellant's complaint failed to state facts upon which relief could be granted, and thus we need not reverse. *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979); *Greeson* v. *Cannon,* 141 Ark. 540, 217 S.W. 786 (1920).

Affirmed.

# O.D. AZBILL *v.* STATE of Arkansas

CR 85-27 685 S.W.2d 162

Supreme Court of Arkansas
Opinion delivered March 4, 1985
[Rehearing denied April 15, 1985.*]

*Guy Jones, Jr., P.A.*, for appellant.

*Steve Clark,* Att'y Gen., by: *Joyce Rayburn Greene,* Asst. Att'y Gen., for appellee.

JACK HOLT, JR. Chief Justice. The appellant was convicted under the Omnibus DWI Act. The sole question

*PURTLE, J., would grant rehearing.

raised in this appeal is whether the appellant was in actual physical control of his vehicle as required by Ark. Stat. Ann. § 75-2503 (Supp. 1983). We find that he was.

The case was presented to the trial court on stipulated facts. The appellant did not testify. The stipulations were that Officer Leroy Davis was summoned by citizens band radio to U.S. Highway 67 at 6:22 p.m. on March 5, 1984, to investigate a truck which was stuck in the median of the highway. The truck belongs to the appellant. At the scene the officer found the appellant alone outside the truck. The appellant informed the officer that he was coming from Jonesboro and that he was the only person around the vehicle.

When the officer arrived, another car had stopped and its occupants were in the process of getting out and approaching the truck. Officer Davis was not able to testify as to the length of time the truck was stuck. He also did not know where the keys to the truck were when he arrived. The keys were available however because they were used to lock the truck, which was later towed and impounded. The truck was not locked when the officer arrived. Officer Davis never saw the appellant driving or exercising physical control of the truck. A breathalizer test was administered and the appellant registered .22%. The test results were properly certified and authenticated.

The parties further agreed that the only question before the trial court and on this appeal is whether or not the appellant was driving, or was in possession or in control, of the vehicle.

Act 549 of 1983, codified at Ark. Stat. Ann. § 75-2503 (Supp. 1983) provides:

> (a) It is unlawful and punishable as provided in this Act. . .for any person who is intoxicated *to operate or be in actual physical control* of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this Act for any person *to operate or be in actual physical*

*control* of a motor vehicle if at that time there was 0.10% or more by weight of alcohol in the person's blood. [emphasis added].

Although the evidence that the appellant operated or was in actual physical control of the truck while intoxicated is circumstantial, the question of whether that evidence "excludes every other reasonable hypothesis is for the fact finder to determine." *Boone* v. *State,* 282 Ark. 274, 668 S.W.2d 17 (1984). This court's responsibility is to determine whether the verdict is supported by substantial evidence. *Id.*

We find that it was. We have recently discussed the issue of actual physical control of a vehicle in two cases. In *Dowell* v. *State,* 283 Ark. 161, 671 S.W.2d 740 (1984) we found the appellant was not in control where he was found asleep in his car with the motor off, in the driveway of a business and with the car keys in the vehicle seat. We said, "He may not have been the person who drove the vehicle to where it was parked. If he drove it to the place where it was found he may have become intoxicated later."

This case is distinguishable in that here, the appellant in his statement to the officer admitted that he was coming from Jonesboro and he was the only person around the vehicle. Therefore the court was justified in believing that he had operated and was in actual physical control of the truck until he became stuck on the median.

In *Wiyott* v. *State,* 284 Ark. 399, 683 S.W.2d 220 (1985), the appellant and a companion were found asleep in a parked vehicle. When the officer awoke them, the appellant reached for the key which was in the ignition and attempted to start the vehicle.

This court affirmed the finding of guilt stating, "There is no evidence that any one else had control over the automobile. We think the evidence in this case indicates that appellant was as much in control of his vehicle as an intoxicated person could be."

The evidence in this case necessitates a similar con-

clusion. The appellant was the only person at the scene who was likely to have been in control of the truck.

Actual control of a vehicle may be proved by circumstantial evidence. The officer need not see the driver operating the car in order to have reasonable cause to believe he was doing so. 7A Am Jur 2d *Automobiles & Highway Traffic* § 300 p. 483-84 (1980).

This court has not previously been presented with a situation similar to the present one, where the appellant is outside of his vehicle with the motor turned off and the location of the keys to the automobile is uncertain. The New Jersey court in *State* v. *Prociuk,* 145 N.J. Super 570, 368 A.2d 436 (1976) stated that there are three ways to prove operation of a motor vehicle. They are (1) observation by the officer; (2) evidence of intent to drive after the moment of arrest; or (3) a confession by the defendant that he was driving.

In *Prociuk* an officer was called to a turnpike exit where he saw the appellant near a toll booth with his van parked on the other side of the booth. The appellant, who was intoxicated, told the officer he had just run out of gas. The New Jersey court found that the appellant's statement amounted to a confession because of the word "just" which implied that he had recently been driving. Applying the same test here, the appellant's statement to the officer that he had come from Jonesboro and that he was the only person around the vehicle is considered a confession of use and control of the vehicle.

The appellant's admissions coupled with other circumstantial evidence lead to only one logical conclusion: the appellant was in actual physical control of his vehicle while intoxicated.

Affirmed.

W. R. TAYLOR et al *v.*
Kenneth SCOTT et al

84-237 685 S.W.2d 160

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Peel & Eddy,* by: *David L. Eddy,* for appellants.

*Bullock & McCormick,* by: *David H. McCormick,* for appellees.

GEORGE ROSE SMITH, Justice. The key question in this case, on undisputed facts, is this: When the owner of the record title to a tract of land conveys an undivided half-interest in the minerals to another person, but the mineral deed is not recorded for 18 years, and a stranger to the title takes adverse possession of the land a year after the execution of the unrecorded mineral deed and continues his adverse possession for more than seven years, does the adverse possessor acquire title to the constructively severed half-interest in the minerals? The chancellor correctly decided that the adverse possessor does not acquire title to the severed mineral interest. We therefore affirm his decree.

In 1937, Ben H. Qualls and his wife, holding record title to a 120-acre tract of land, conveyed an undivided half-interest in the minerals to G. W. Nowlin and his wife. The Nowlins did not record the deed until 1956. In 1938, A. W. Austin and his wife, who appear to have been in adverse possession of the 120 acres, conveyed the land to Joe Chenowith. That deed was promptly recorded. Chenowith and his successors in title, the appellants, have been in possession of the land ever since, using it primarily as pasture.

In 1983, the appellees, successors in title to the half-interest in the minerals that had been conveyed to the Nowlins, brought this suit to quiet their title to that half-interest. The appellants defended on the ground that the constructive severance created by the 1937 mineral deed was not effective against them until that deed was placed of record in 1956, at which time they had held the surface adversely for some 18 years.

The appellants recognize our settled rule that when a mineral ownership has been severed by deed from the surface ownership, adverse possession of the surface is ineffective against the owner of the minerals unless the possessor

actually invades the minerals by opening mines or drilling wells and continues that action for the necessary period. *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W.2d 390, 67 ALR 1436 (1929); *Bodcaw Lbr. Co.* v. *Goode,* 160 Ark. 48, 254 S.W. 345, 29 ALR 578 (1923). The appellants insist, however, that under our law the severance is not effective until the deed is recorded.

The cases relied upon do not support that view. In *Thompson* v. *Graves,* 281 Ark. 492, 665 S.W.2d 268 (1984), we did refuse to give effect to an asserted mineral reservation in an unrecorded lost deed, but the reason was that the contents of the lost deed were not proved clearly and convincingly. In *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S.W.2d 425 (1946), we did say that the placing of three mineral deeds of record constituted a constructive severance of the minerals. The opinion shows, however, that all three deeds were promptly recorded, with no third-party rights arising between the execution of the deeds and their recordation. We think the severance actually occurred when the deeds became effective, not when they were recorded, but that distinction was of no importance in the case. Hence the language relied upon by these appellants was dicta.

As a matter both of settled law and of simple justice, there is no reason why an adverse possessor should benefit from the record owner's failure to record a deed. A trespasser does not examine the records at the courthouse before deciding to appropriate another's property. He does not rely upon the record, nor is he misled by its absence. Our recording statute gives priority to the first recordation only as between purchasers deriving their interests from a common grantor. *Richardson* v. *Fisher,* 236 Ark. 612, 367 S.W.2d 440 (1963).

The same principle applies to deeds that bring about a constructive severance of the minerals from the surface. In the language of Professor Kuntz:

> A failure to record the instrument by which the severance was accomplished may or may not be significant. If the subsequent possessor took from the same

> chain of title and claimed as a bona fide purchaser, obviously the failure to record a deed by which a mineral interest was severed would be very significant and would control his rights under local statutory law. If, however, the subsequent possessor was an adverse possessor not under the same chain of title, recording would have no significance. An adverse possessor does not occupy the status of a purchaser, and an unrecorded severance should be effective as to him.

Kuntz, Oil and Gas, § 10.4 (1962). The same reasoning was followed in *United Fuel Gas Co.* v. *Dyer,* 185 F. 2d 99 (4th Cir. 1950). There Judge Parker first noted that an adverse possessor is charged with notice of a mineral severance appearing in his own chain of title, but the rule does not apply to an adverse possessor not claiming under the same chain. From the opinion:

> Such adverse possessor is manifestly not entitled to any notice with respect to the estate of the true owner which he is invading. On the contrary, it is he who must give notice by exercising possession of such character as will apprise the true owner that the right of the latter is challenged.

We have no similar case in Arkansas relating to mineral deeds, but in an analogous situation we held that the purchaser at a tax sale took subject to an unrecorded timber deed, because the recording statute benefits a subsequent purchaser from the common grantor, not a purchaser at a tax sale. *Brewer* v. *Fletcher,* 210 Ark. 110, 194 S.W.2d 668 (1946).

The preceding discussion also answers the appellants' argument that when Chenowith, an adverse possessor, sold the tract to Carrel Luningham in 1945, Luningham acquired the mineral half-interest as a bona fide purchaser. Luningham, however, was necessarily charged with notice that his grantor did not have the record title to the land. Luningham must therefore be charged with knowledge that he was not acquiring a perfect record title; so he cannot claim to be a purchaser without notice of possible outstanding flaws in his grantor's title.

Counsel for the appellants insist that the position we are taking will "create uncertainty in the oil and gas industry and lack of confidence in the real estate records." We do not think so. When a lawyer examines an abstract of title and finds that the apparent owner's title rests only on adverse possession, a rare situation, he is at once on notice that there may be flaws in the title, such as the interest of a minor or insane heir of a deceased holder of the record title. There is no reason to confer a windfall on the adverse possessor by giving him the benefit of a possible record that he would not have seen or relied on even if it had existed. On the other hand, our law has long protected the owner of a mineral interest against the loss of his title to an adverse possessor of the surface only. Our present holding is in harmony with our existing case law.

Affirmed.

Robert LINCOLN *v.* STATE of Arkansas

CR 84-142 685 S.W.2d 166

Supreme Court of Arkansas
Opinion delivered March 4, 1985
[Rehearing denied April 15, 1985.*]

*Joel W. Price,* for appellant.

*PURTLE, J., would grant rehearing.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. Upon the jury's verdicts of guilty the appellant was sentenced to (1) a $5,000 fine and five years' imprisonment with three years suspended, for possession of cocaine with intent to deliver, and (2) four years' imprisonment with two years suspended, for possession of marihuana with intent to deliver, the sentences to be concurrent. The Court of Appeals certified the case to us as presenting a significant and important issue concerning the effect upon our law of recent Supreme Court decisions modifying the exclusionary rule in search-and-seizure cases. *United States* v. *Leon,* ___ U.S. ___ , 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *Massachusetts* v. *Sheppard,* ___ U.S. ___ , 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). By now we have expressed our intention of following the modified rule, a position to which we shall adhere. *McFarland and Soest* v. *State,* 284 Ark. 533, 684 S.W.2d 233 (1985). There is no merit in the appellant's six arguments for reversal.

First, the search-and-seizure issue. On the evening of February 15, 1983, police officers obtained a warrant to search Lincoln's Fort Smith apartment for cocaine. The search was conducted immediately and yielded the drugs upon which the present charges were filed. Counsel for the appellant, in challenging the sufficiency of the affidavit for the search warrant, relies upon the law that was applicable before the *Leon* and *Sheppard* cases, although they were decided three months before the appellant's brief was filed. The earlier law is no longer applicable. There is no vested right in a rule of evidence. *Reid* v. *Hart,* 45 Ark. 41 (1885). Indeed, the Supreme Court applied its new rule retroactively in *Leon,* reversing a federal Court of Appeals decision which had invalidated a search-warrant affidavit in reliance on the pre-existing law.

The appellant's only argument falling within the possible purview of *Leon* is the contention that statements in the affidavit were false. In *Leon,* the court said that deference to the magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of

the supporting affidavit. Here the affidavit stated that recently an informant had obtained a sample of cocaine that was purchased from Lincoln. The affiant admitted at the suppression hearing that he should have said that the informant obtained the sample from somebody else who reported to the informant that it had come from Lincoln. There is no reason to think the circuit judge who issued the warrant would have acted differently had the affidavit been exact. To the contrary, the really vital statement in the affidavit was that another informant who had been in Lincoln's residence that very evening said she had purchased cocaine from Lincoln at that time and that Lincoln had stated he had more cocaine available, but it was selling fast. Evidently the judge relied on that statement, for the warrant contains a finding that the objects to be seized were in danger of imminent removal, and the search was carried out at once. We attach no importance to the fact that the affidavit said that the informant had knowledge of "the penal implications" of her statement, for even though she was released without being charged, her release was conditioned on her promise to cooperate in the prosecution of Lincoln. We hold that under *Leon* the affidavit was sufficient to support the issuance of the search warrant.

Second, the court allowed the State to prove, for the purpose of showing Lincoln's possession of the drugs with intent to deliver, that various witnesses had bought drugs from Lincoln in the past. One witness, for example, testified that for about a year he had bought drugs from Lincoln once or twice a month. The court cautioned the jury that proof of prior sales was admitted only to be considered with regard to the intent with which Lincoln had possessed the drugs on the evening in question. Such prior sales are admissible if not too remote in time, which is not the case here. *Rowland* v. *State,* 262 Ark. 783, 792, 561 S.W.2d 304 (1978); *Cary* v. *State,* 259 Ark. 510, 514, 534 S.W.2d 230 (1976). Our holding in *Moser* v. *State,* 266 Ark. 200, 583 S.W.2d 15 (1979), is not in point, for there the prosecutor charged possession with intent to deliver, instead of the actual sale that was proved, as a subterfuge to get before the jury prior sales, as bearing on intent.

Third, the court did not improperly limit the appellant's cross examination of five codefendants who were also present when the police searched Lincoln's apartment and arrested all six persons. The court simply confined cross examination to the drugs in question. We find no abuse of its discretionary authority to confine cross examination to matters relevant to the charges on trial.

The remaining arguments do not need extended discussion. A requested instruction about the weight to be given to proof of prior sales was properly refused, for it was heavily slanted in favor of the defense, even to the point of being a comment on the weight of the evidence. See per curiam order, AMI Criminal, viii (1982). The court's refusal to grant Lincoln a separate trial is not shown to have been error for either of the reasons argued: that a codefendant's statement that a certain substance was "cutter" instead of cocaine was admitted in evidence or that there was proof of a single sale by another resident of the apartment, in addition to the many sales by Lincoln that were shown. Neither ruling can be said to have been substantially prejudicial to the defendant, for there was abundant proof of drug activity in the apartment. Finally, we do not perceive that the proffered proof that two codefendants had pleaded guilty to possession of a different drug, LSD, was relevant to the charges on trial.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent from the majority opinion on principle as well as law. I am saddened because I see this opinion as a repudiation of more than 100 years of precedent and the destruction of parts of the Arkansas and United States Constitutions. Additionally the opinion repeals a portion of our rules of criminal procedure and possibly some statutory law as well. I have never felt that this court is bound by the opinions of the United States Supreme Court in matters where our Constitution and laws are more protective of individual rights than are those of the United States. I have been under the impression that the

other members of this court did not always feel bound by decisions of the federal courts. *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983).

The affidavit for the search warrant in this case was obtained upon the application of an officer who stated that his information was obtained from a reliable informant who had recently purchased cocaine from the appellant. At the suppression hearing testimony revealed that the so-called reliable informant had not purchased from the appellant at all but had been told by some third party that he had purchased from the appellant. The officer applying for the warrant knew that the informant had not made the purchase. I believe the affidavit was false in that respect. There was absolutely no reason for the affiant to rely on information from an unknown and unproven informant. It may well have been a complete fabrication. Neither the officers nor the court had any known reason to rely on this hearsay upon hearsay information. This is a step toward the return of Star Chamber proceedings which I had previously thought to have been renounced by this nation. Perhaps I am in error. The majority clearly holds that the judge evidently relied upon the unidentified third party. I am saddened by this departure by the majority of this court. It is my opinion that had the issuing judge been told the truth he would have refused to issue the warrant. The majority seems to me to go far beyond the *Leon* holding.

Another glaring falsity in the statement was that the informant (who was not the informant at all) disclosed the information with knowledge of "the penal implications" of her statement. There was no culpatory or penal information at all because the informant had been granted immunity (she was never even charged for her drug violations) and what she said implicated other people, not herself. When it is considered that this affidavit was prepared by the prosecuting attorney's staff with cooperation of supervising police officers, I conclude that it was not even in "good faith." No doubt it was a good faith effort to search appellant's house as are all such efforts of law enforcement officials. Even if some activities were not in good faith, it is unlikely that officers would admit it. The "general search"

which the Fourth Amendment sought to destroy seems to me to have now been reinstated. Henceforth officers will no doubt rely in "good faith" upon the most rank hearsay, suspicion or even complete lies and expect the approval of this court.

I cannot end this dissent without referring to A.R.Cr.P. Rule 13.1(b) which states in part: "If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained." This rule was clearly violated. For these reasons and many more, I would reverse and remand.

Franklin Delano TOWERY *v.*
Diana J. TOWERY

84-190 685 S.W.2d 155

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Daily, West, Core, Coffman & Canfield,* by: *Stanley A. Leasure;* and *Tucker & Thrailkill,* by: *Patricia A. Tucker,* for appellant.

*Maddox & Miller,* by: *G. D. "Steve" Stephenson,* for appellee.

DARRELL HICKMAN, Justice. The general rule is that once a child reaches majority and is physically and mentally normal, the legal duty of the parents to support that child ceases. The question in this case is whether that duty can be reimposed later if the adult child becomes disabled and needs support. The answer is that the law imposes no such duty regardless of what the moral obligation may be. The facts in this case are largely undisputed.

Timothy Dewitt Towery was 17 when his parents divorced in August, 1980. The Towerys had two other grown children and no provision for their care and support was ordered. Franklin Towery, the father and appellant, pursuant to court order, provided support for Timothy until he reached his majority. Timothy graduated from high school in May, 1981, and legally became an adult on his 18th birthday, June 16, 1981. Timothy attended Henderson State College on a football scholarship and completed three semesters. During summer vacation of 1982, he worked full time in the Texas oil fields. On a visit to Arkansas in June, 1982, he was injured in an automobile accident which left him a quadriplegic. It was stipulated that Timothy was emancipated before the accident. In January, 1984, Timothy's mother petitioned the Polk County Chancery Court to require Franklin to resume contributions toward Timothy's support. She testified Timothy's monthly needs totaled $625, of which $229 is paid by social security. Timothy had dropped out of college but intended to return. Timothy did not join in this suit although it is undisputed that he is mentally competent.

After hearing testimony, the chancellor ordered the father to pay the mother $215 a month support. No time lilmit was placed on the order. The appellant's main argument on appeal is that the law cannot require a parent to support an adult child who has become emancipated. Under these circumstances, we agree.

All family members have some legal obligations to each other. Often what are generally recognized as moral obligations among family members are also recognized by the common law or by statutes to be legal obligations. For

instance, children must generally obey their parents and have their consent in legal matters. 59 Am. Jur. 2d, *Parent and Child,* §§ 8-24. Also, it is elementary that parents must support their minor children. *Johnson* v. *Mitchell,* 164 Ark. 1, 260 S.W. 710 (1924). This duty of support was the common law and has become codified; in Arkansas the law is Ark. Stat. Ann. § 57-633 (Repl. 1977). The legal obligation ceases at some point, just as the duties of the child to the parent cease. While the statutory law in Arkansas does not expressly state when the duty ceases, we have easily found it to be at the age of majority. *Hogue* v. *Hogue,* 262 Ark. 767, 561 S.W.2d 299 (1978); *Worthington* v. *Worthington,* 207 Ark. 185, 179 S.W.2d 648 (1944); *Missouri Pacific Railroad Co.* v. *Foreman,* 196 Ark. 636, 119 S.W.2d 747 (1938). The rule which we and most, if not all, states follow is that "[o]rdinarily the legal obligation of a parent to support a normal child ceases upon majority of the child." *Worthington* v. *Worthington, supra.* In Arkansas a child reaches majority at age 18. Ark. Stat. Ann. § 57-103 (Supp. 1983).

We have recognized some exceptions to the general rule. We have held the duty to support a child does not cease at majority *if* the child is mentally or physically disabled in any way *at* majority and needs support. *Eskridge* v. *Eskridge,* 216 Ark. 592, 226 S.W.2d 811 (1950) (physically injured at birth); *Petty* v. *Petty,* 252 Ark. 1032, 482 S.W.2d 119 (1972) (epilepsy); *Elkins* v. *Elkins,* 262 Ark. 63, 553 S.W.2d 34 (1977) (dyslexia). A great number of states also recognize that exception. Note, *Duty of Continued Child Support Past The Age of Majority* 1 UALR L.J. 397 (1978); 1 A.L.R.2d 910, 921 (1948). Some states have founded this duty on common law, as we have. *Brown* v. *Brown,* 474 A.2d 1168 (Pa. Super. 1984); *Grapin* v. *Grapin,* 450 So.2d 853 (Fla. 1984). The Missouri Supreme Court pointed out the need to stray from the common law rule and to support disabled children when they reach majority stating that "our courts should depart from the common law rule of nonliability to support an adult child if that rule is not suited to the conditions and needs of the people of the state." *State* v. *Carroll,* 309 S.W.2d 654 (Mo. 1958). The court further recognized that the majority of the states were negating the common law rule

and "following the 'dictates of humanity' by enforcing the exception." Other states have based this duty on statute. *Stern* v. *Stern,* 58 Md. App. 280, 473 A.2d 56 (1984); *Miller* v. *Miller,* 62 Or. App. 371, 660 P.2d 205 (1983); *State* v. *Panzeri,* 76 Ida. 211, 280 P.2d 1064 (1955); *Hight* v. *Hight,* 5 Ill. App. 3d 991, 284 N.E.2d 679 (1972).

In only one case have we extended the duty of a parent to support a child beyond majority who did not have a handicap or disability. In *Matthews* v. *Matthews,* 245 Ark. 1, 430 S.W.2d 864 (1968), we required a father to continue child support for six months after his daughter reached majority so she could finish high school. We considered this exception as only a "slight extension" of the father's duty and noted that a high school diploma is extremely important to a person seeking to support herself. Beyond these deviations we have not extended the parental duty beyond majority.

All of these cases which found a legal parental duty deal with unemancipated children who reached their majority unable to care for themselves. The question before us is unique because the legal duty has been severed. Should a court, absent statutory guidelines, reimpose that duty?

In examining the decisions of other courts which have been faced with that question, we find the attempts to reimpose a duty to support, absent a statutory provision, have been rejected. Florida found no such legal duty for the parent to provide support for an adult child even though the court believed parents should provide their children with as much formal education as possible. In *Keenan* v. *Keenan,* 440 So. 2d 642 (Fla. App. 5 Dist. 1983) the court said:

> While we firmly believe that parents, divorced or undivorced should provide their children with as much formal education as each child can absorb and the parents can afford, this court cannot create a legal duty to do so where none exists. That power rests in the legislature.

In a similar case involving college education costs, the Florida court said:

> While most parents willingly assist their adult children in obtainig a higher education that is increasingly necessary in today's fast-changing world, any duty to do so is a moral rather than a legal one. Parents who remain married while their children attend college may continue supporting their children even beyond age twenty-one, but such support may be conditional or may be withdrawn at anytime, and no one may bring an action to enforce continued payments. It would be fundamentally unfair for courts to enforce these moral obligations of support only against divorced parents while other parents may do as they choose.

*Grapin* v. *Grapin, supra.*

In *Breuer* v. *Dowden,* 207 Ky. 12, 268 S.W. 541 (1925), the Kentucky court held that the parent was not liable for his disabled adult child's debts in the absence of a statute to the contrary. The court stated:

> That if at the time the child becomes of age he is reasonably physically and mentally sound and able, if willing, to make and earn his own support, the parent is not liable for his debts or obligations thereafter contracted, even though he should later become sick or mentally unbalanced and therefore incapacitated to earn a livelihood.

The Indiana appellate court held in *Pocialik* v. *Federal Cement Tile Co.,* 121 Ind. A. 10, 97 N.E.2d 360 (1951), that once the parent's liability of support terminated, the liability will not be restored due to a subsequent change in the condition of the child. In this case, the appellant was seeking compensation for her father's death. The court held that she was not able to recover under the Compensation Act because she was not a presumptive dependent within the Act's definition. The court did not find any statute which imposed a duty on the deceased father to support his adult daughter under the facts of this case.

In *State* v. *Panzeri, supra,* the Idaho court held there was no duty on a parent to support an adult child who was

mentally competent when he attained majority but later became disabled. There was no such duty at common law, and for one to exist, it must be created by statute. This case was an action against the estate of a mother of an adult insane person for the cost of care and treatment of an adult in the state hospital. There was a statute providing for the recovery of costs for the care of insane persons. The suit was brought pursuant to that statute.

The Maryland Court of Special Appeals decided that their statute requiring a parent to support dependent children could be construed to require support of an adult child who became disabled after emancipation. There was nothing in the wording of the statute which precluded its application to an emancipated child who later becomes a dependent adult child. *Stern* v. *Stern,* supra. In Oregon the court held a father could not be ordered to support a mentally handicapped child that had reached majority and was not attending school. This was despite an Oregon statute that provided: "Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances." *Haxton* v. *Haxton,* 68 Or. App. 218, 680 P.2d 1008 (1984). In *Koltay* v. *Koltay,* 667 P.2d 1374 (Colo. 1983), a father was ordered to continue to support a handicapped child beyond majority because the child was not "emancipated" under Colorado law. But in dictum, the court observed that "the Uniform Dissolution of Marriage Act does not provide for the support of a child who is emancipated at the age of majority and later becomes disabled."

The appellee is asking us to reimpose a legal duty that no longer exists. It was stipulated that the child in this case was emancipated before the accident. He was not living with his father. That means he had no legal duty to his father and the father had none to him. If any obligation exists it is moral, not legal. Arkansas has no statute that imposes a legal duty on this father.[1] We take the same view that other

[1]That does not mean, however, that the legislature is blind to all cases of special need. Ark. Stat. Ann. § 59-115 (Repl. 1971) provides that the parents of an insane child shall maintain it if financially able, and the children of insane parents shall provide for them, if able.

states do; absent a statute, we cannot interfere for to do so would be to impose our personal moral judgment on the father as to what he ought to do, rather than what the law requires he do.

Timothy decided, as he well should have, where he wanted to live, where he wanted to go to college, and how he would live. Undoubtedly, his case is tragic, and he needs some financial assistance. Perhaps his father ought to help; perhaps he will. That is for him to decide, not this court.[2]

Since there is no statutory or constitutional authority for the court's order of support, it must be reversed. We need not address the other issues raised which are jurisdiction and standing of the mother to bring the suit.

Reversed and dismissed.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. The Chancellor reached a fair and equitable result in this case by ordering the father to pay $215 for the support of Timothy. In that fashion the $625 needed each month for Timothy's maintenance through college was divided equally between the mother (whose income was $850 per month), the father (whose income was $1,932 per month) and Timothy, Timothy's part coming from a social security check of $229 per month.

I can see no reason to override the Chancellor on the

[2]Actually, the testimony is not entirely unfavorable to the father. He said he bought an expensive van, had it equipped for a handicapped person, and arranged for driving instructions. Timothy said he had used the van about a dozen times but declined the lessons because his father would not let him drive alone. The father wanted Timothy to attend the local community college; Timothy wanted to enroll at Henderson State University. Timothy chose to live with his mother and his social security benefits were reduced because it was found he was a dependent of his mother's. Timothy's mother brought the suit; he didn't. A majority of the court chooses not to rule on the standing issue to avoid a remand which would delay but not resolve the main issue. See *Upchurch* v. *Upchurch*, 196 Ark. 324 117 S.W.2d 339 (1938).

circumstances of this case, unless this court is adopting a rigid rule that any duty of support ends when a child reaches age eighteen. While we have said that *ordinarily* when a child comes of age the duty of a parent ends, we have stressed the fact that it is not an inflexible rule, but one that is dependent on the circumstances of the case. *Matthews* v. *Matthews,* 245 Ark. 1, 430 S.W.2d 834 (1968).

In *Matthews* we upheld the Chancellor in ordering a father to continue supporting an adult daughter for some six months until she graduated from high school. We expressly recognized the importance of a high school diploma in obtaining work. If that was the right result on those facts, as clearly it was, of how much greater importance is a degree in accounting to Timothy Towery, a quadriplegic. Without a degree or some useful skill, his chances of ever providing for himself are virtually non-existent, whereas, the daughter in the *Matthews* case could certainly have found employment of some kind irrespective of a high school diploma. Thus, the circumstances of this case seem far more compelling than those in the *Matthews* case.

The majority opinion states that Timothy Towery had dropped out of college, but intended to return. If that statement implies that Timothy had dropped out of college before his accident, it is incorrect. After graduating from high school in May, 1981, Timothy attended Henderson State University in the fall of 1981 and the spring of 1982, prior to the accident in June, 1982. Emancipation is dependent on the circumstances of each case, (see 67A C.J.S., Parent and Child, § 5) and Timothy Towery had not become emanicipated in the sense that he had voluntarily ended his education and embarked on a chosen course in life, he was merely working during the summer to help pay for college, just as he had the previous summer. At the time of the accident he was barely nineteen years old, was living temporarily with his brother in Texas in order to work in an oil field. It is undisputed that he intended to return to college in the fall and was saving money for that purpose.

I believe the Chancellor's order should be affirmed until Timothy finishes college or chooses some other course.

# ONE 1982 DATSUN 280ZX, VIN NO. JN1CZ04S6CX625757, Arkansas License No. IXK 624 and John NABORS *v.* Wilbur C. BENTLEY, Prosecuting Attorney, Sixth Judicial District, ex rel., NORTH LITTLE ROCK POLICE DEPARTMENT

84-240 685 S.W.2d 498

Supreme Court of Arkansas
Opinion delivered March 4, 1985
[Rehearing denied March 25, 1985.]

*John Wesley Hall, Jr.,* for appellants.

*Eddy Montgomery,* Deputy Prosecuting Attorney, for appellee.

DARRELL HICKMAN, Justice. The Pulaski County Circuit Court ordered John Nabors' 1982 Datsun forfeited because it had been used to deliver controlled substances. On appeal Nabors makes three arguments: the Arkansas forfeiture statute is unconstitutional because it violates Ark. Const. Art. 2 § 22 (1884); the burden of proof in such cases should be beyond a reasonable doubt rather than by a preponderance of the evidence; and the trial court improperly limited the cross-examination of the state's chief witness. Finding no merit to any of these arguments, we affirm.

The appellant concedes that under the United States Constitution and federal cases such statutes have been found to be legal. He argues, however, that the Arkansas Constitution has a unique provision protecting private property which is violated by this statute. That is Ark. Const. Art. 2 § 22, which reads:

> Property rights — Taking without just compensation prohibited. — The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

We held in *Albright* v. *Muncrief,* 206 Ark. 319, 176 S.W.2d 426 (1943), that personal property, which is not contraband per se, could still be considered contraband, subject to forfeiture, if used for an unlawful purpose. There we stated that the moment property is used in an unlawful business, it is liable to forfeiture and that under those circumstances the owner has no greater right in the property than any other person. In discussing a forfeiture statute which allowed forfeiture of gambling devices, we said:

> "For the promotion of the general welfare the state, under its police power, has the undoubted right to adopt the most expeditious, inexpensive, and effective mode of abolishing and abating the same."

Therefore, private property enjoys no constitutional privilege when it is knowingly used to defy the state's criminal

laws and trafficking in drugs is an especially insidious evil in our society.

The argument that the state must prove beyond a reasonable doubt that the vehicle was used for unlawful purposes has been rejected. *One 1961 Lincoln Continental Sedan* v. *United States,* 360 F.2d 467 (8th Cir. 1966). The overwhelming authority relies on the preponderance of the evidence standard. *Utley Wholesale Co.* v. *United States,* 308 F.2d 157 (5th Cir. 1962); *United States* v. *One 1955 Mercury Sedan,* 242 F.2d 429 (4th Cir. 1957); *D'Agostino* v. *United States,* 261 F.2d 154 (9th Cir. 1958) cert. denied, 359 U.S. 953 (1958).

Nabors also argues that the trial court erred in limiting the cross-examination of the state's chief witness. The argument is answered by quoting from the transcript which demonstrates the objection was waived:

> Q. Have you been granted immunity?
>
> A. Yes, I have.
>
> Q. And since that time, you have been financially supported by the United States government.
>
> [Prosecutor]: I object, your honor, that's a misleading question.
>
> The Court: I don't think that is relevant and material.
>
> Q. Since that time, let me ask it another way — well, that's all right. Anyway, you have been granted immunity to testify against him, right?
>
> A. Yes, sir.

The defense waived any objection it had by not pursuing the subject. We, therefore, do not consider the point on appeal. See *Jones* v. *State,* 224 Ark. 134, 273 S.W.2d 534 (1955).

Affirmed.

FAUSETT AND COMPANY, INC.;
FAUSETT MANAGEMENT COMPANY; ROUND
RIVER DEVELOPMENT COMPANY; Edward K.
WILLIS; Stephen C. HOCKERSMITH; and
Moise B. SELIGMAN *v.*
The Honorable David BOGARD, Circuit Judge

84-226 685 S.W.2d 153

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Dodds, Kidd, Ryan & Moore; Wright, Lindsey & Jennings;* and *The Rose Law Firm,* for appellants.

*Steve Clark,* Att'y Gen., by: *Kay J. Jackson Demailly,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. This matter is here on an original petition for a writ of prohibition to the Pulaski Circuit Court, Sixth Division, to prevent the trial court from conducting a trial on the matter in dispute between the parties. Petitioners argue the Circuit Court lacks jurisdiction because the plaintiff lacks standing and capacity to maintain an action in the courts. We agree that the plaintiff lacks both standing and capacity.

Round River Horizontal Property Regime (Regime) filed suit in the trial court below seeking damages for breach of contract and punitive damages. The Regime was and is an unincorporated association of property owners who own most of the condominiums in a project which was originated, developed, managed and sold by petitioners. The Regime is apparently in control of the common property used by the residents. Petitioners' answer to the complaint was that the Regime lacked capacity and standing to maintain the action. The trial court denied petitioners' motion for a summary judgment. This petition was then filed in this court.

The trial court found that the Regime was an unincorporated association with no designated agent for service of process. This fact is undisputed. Therefore, the question presented is whether such an association has capacity or standing to maintain an action in its own behalf.

We briefly note that the purpose of a writ of prohibition is to prevent a court from exercising powers not authorized by law when there is no other adequate remedy available. *Streett* v. *Roberts,* 258 Ark. 839, 529 S.W.2d 343 (1975). If jurisdiction depends upon establishment of facts, then it is a

matter for the trial court and properly presented on appeal to this court. *Robinson* v. *Means, Judge,* 192 Ark. 816, 95 S.W.2d 98 (1936). In the case before us all parties agree that the plaintiff is an unincorporated association with no agent for service and that the association is apparently operating pursuant to its own bylaws. Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Titsworth* v. *Mayfield,* 241 Ark. 641, 409 S.W.2d 500 (1966).

We now consider whether the Regime has capacity to sue. The general rule in Arkansas is that an unincorporated association does not have the capacity to sue. *Curators of Central College* v. *Bird,* 148 Ark. 323, 229 S.W. 730 (1921). In *Bird* we stated: "It goes without saying that suits must be instituted or defended by persons, either natural or artificial. 'Curators of Central College' is not a designation or description of any person either natural or artificial." In *Baskins* v. *United Mine Workers of America,* 150 Ark. 398, 234 S.W. 464 (1921), an unincorporated association (the union) was sued on allegations that members of the association had murdered the decedent. We held that an unincorporated association could not be sued in the absence of a statute, but that the proper parties were the individual members. We do not find that the legislature has enacted statutes allowing the Regime to sue or be sued. The same issue was considered in *Smith* v. *Arkansas Motor Freight Lines, Inc.,* 214 Ark. 553, 217 S.W.2d 249 (1949). In *Smith* the union had entered into a contract with the employer. The president and secretary of the union brought suit, in a class action for all of its members, to compel the employer to comply with the terms of the agreement. We held that the action could be maintained. However, the authority to sue was pursuant to Ark. Stat. Ann. § 27-809 (1947). That statute was superseded by ARCP Rule 23 (class actions). In the present case there was no person, natural or artificial, purporting to act for the class. The Regime is simply a piece of property owned by the individual members of the association. Absent statutory authority or incorporation, the Regime has no capacity to sue or be sued.

We now consider the "standing" issue. An unincor-

porated association cannot acquire and hold property in its own name. *NLR Hunting Club* v. *Toon,* 259 Ark. 784, 536 S.W.2d 709 (1976). Suits brought by or against members of an unincorporated association may be maintained as class actions by naming certain members as representatives of the class if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. ARCP Rule 23.2. Summons may be served upon an unincorporated association by serving an agent authorized by appointment or by law to receive such service. ARCP Rules 4(d) and (5). No such person exists in the present case. In this case there was no named individual who had been appointed or designated by law to receive process or act on behalf of the other class members. Therefore, the Regime had neither standing nor capacity to sue.

Writ granted.

DUDLEY, J. and HAYS, J., not participating.

# Joe MOUROT, Marlin FREEMAN and Joyce BAILEY *v.* ARKANSAS BOARD OF DISPENSING OPTICIANS

84-241 685 S.W.2d 502

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Larry D. Vaught,* for appellant.

*Steve Clark,* Att'y Gen., by: *Thomas S. Gay,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The Arkansas Board of Dispensing Opticians was created by Act 589 of 1981 (Ark. Stat. Ann. §§ 72-2102 — 72-2123 [Supp. 1983]). Among the Board's duties are the registration and licensure of dis-

pensing opticians. Applicants for registration or licensure are normally required to successfully complete an examination of their professional skills. However, section nine of the Act (Ark. Stat. Ann. § 72-2109) is a "grandfather clause" which allows the registration or licensure, without examination, of dispensing opticians who meet certain requirements. Under section nine, the requirements for obtaining a certificate of registry are somewhat different from the requirements for obtaining a certificate of licensure.

Appellants applied to the Board for certificates of licensure under section nine. The applications were denied. Appellants appealed to the full Board which, after interviews with appellants, again denied the applications. The Board stated that it was denying the applications because appellants had not "been providing direct retail ophthalmic dispensing services as [their] primary mode of employment or business." Appellants appealed to the circuit court, which affirmed the decision of the Board. This appeal followed.

The Board's decision must be reversed because there is no requirement that an applicant for licensure must have "been providing direct retail ophthalmic dispensing services as his primary mode of employment or business. . ." That language is taken from subsection (a) of section nine, which sets out the requirements to be met by applicants for certificates of registry. It has no application to applicants for certificates of licensure. The requirements for applicants for certificates of licensure are set out in subsection (b) of section nine. An applicant under subsection (b) need only show, in addition to requirements not in dispute here, that he has "been providing ophthalmic dispensing services to the public. . . for a minimum period of five (5) years immediately prior to the effective date of [the] Act." Appellants met their burden of proof when they demonstrated that they have been providing such services for the requisite period of time.

Contrary to the Board's argument, neither this court nor the Board has the authority to add a "full time," "primary mode of employment," or "retail" requirement to subsection (b). When a statute is plain and unambiguous,

we must give it effect as it reads. In such cases, we are primarily concerned with what the document says, not with what its drafters may have intended. *Bishop* v. *Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983); *City of Little Rock* v. *Arkansas Corp. Commission*, 209 Ark. 18, 189 S.W.2d 382 (1945). If the General Assembly did intend to say something different in subsection (b), it has the authority to amend the Act. Unless and until the General Assembly does amend the Act, our duty is to apply it as it reads.

Reversed.

John A. YACONO *v.* STATE of Arkansas

CR 85-2 685 S.W.2d 500

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Robert E. Irwin,* for appellant.

*Steve Clark,* Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted in the Yell County Circuit Court, to which he had appealed from a municipal court conviction, of DWI (Act 549 of 1983). On appeal to this court he argues: I) the Circuit Court erred in allowing the introduction of a breathalyzer test showing his blood alcohol content was .13%; II) the verdict was contrary to the facts and the law; and III) it was error to allow the test results because it was not taken immediately after he had been driving. We do not agree with these arguments and therefore affirm the judgment of the trial court.

The facts reveal that appellant had been drinking at a party before driving his girlfriend home. Near her house he struck an embankment or some stationary object. Thereafter he drove the car to her house where he stated he consumed additional alcohol. The accident occurred sometime between 11:30 p.m. and midnight on December 10, 1983, and the ticket charging him with DWI was written at 12:09 a.m. on December 11, 1983. The breathalyzer test was administered shortly thereafter. The appellant was charged with DWI in violation of Act 549 of 1983.

Officers Sheets and Hardin did the primary investigation. They testified that they found a partially empty brandy bottle in the car and stated about 15 minutes elapsed from the time of the accident until the arrest for DWI. One of the

officers testified he observed the appellant as being unsteady, hardly able to stand, weaving back and forth, smelling like he had poured alcohol all over himself, and having slurred speech.

I

The trial court allowed the introduction of the breath test into evidence although appellant was charged with being intoxicated. Ark. Stat. Ann. § 75-2503 (a) (Supp. 1983) makes it illegal for a person to operate or be in control of a vehicle if he is intoxicated. Subsection (b) of the same statute makes it illegal for a person to operate or be in control of a vehicle if his blood alcohol content is 0.10% or more. Either of the above described conditions is a violation of Act 549 of 1983, commonly called the "Omnibus DWI Act." The emergency clause stated the matter of vehicles being operated or controlled by persons under the influence of alcohol or drugs was so great a danger to the public that the Act should go into effect immediately. The thrust of the Act is to keep drinking drivers and those using drugs out of vehicles because the General Assembly has determined them to be a threat to the general public. When a person operates or controls a vehicle while intoxicated (as a result of the ingestion of alcohol or drugs or both) or with a blood alcohol content of 0.10% or more, he violates Act 549. The penalty is the same whether the act is violated by conduct described by (a) or (b). In other words, the two conditions are simply two different ways of proving a single violation. Intoxication may be proven in the manner described in Ark. Stat. Ann. § 75-2502 (a). Proof of blood alcohol content in excess of 0.10% is evidence which may tend to prove intoxication.

II

Little time need be spent on the argument of the sufficiency of the evidence. The test is whether there is substantial evidence to support the verdict. *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978). Substantial evidence is such evidence that forces the mind to a conclusion which is beyond suspicion or conjecture. *Brown* v. *State,* 278 Ark.

604, 648 S.W.2d 67 (1983). In deciding whether evidence is substantial, appellate courts take notice of the unquestioned laws of nature, of mathematics and of physics. *Ocker* v. *Nix,* 202 Ark. 1064, 155 S.W.2d 58 (1941). In testing whether there is substantial evidence we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party who is relying upon the evidence. If material and relevant evidence is not in dispute or there is a conflict in the evidence to the extent that fair minded persons might draw different conclusions therefrom, the evidence is substantial. *Collett* v. *Loews,* 203 Ark. 756, 158 S.W.2d 658 (1942). The evidence, both disputed and undisputed, recited in the facts of this case are such that reasonable minded persons could reach different conclusions. Therefore, there is substantial evidence to support the verdict.

III

Appellant cites no authority for the argument that the trial court erred in allowing the results of the breath test to be introduced into evidence. The test was given at least 30 minutes after the accident and after appellant had drunk additional alcohol. This argument is based entirely upon the fact that appellant ingested additional alcohol between the time of the accident and the time of the test. Of course there is no method by which the additional whiskey could be measured separately from the old whiskey which was already in his bloodstream. There was substantial other evidence to support the verdict without considering appellant's blood alcohol content. In any event the test results were admissible along with any other relevant evidence.

Affirmed.

# Harold WILLIAMS and CENTRAL UTILITIES CONSTRUCTORS, INC. *v.* JOYNER-CRANFORD-BURKE CONSTRUCTION CO. and UNITED PACIFIC INSURANCE CO.

84-242 685 S.W.2d 503

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Rose Law Firm, A Professional Association,* by: *Richard T. Donovan,* for appellant.

*Friday, Eldredge & Clark,* by: *Michael G. Smith,* for appellee.

ROBERT H. DUDLEY, Justice. Appellants, Central Utilities Constructors, Inc., a construction company, and Harold Williams, its primary shareholder, filed suit alleging that appellees, Joyner-Cranford-Burke Construction Co., and United Pacific Insurance Company, its bonding company, refused to pay appellant Central the $27,999.98 balance due on its written subcontract for construction of sewer laterals in the Mabelvale-Alexander Sewer Improvement District #142. Appellants further alleged that appellees' conduct and failure to act in a commercially reasonable manner was so egregious that appellees were guilty of the tort of bad faith. Appellees contended that appellants could not bring an action in either law or equity for the breach of any contract related to the District since neither appellant was licensed as a contractor pursuant to Ark. Stat. Ann. § 71-701 et seq. (Repl. 1979), the contractor's licensing act. Section 71-713 provides generally that contractors who undertake construction jobs, excluding residences, with a cost to the contractor of $20,000.00 or more must be licensed to do business by the State Licensing Board for Contractors. Failure to obtain such a license constitutes a misdemeanor, and the statute additionally prohibits the contractor from suing ". . . either at law or in equity to enforce any provision of a contract entered into . . ."

Appellees further answered that appellants failed to

state a claim upon which relief could be granted for the alleged tort of bad faith non-payment.

Appellants subsequently amended their complaint to plead that they were not seeking reimbursement for work performed under the original $500,000.00 written contract but for work performed pursuant to 16 separate and distinct oral contracts for the construction of the laterals, none of which exceeded $20,000.00. The trial court granted summary judgment in favor of both appellees. We affirm. Jurisdiction is in this court pursuant to Rule 29(1)(c) of the Rules of the Supreme Court.

The affidavits submitted by the appellees in support of their motion for Summary Judgment establish the following:

(1) Neither Harold Williams nor Central Utilities Constructors, Inc. was a licensed contractor with the Arkansas Contractors Licensing Board pursuant to the requirements of Ark. Stat. Ann. § 71-701 at the time the written subcontract with Joyner-Cranford-Burke was executed.

(2) The total approximate price for the job to be completed under the subcontract by Central Utilities was $500,000.00.

(3) The laterals set out in the plaintiffs' amended complaint were all a part of the Sewer Improvement District No. 142 project, and these laterals were add-on items to the original subcontract. The laterals were created by change orders issued to Joyner-Cranford-Burke from the engineers on the project and in some cases they replaced the laterals listed on the written contract between Joyner-Cranford-Burke and Utilities.

(4) All payments to Central Utilities for the work performed by it on Sewer Improvement District No. 142 were governed by the written contract, and the terms of performance of the extra work were governed wholly by the written subcontract.

In response, Appellant Harold Williams filed an affidavit which stated:

> (1) The contracts referred to in my Amended Complaint were sixteen separate and distinct oral contracts. Each lateral listed in my Amended Complaint constitutes a separate and distinct oral contract entered into between myself and Joyner-Cranford-Burke.

The appellants contend that their amended complaint coupled with Williams's affidavit raise genuine issues of material fact. We find the argument without merit.

Even though affidavits for summary judgment are to be construed against the movant, *Leigh Winham, Inc.* v. *Reynolds Ins. Agency,* 279 Ark. 317, 651 S.W.2d 74 (1983), once the moving party makes a prima facie showing of entitlement to a summary judgment, the responding party must discard the cloak of formal allegations and meet with proof by showing a genuine issue as to a material fact. *Hughes Western World, Inc.* v. *Westmoor Mfg.,* 269 Ark. 300, 601 S.W.2d 826 (1980). Our summary judgment rule, ARCP Rule 56, requires that proof offered to meet a properly supported motion for summary judgment "must set forth *specific facts* showing that there is a genuine issue for trial." *Turner* v. *Baptist Medical Center,* 275 Ark. 424, 631 S.W.2d 275 (1982). Affidavits which consist merely of general denials, without any statement of specific facts, are insufficient. *Id.* at 427.

In the case at bar, it is undisputed that appellants were not licensed; that their overall subcontract called for payment of $500,000.00; and that all laterals were a part of the Improvement District No. 142 project. By affidavit the appellees swore that these laterals were add-on items to the original contract and were caused by change orders from the engineers and that the terms of performance on these added laterals were governed wholly by the written subcontract. To those specific facts, the appellants merely gave a conclusory affidavit that each lateral constituted a separate and distinct oral contract. The appellants failed to meet proof with proof. They did not allege that the extra laterals were

negotiated separately, nor that there was anything separate and distinct about these laterals, nor did they deny that the terms of performance for the laterals were governed by the original contract.

The summary judgment must be affirmed for another reason. The appellants offer no facts to dispute appellees' statement that all of the laterals were a part of the Improvement District No. 142 project. The statute applies when "the cost of the work to be done" is $20,000.00 or more. The "cost of the work to be done" by appellant on the project was $500,000.00, and the statute cannot be circumvented by dividing the project into many contracts of less than $20,000.00. See *Cochran* v. *Ozark Country Club, Inc.*, 339 So.2d 1023 (Ala. 1976). The word "cost" refers to the aggregate amount which a contractor is to receive on any one project. The trial court correctly granted the motion for summary judgment on the claim for breach of contract.

The appellants' complaint also contained a count for the tort of bad faith. The trial court ruled that the claim failed to state facts upon which relief could be granted. Appellants ask us to problematically decide whether the contractors licensing statute precludes an unlicensed contractor from bringing a claim sounding in tort. We need not decide that issue, for this claim does not state a cause of action for the tort of bad faith, no matter how we interpret the statute.

The count is as follows:

> That due to JCB's and UPIC's [Appellees] willful conduct and failure to act in a commercially reasonable manner the Plaintiff, Harold Williams, has been irreparably harmed, in that he has been psychologically injured by the infliction of mental distress and his business reputation, as well as the business reputation of CUC, has been damaged beyond repair and as a result of these actions of JCB and UPIC he has been forced to file personal bankruptcy pursuant to Chapter 11 of Title XI, United States Code, on March 21, 1983. (R. 3)

It will be seen that the count does not assert any *affirmative* action on the part of the appellees which would constitute the tort of bad faith. Under our rules of civil procedure we do not recognize "notice pleadings," we recognize "fact pleadings." ARCP Rule 8; *Dunlap* v. *McCarty,* 284 Ark. 5, 678 S.W.2d 361 (1984). In notice form the complaint states that it is for willful conduct. It fails to state any facts from which one could conclude that appellees engaged in dishonest, malicious, or oppressive conduct in order to avoid their liability. The trial court correctly ruled that the tort count for bad faith failed to state facts upon which relief can be granted.

The appellants next contend that the contractors licensing statute is intended to protect the public, not contractors, and it should not be used as a shield by a contractor to avoid an otherwise valid obligation to a subcontractor. We have examined the statute in light of appellants' argument, but the statute is so clear that to quote it in the pertinent part is to fully answer the argument. "No action may be brought either at law or in equity to enforce any provision of *any* contract entered into in violation of this act." Ark. Stat. Ann. § 71-713 (Repl. 1979). Unfortunately for the appellants, the statute is a penal one, and, at times, harsh results flow from construction of penal statutes.

Affirmed.

# E. W. GLOVER *v.* R. H. DIXON

84-231 688 S.W.2d 930

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Guy Jones, Jr., P.A.,* for appellant.

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

DAVID NEWBERN, Justice. This case arose from a collision of two pickup trucks at an intersection of two unpaved country roads. The question presented is whether the court should have given instructions based on the statutory rules of the road despite evidence that one of the roads was on private property. As we must determine the

applicability of certain statutes, our jurisdiction arises from Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

The plaintiff Glover was coming from the defendant Dixon's right hand side. He asked the court to instruct, in accordance with Arkansas Model Jury Instruction 904, that the vehicle on the left must yield the right-of-way when two vehicles approach an intersection at the same time. The instruction is based on Ark. Stat. Ann. § 75-621(b) (Repl. 1979) which says,

> When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

Glover also asked the court to instruct the jury in the specific terms of the statute and in accordance with AMI 903.

The AMI 904 instruction and the statute use the terms "intersection" and "highways." In refusing the instructions the court said, in part,

> . . . the court believes, based on the testimony, that this was an intersection of a county road some two lanes wide with maintained ditches and a private road belonging to the timber company barely wide enough for two cars to pass. . . .

The facts as to the relative widths and state of maintenance of the two roads were disputed. There was evidence that the road on which the plaintiff travelled was on privately owned land, but there was no evidence taken on whether it was a private road.

Ark. Stat. Ann. § 75-412(b) (Repl. 1979) defines "private road" as one "in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by others." Ark. Stat. Ann. § 75-412(a) (Repl. 1979) defines a "highway" as being "open to the use of the public, as a matter of right, for purposes of vehicular traffic."

An "intersection" is defined as a place at which two "highways" come together. Ark. Stat. Ann. § 75-413 (Repl. 1979).

As we said in *Louisiana & A. Ry.* v. *O'Steen,* 194 Ark. 1125, 110 S.W.2d 488 (1938), an instruction is not objectionable if the objection assumes facts in dispute. Nothing in the record before the trial court or before this court could be viewed as conclusive on the issue whether the public had the right to use the road on which the plaintiff entered the alleged intersection. If the road on which the plaintiff travelled fit the definition of a "highway," the instructions sought would have been appropriate. The evidence that the road was on private property was insufficient to reach the conclusion that the instructions should not have been given. The jury should have been allowed to decide whether the road travelled by the plaintiff was a "highway."

Reversed and remanded for a new trial.

Herbert DUNCAN and Silersteen DUNCAN *v.*
DAVIS AND EARNEST, INC. d/b/a DAVID DISCOUNT
AND GENERAL SHEET METAL CO.

84-261 685 S.W.2d 509

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*James C. Cole,* for appellant.

*G. Christopher Walthall,* for appellee.

DAVID NEWBERN, Justice. Davis and Earnest, Inc., hereafter referred to as "Davis," claims a materialman's lien on property owned by the Duncans. The notice required by Ark. Stat. Ann. § 51-608.1 (Supp. 1983) to be given by the materialman to the owner prior to supplying material, and ordinarily necessary to perfection of the lien, was not given. Davis claimed, and the trial court held, that the notice was not required because the transaction or transactions fell within an exception to the notice requirement. The exception is created by Ark. Stat. Ann. § 51-608.5 (Supp. 1983) in the case of a "direct sale" by the materialman to the property owner.

The question on this appeal is whether the determination that the statutory exception to the notice requirement applied was clearly erroneous, i.e., clearly against the preponderance of the evidence. As we are required to interpret the statute, our jurisdiction arises under Arkansas Supreme Court and Court of Appeals Rule 29 1. c.

The statute, § 51-608.5, provides that the notice requirement of § 51-608.1 does not apply if there is a direct sale by the materialman to the property owner. It further provides that "[a] sale shall be a direct sale only if the owner or his authorized agent personally orders such materials from the lien claimant."

The chancellor's findings were that the notice was not required because the Duncans had dealt personally and directly with Davis. The judgment says Davis ". . . by virtue of its direct contact with the defendants, has availed itself of the statutory exception to the requirement for notice. . . ." However, the primary position of Davis in this appeal is that the Duncans made their builder, Leard Burks, their "authorized agent" and thus entitled Davis to the exception to the notice requirement. As there was no finding on the agency point by the trial court, we assume Davis is asking us to say the chancellor reached the correct result for the wrong reasons and should be affirmed notwithstanding the reason given.

We will first explore whether the findings of the

chancellor were clearly against the preponderance of the evidence and then whether the record supports Davis's "authorized agent" theory.

*1. Direct Dealing*

The Duncans hired Burks to build a house in Hot Spring County while they continued to reside in Ohio, making occasional visits to Arkansas.

The evidence of direct dealing between Davis and the Duncans cited by Davis was that the Duncans went to the store several times and picked out some items to be used in the construction of their home. Davis contends that the Duncans "ordered" the items, but the very exhibit to which they point to support the contention is just a list made by a Davis employee of items such as a bathtub, sink and windows. It contains no prices or delivery specifications. The only name on the paper is "L. Burks," the builder.

There was also testimony that on the occasion of selecting the materials Mr. Duncan left his business card with a Davis employee, saying to let Burks have whatever was needed and to call him in the event of a problem and that "money is no problem."

By contrast, the Duncans' Exhibit 3 consists of twelve invoices totaling $11,992.31, the amount of the lien sought. On each of the invoices, the customer's name is shown to be Leard Burks. All but one show delivery to Leard Burks or a carpenter on the job, and the one exception does not show who the recipient was.

A Davis employee testified he gave the statutory lien notice form to Burks to be signed by the Duncans but that it was not returned. Mr. Duncan testified he had refused to sign the form.

The trial court's finding that Davis dealt directly with the Duncans is clearly against the preponderance of the evidence. All of the documents show Burks was their customer. The mere act of picking out items to be supplied

to Burks is no evidence that the Duncans placed an order with Davis. Had Davis thought it was dealing directly with the Duncans surely the Duncans rather than Burks would have been billed for the materials, but that was not the case. We find the clear preponderance of the evidence shows Burks was Davis's customer, having been engaged to build a house for the Duncans as an ordinary contractor. If Davis planned to assert a lien on the property, it should have complied with the clear statutory notice requirement by obtaining a signed notice form.

*2. Authorized Agent*

The testimony of a Davis employee that Mr. Duncan told him to let Burks have whatever was needed is some evidence showing an agency existed. However, in view of the already recited overwhelming evidence that Davis regarded Burks as its customer and not as agent for the Duncans, we are disinclined to go beyond the trial court's findings on this record to say the notice requirement did not apply.

The statutory notice requirement and exception scheme enacted in 1979 is apparently in some measure a codification of the earlier common law. In *Malone* v. *Holly Grove Lumber Co.,* 148 Ark. 242, 229 S.W. 716 (1921), the question whether a builder was an agent of the property owner for purposes of the materialman's lien arose. There we were dealing with the ten-day notice requirement contained in § 51-608. We said the notice requirement does not apply if the owner himself purchased the material. We upheld the chancellor's determination that purchases had been made by a builder as agent for the owner and thus the purchases were by the owner and the notice was not required. We said,

> . . .[t]he fact that the material was charged to, shipped to, and received by, appellant [the property owner] and the testimony that an invoice and monthly statement were sent to appellant are strong corroborative circumstances that it was sold directly to said appellant on the order of [the builder]. . . .[148 Ark. at 246, 229 S.W. at 717]

In this case, none of those factors were present. Quite the contrary is shown by the record.

*Conclusion*

We find the evidence of agency, when compared with evidence that Burks was an independent contractor and the customer of Davis, insufficient for the exercise of our de novo review power to reach a factual determination different from that of the chancellor but in support of the result he reached.

We hold the chancellor's finding that Davis dealt directly with the Duncans is clearly erroneous, i.e., clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a), *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W.2d 664 (1981).

Reversed.

Stacy J. PRICE *v.* STATE of Arkansas

CR 85-25 685 S.W.2d 506

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*James F. Werner,* for appellant.

*Steve Clark,* Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. This is an appeal of a conviction of DWI under Act 549 of 1983 and of speeding. Questions of interpretation and constitutionality of the Act are raised, thus our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29.1. a. and c. Facts necessary to understanding the appellant's points will be considered as each point is discussed.

*1. Sufficiency of Citation*

The appellant complains that he was charged with DWI by an instrument entitled "complaint" rather than "citation." The appellant does not suggest how he was prejudiced by this misnomer. Neither his abstract or the record shows the point to have been argued to the trial court, so we will not consider it on appeal. *Boone* v. *State,* 282 Ark. 274, 668 S.W.2d 17 (1984). For the same reason we decline to consider the appellant's argument that the "complaint" did not notify him of the time and place of the trial. There was no objection in the trial court. *Stiles* v. *Hopkins,* 282 Ark. 207, 666 S.W.2d 703 (1984).

The appellant contends the "complaint" was insufficient because it simply charged him with DWI and was issued within ninety days after the adjournment of the

General Assembly session which passed Act 549. The argument is that no case had yet decided the validity vel non of the emergency clause which accompanied the Act. The short answer to this argument is that all legislation is presumed to be constitutionally valid. *Davis* v. *Cox,* 268 Ark. 78, 593 S.W.2d 180 (1980).

*2. Culpable Mental State*

The appellant argues Act 549 should be declared invalid because it does not require a culpable mental state and is thus in violation of the requirement of Ark. Stat. Ann. § 41-204(2) (Repl. 1977). That section says if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required. It clearly does not require that any criminal statute make a culpable mental state an element of the crime in so many words.

*3. Conflict with Act 409*

The appellant argues that Act 409 of 1983, which deals generally with sentencing, came into effect after Act 549 and thus invalidates the sentencing limitations of Act 549. Act 549 had an emergency clause, and it came into effect March 21, 1983. Act 409 had no emergency clause, and it came into effect July 1, 1983. The appellant argues that the act which comes into effect later is controlling. The argument is not correct. If there is a conflict which cannot otherwise be resolved Act 549 is the later expression of the legislative will, and thus it is controlling regardless of its having become effective earlier than Act 409. *Williams* v. *State,* 215 Ark. 757, 223 S.W.2d 190 (1949).

*4. Radar Operator's Qualifications*

Testimony at the trial was that the appellant drove 45 mph in a 25 mph zone. The appellant contends the officer who operated the radar device upon which the testimony was based was in violation of Act 672 of 1983, and the testimony should have been stricken. The officer testified he had been certified in 1980. The Act, codified in relevant part as Ark. Stat. Ann. § 42-1013(b) (Supp. 1983), provides that

police radar operators have one year from March 22, 1983, to complete new training or have previous training determined to be equivalent. The appellant's trial was in January, 1984, thus the officer's certification was not invalidated by the Act.

*5. Observation Time*

The appellant was given a breathalyzer test showing his blood alcohol content to have been in excess of the minimum permitted for drivers under Ark. Stat. Ann. § 75-2503(b) (Supp. 1983). He contends he was not kept under observation for a twenty-minute period before the test was administered. Evidence showed the appellant was stopped in his car no later than 11:31 p.m., and the test was administered at 11:54 p.m. During that twenty-three minute period the appellant was in the presence of officers. We have held that substantial compliance with the state health department regulation requiring the observation period is sufficient. *Sparrow* v. *State,* 284 Ark. 396, 683 S.W.2d 218 (1985). There was substantial compliance in this case.

*6. Presentence Report Requirement*

Ark. Stat. Ann. § 75-2506 (Supp. 1983) requires that before sentence is pronounced the court must have received a presentence report from the "Highway Safety Program or its designee." In this case there was no such report, so the court was in error in pronouncing sentence. However, no objection was made before or after pronouncement of sentence. After sentencing defense counsel said, "Doesn't he have to visit the alcohol treatment center?" After colloquy between the court and the prosecutor the defense counsel said, "But you're not requiring visiting the treatment center before sentencing?" Neither of these interrogatories can be characterized as an objection. No mention was made of the specific statutory requirement, and thus the court was not given an opportunity to rule on it. The issue was thus not preserved for appeal. *Stiles* v. *Hopkins,* 282 Ark. 207, 666 S.W.2d 703 (1983).

Two other points were raised by the appellant, but we will not consider them because they were supported neither

by authority nor by convincing argument. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Affirmed.

John C. PULLAN d/b/a SHEAR PLEASURE FAMILY HAIR CARE *v.* Julia P. FULBRIGHT d/b/a JULIA'S SHEAR PLEASURE BEAUTY SALON and Raymond PHILLIPS *v.* Patricia Ann HILL and Robert Lee HILL

685 S.W.2d 151

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Floyd G. Rogers,* for appellant John C. Pullan.

*James C. Mainard,* for appellant Raymond Phillips.

No response by appellees.

PER CURIAM. Motions for Rule on Clerk were filed in both of the above-styled cases. Both motions state that the parties in the respective cases have been notified that the transcripts of the Crawford County proceedings cannot be filed by the Supreme Court Clerk because the court reporter who transcribed them, Mickey Sparks, is not properly certified as a court reporter.

This court adopted a rule providing for the certification of court reporters on July 5, 1983. *In Re: Arkansas Supreme Court Bd. of Certified Court Reporters Examiners,* 280 Ark. 598, 656 S.W.2d 694 (1983). Section 9 of that rule provides as follows:

> Scope.
> As to all transcripts taken from and after the effective date of this Rule, all courts in Arkansas will accept as evidence only those transcripts which are certified by a court reporter who holds a valid certificate under this Rule.

By Per Curiam order September 26, 1983, this court approved certain rules and regulations with reference to Certified Court Reporters, including the following provisions:

12. Any eligible applicant not certified pursuant to the

*per curiam* Order of the Supreme Court of Arkansas, dated July 5, 1983, or any eligible applicant who is certified in another state, may be granted a non-renewable temporary certificate, at the discretion of the Board, to enable said applicant to work. Applicants issued a temporary certificate shall be given a period of one year from the date of said certificate to complete certification requirements.

13. In the event of an emergency where no Certified Court Reporter is immediately available, a judge of a circuit or chancery court may in his discretion, grant a thirty-day, non-renewable emergency certificate in order to continue the conduct of the court's business; provided a copy of the thirty-day emergency certificate is forthwith filed with the Clerk of the Arkansas Supreme Court and Secretary of this Board.

It is undisputed that Mickey Sparks, the Court Reporter in both cases, was not certified. Under Section 9 therefore, the transcripts cannot be accepted by this court as evidence unless Mr. Sparks has a valid temporary certificate or emergency certificate as defined in the regulations.

The records of the Clerk of this Court reflect that Mr. Sparks made formal application on June 27, 1984, for "a temporary permit" from our Clerk to continue reporting until such time as he obtained certification, taking exception to the paying of his fee. On July 2, 1984, he was advised in writing by Judge Cracraft, Chairman, Board of Court Reporting Examiners, that our Clerk does not issue temporary certificates and they are only issued by action of the full Board of Examiners upon payment of his application fee. Mr. Sparks was not heard from again until January 18, 1985, at which time he resubmitted an application for "a temporary work permit" together with tender of application fee.

On January 24, 1985, Chancellor Bernice L. Kizer issued orders *In the Matter of the Adoption of Ronald Lee Hill,* Van Buren Probate No. P-83-101 declaring an emergency to exist and ordering that Mickey Sparks be allowed to serve as

certified court reporter on August 7, 1984. At the same time an identical order was issued in *Julia Fulbright et al* v. *John Pullan,* Van Buren Chancery No. E-83-543 specifying that Mickey Sparks was not certified on July 31, 1984, declaring an emergency and ordering that Mickey Sparks be allowed to serve as certified court reporter in the proceedings on that date. In each instance these orders were entered in the trial court *nunc pro tunc* but were not filed with the Clerk of this Court or with the Secretary of the Board of Certified Court Reporters Examiners as required by Regulation 13.

It is obvious that Mickey Sparks was not a properly certified court reporter on July 31, 1984, and/or August 7, 1984, and that the court's order of January 24, 1985, entered *nunc pro tunc* to these respective dates does not satisfy the regulations.

The actions of applicant Sparks and of the trial court which issued orders allowing him to serve as "Certified Court Reporter" are in direct conflict with the court's Per Curiam orders and regulations, thus violating the purpose and spirit of the certification of court reporters. Although application is a matter for the person desiring to be certified as a court reporter, it is the responsibility of all courts in Arkansas to ascertain and insure that his or her court reporter is properly certified.

It is our intention to adhere strictly to § 9, however, an exception will be made in this instance, since this is the first airing of our Rule and its strict application.

In the interests of allowing the litigants in these cases their opportunity to appeal and because of the burdensome effect on our court system of such a harsh result, we will accept transcripts in each of these cases, provided the attorneys of record will certify to the Supreme Court Clerk, by affidavit, statements that the transcripts are true, accurate, and complete and provided the trial court certifies that this reporter is not now employed as court reporter without proper certification.

In the future, remedies of this nature may not be available.

Lodene GARRETT, et al v.
Honorable Perry V. WHITMORE, Judge

85-49 685 S.W.2d 172

Supreme Court of Arkansas
Opinion delivered March 4, 1985

*Charles L. Carpenter,* for petitioner.

*Steve Clark,* Att'y Gen., and *Jim Hamilton,* City Att'y for North Little Rock, for appellee.

PER CURIAM. Petition for Writ of Prohibition is denied. Purtle, J., would grant.

JOHN I. PURTLE, Justice, dissenting. The majority denied the petition for prohibition without written opinion, as we often do because of the tremendous number of petitions and motions which we must act upon. To write a full opinion in all cases is an impossibility. The petition sought to compel the circuit court to transfer this case back to chancery from whence it came. The petitioners originally filed a complaint in chancery to prohibit the City of North Little Rock and the Pulaski County Election Commission from holding an annexation election in conjunction with the annual school board election. The complaint relied upon Ark. Stat. Ann. § 19-307.2 (Repl. 1980) which speaks to annexation elections and in part states: "Such annexation ordinance shall not become effective until the question of annexation is submitted to the qualified electors of the annexing city and of the area to be annexed at the next general election or at a special election." The statute gives the circuit court jurisdiction over such annexation procedures.

Petitioners sought to prevent the election in the chancery court, alleging an illegal exaction in violation of Article 16, Section 13, of the Constitution of the State of Arkansas. When a local bank agreed to pay the future election expense, the chancellor transferred the case im-

mediately to the circuit court. Petitioners then moved to transfer the case back to chancery. After the circuit court rejected their motion a petition for a writ of prohibition was filed in this court. The petition sought to compel the circuit court to transfer the case back to equity.

The ordinance was published on February 14, 1985, and the complaint was filed on February 19, 1985. The motion to transfer was filed on February 21, 1985, a hearing was held on February 26, 1985, and the order of transfer was entered on March 1, 1985. On the same day a motion to transfer back was filed and still later on March 1, 1985, the motion was denied. The present petition was filed on March 4, 1985, and denied on the same day by this court. There has been no foot dragging by the parties or the courts.

Time is of the essence. I would exercise our superintending control over inferior courts as established in Article 7, Section 4, of the Constitution of the State of Arkansas and prohibit the election until it is held according to law. We have the authority to treat a pleading for what it is rather than what it is called by the parties. Ark. Stat. Ann. §§ 27-131 and 27-1160 (Repl. 1979); *Edwards* v. *Brimm,* 236 Ark. 588, 367 S.W.2d 433 (1963). In any event if the parties and courts continue to exercise all deliberate speed, this cause of action may yet be heard prior to the election. If the election is not being legally held I am sure we will so declare and take proper action.

Floyd E. SAGELY, Jr., Steve P. DONEHUE and Ricky G. DAVIS *v.* STATE of Arkansas

CR 84-220 685 S.W.2d 169

Supreme Court of Arkansas
Opinion delivered February 25, 1985
[Substituted Opinion delivered March 4, 1985[

*William M. Cromwell,* for appellant.

No response.

PER CURIAM. The appellants Sagely, Donehue, and Davis, tendered a consolidated record for filing, but the clerk refused to file it on the ground that it was tendered too late as to some of the 14 named appellants. William Cromwell, counsel for these three appellants, insists that the tender of

the record was timely and has filed a motion for a rule on the clerk to compel the filing of the record.

Each of the appellants is in a different position. In Sagely's case the trial was in January, 1984, and notice of appeal was filed on February 21, but the judgment was not entered until July 31. The premature notice of appeal was timely, but the 90 days for the entry of an order extending the time for filing the record necessarily ran from the entry of the judgment. The order of extension was not entered until November 14, more than 90 days after July 31. The extension order was therefore invalid, and the record was tendered too late.

In Donehue's case the judgment was entered on July 31, the notice of appeal was filed on August 17, and the order extending the time for filing the record was entered within 90 days, on November 14. The record was tendered within the time allowed by the extension and was timely.

In Davis's case the judgment was entered on July 31, but the notice of appeal was not filed until September 4, which was past the 30 days allowed. Counsel is in error in arguing that three extra days for mailing are to be allowed under Civil Procedure Rule 6 (d). That provision does not apply to a judgment, which is not a pleading. A party is expected to keep himself informed about the entry of judgment. *Karam* v. *Halk,* 260 Ark. 36, 537 S.W.2d 797 (1976). If an attorney receives a copy of the judgment three days after its entry, he is obviously not prejudiced by having only 27 days more in which to file a simple notice of appeal.

As to Donehue, the tender of the record was timely; so the record was properly filed in his case. As to Sagely and Davis, the tender was not timely. The motion is therefore denied as to them. If counsel will file another motion assuming full responsibility for the errors or showing other sufficient cause for granting the motion, the motion for a rule on the clerk will be granted. See Per Curiam opinion, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964. (This opinion replaces an earlier one handed down on February 25, 1985.

Lonnie DUDLEY *v.* STATE of Arkansas

CR 85-13 685 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered March 4, 1985

Pro Se Petition to Proceed in the Circuit Court of Lincoln County pursuant to Criminal Procedure Rule 37; denied.

Appellant, *pro se.*

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

PER CURIAM. Petitioner Lonnie W. Dudley stabbed a fellow inmate at Cummins Prison and was subsequently convicted by a jury of first degree battery, Ark. Stat. Ann. § 41-1601 (1977). He was sentenced as an habitual offender with five prior felony convictions to a term of thirty years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Dudley* v. *State,* CA CR 83-21 (September 21, 1983). Petitioner seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37 on the grounds of ineffective assistance of counsel and the failure of the trial court to raise *sua sponte* the issue of his sanity.

Petitioner was examined before trial by the Southeast Mental Health Center and found competent. He contends now that he was not competent to stand trial and was mentally ill before, during and after the stabbing. He alleges that if counsel had investigated, he would have found evidence of his long history of mental illness and proof that he was under the influence of a drug when he stabbed the inmate. Petitioner argues that counsel should have put the evidence of his insanity before the jury even though he was found legally competent when examined at the mental health center.

Petitioner called several witnesses at trial to testify that he was watching television when the crime occurred. The main point of this petition appears to be that counsel should have employed an insanity defense instead of the alibi strategy which proved unsuccessful. If the question is one of mere trial strategy, then petitioner has stated no ground for granting postconviction relief. Questions of trial strategy are matters of professional judgment about which experienced advocates could engage in endless debate. As a result, such questions are not cognizable under Rule 37. *Leasure* v *State,* 254 Ark. 961, 497 S.W.2d 1 (1973).

Petitioner suggests, however, that counsel's conduct was unreasonable and therefore should be considered

fundamentally unsound representation. Petitioner lists witnesses who could have testified to his history of mental illness, drug use at the time of the offense and his general incompetence to stand trial, implying that an insanity defense was the only real choice open to counsel.

The United States Supreme Court has provided guidelines for assessing attorney performance in the area of investigation of a defense. These guidelines are applicable to petitioner's case.

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland* v. *Washington,* ___ U.S. ___, 104 S. Ct. 2052 (1984).

In light of the psychiatric report finding petitioner legally competent, petitioner has failed to overcome the presumption that counsel's decision to employ an alibi amounted to other than a reasonable professional judgment. The mere fact that an accused might have raised the question of mental competence at trial does not entitle him to a new trial or a hearing pursuant to Rule 37.

The allegation that the trial court should have injected the question of petitioner's sanity into the proceedings and given an instruction on insanity as a defense is without merit. While a trial court should be alert to circumstances suggesting that an accused is not competent to stand trial, *Drope* v. *Missouri,* 420 U.S. 162 (1975), there is nothing in the petition before us to show that the court had any reason to question the petitioner's competence.

After trial, counsel filed a motion to be relieved and a brief pursuant to *Anders* v. *California,* 386 U.S. 738 (1967), stating there was no merit to the appeal of the judgment.

Petitioner's final assertion of ineffective assistance of counsel is that filing a "no merit" brief is tantamount to ineffective assistance. He contends that counsel should have raised on appeal the issues presented in this petition.

The decision to file an *Anders* brief is a matter of professional judgment. Counsel, not the appellant, must decide whether the issues raised at trial are meritorious. *See Jones* v. *Barnes,* ___ U.S. ___, 103 S. Ct. 3308 (1983). Moreover, the sanity issue was not raised at trial and could not have been reviewed on appeal. If there were other issues which appellant wished to raise on appeal, he had the opportunity to raise them himself since he was informed of his right to file a brief in accordance with Supreme Court Rule 11 (h) but did not do so.

Petition denied.

Maxine Chrisco WEBB *v.* Bedford G. WEBB

84-269 685 S.W.2d 514

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Frierson, Walker, Snellgrove & Laser,* for appellant.

*Carolyn Lee Whitefield,* for appellee.

JACK HOLT, JR., Chief Justice. This is a divorce case which has previously been appealed to this court. *Webb* v. *Webb,* 262 Ark. 461, 557 S.W.2d 878 (1977). On remand, in 1979, the trial court issued a supplementary decree. Almost five years later the appellee filed a "Motion to Expunge" certain portions of that decree which was granted by the trial court. It is from that order of expungement that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29 (1) (j) as this is a second appeal.

The parties were divorced on September 26, 1976. The decree awarded property which had not previously been divided by the parties and $400 per month alimony for the appellant until February 1, 1977; provided for the payment of bills and insurance premiums; and ordered the appellee to pay the appellant one-third of his net income beginning February 1, 1977 through December 21, 1977 as alimony. An

amended decree also awarded attorney's fees and deposition costs. Jurisdiction was retained by the trial court for the February 1 through December 21 period to consider any petitions for modification and/or extension.

On October 21, 1976, the appellee filed a notice of appeal from that part of the decree relating to permanent alimony, support and maintenance. This court reversed the decree on November 28, 1977. *Webb, supra.*

The trial court, on August 8, 1979, issued a supplementary decree based on the pleadings, previous orders, this court's opinion, and stipulations of counsel. The supplementary decree found that due to the change in circumstances, no alimony should be awarded and instead the appellant was to receive a total of $4,025.00 for her interest in the appellee's property, unpaid expenses under the original decree and attorney's fees.

On June 21, 1984, the appellee filed a "Motion to Expunge" in which he argued that the portions of the supplementary decree of 1979 not relating to alimony were barred by the trial court's prior decision since the case was remanded by the Supreme Court on the alimony issue only.

In granting the motion, the trial court agreed that it was bound by the supreme court "to make appropriate orders on the issue of alimony only" and was without jurisdiction on the other matters. The trial court was without jurisdiction to entertain this motion.

Appellee's relief, if any, from the trial court's order of August 8, 1979, should have been sought through appeal or the procedure for modification of judgment. An appeal must be filed within 30 days from the entry of a decree or judgment. Ark. R. App. P. 4(a). The procedure for modifying a judgment is governed by Ark. R. Civ. P. 60(b) which provides that the judgment may be modified within 90 days after it's entered. Appellee should have acted within the time allowed, rather than five years later. Accordingly, the trial court is reversed and the order of expungement of the August 8, 1979 order is dismissed.

Cleofas LIMON *v.* STATE of Arkansas

84-202 685 S.W.2d 515

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Douglas W. Parker,* for appellant.

*Steve Clark,* Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The Controlled Substances Act was amended in 1981 to provide for the forfeiture of all moneys used or intended to be used to facilitate a violation of the Act. The amendment also provides that all moneys found "in close proximity" to forfeitable controlled substances or to forfeitable drug manufacturing or distributing paraphernalia are presumed to be forfeitable. The burden of proof to rebut the presumption is on the claimant to the property. Ark. Stat. Ann. § 82-2629 (a)(6) (Supp. 1983). Forfeitable property other than drugs includes equipment of any kind used or intended for use in delivering controlled substances and all property used or intended for use as a container for controlled substances. Section 82-2629 (a) (1), (2), and (3).

The question here is whether the State was entitled to confiscate $3,000 and $1,770 found in separate rooms in a house occupied by the appellant Cleofas Limon and by Jennifer Taylor, in Rudy, Arkansas. On Limon's petition to release the money the circuit judge held that Limon is entitled to the return of the $3,000, but not of the $1,770. An appeal and cross appeal bring both issues to us under Rule 29 (1) (c).

Acting under a search warrant, police officers searched the house and found on a shelf in the bathroom a plastic bag containing $1,000 and another containing $770. Those bags were next to a third bag containing an ounce of marihuana. The officers also found in a kitchen drawer a total of $3,000 in two plastic bags, along with "boxes of plastic bags and aluminum foil and so forth." Other drug paraphernalia were on the kitchen table. Within ten feet of the money was a vial containing a residue of white powder which, according to the arresting officer, Limon identified as cocaine. Other indications of drug activity within the residence included marihuana residue in two suitcases, a tin box containing marihuana, a tray containing about a fourth of an ounce of marihuana, three pipes, and five vials.

Limon was later charged with possession of a controlled substance with intent to deliver. A forfeiture is nevertheless an *in rem* civil proceeding, independent of the criminal charge and to be decided by a preponderance of the evidence. *Morley* v. *Fifty Cases of Whiskey*, 216 Ark. 528, 226 S.W. 2d 344 (1950); *Leach* v. *Cook*, 211 Ark. 763, 202 S.W. 2d 359 (1947); *Kirkland* v. *State*, 72 Ark. 171, 78 S.W. 770, 65 LRA 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242 (1904). This being a civil case, we set aside the trial judge's findings if they are clearly erroneous. A.R.C.P. Rule 52 (a).

"In close proximity" simply means "very near." For that reason it has been said that the meaning of the term in such a statute is to be determined on a case-by-case basis. *Bozman* v. *Office of Finance of Baltimore County*, 445 A. 2d 1073 (Md. App. 1982), aff'd 296 Md. 492, 463 A. 2d 832 (1983). We agree with that approach and do not mean by this opinion to suggest rigid rules for fixing "close proximity" by a particular number of feet, by reference to particular rooms, or by any rule of thumb. Here the two plastic bags containing $1,770 were next to a bag of marihuana. The $3,000 was in two plastic bags in a kitchen drawer along with boxes of plastic bags and aluminum foil. Other drug paraphernalia were on the kitchen table; the cocaine vial was nearby. We think the preponderance of the evidence places all the money, not merely the $1,770, in close proximity to controlled substances or drug paraphernalia. That being true, all the money is presumed under the statute to be forfeitable. There is no burden on the state to show separately a specific intent that the money is to be used in exchange for drugs, because the statute provides that money found in close proximity to forfeitable articles is "presumed to be forfeitable." § 82-2629(a)(6), *supra.*

The question, then, is whether Limon and Ms. Taylor overcame the presumption. The two, though not married, had lived together for five years and regarded their property as belonging to them both. They testified that the total of $4,770 had come from the sale of a car six months earlier. They did not explain why they had kept such large sums in plastic bags for so long, except that Ms. Taylor did say, "I just don't desire to open a bank account." At one point she

said that the car had been in her name and that the money was hers, but otherwise she referred to both the money and the car as being their property. The trial judge evidently did not accept Ms. Taylor's claim to sole ownership, for he forfeited the $1,770 found in the bathroom. He seems to have overlooked the statutory provision that money is subject to forfeiture if found in close proximity to drug paraphernalia, for his written opinion mentioned only proximity to controlled substances.

There were also strong indications that the money was to be used immediately for the purchase of drugs. At the time the house was searched, both Limon and Carl Jacobs were arrested there. An officer testified that Limon told him at the time that he was negotiating to buy marihuana from Jacobs for $400 a pound. Called back to the witness stand to rebut that statement, Limon was evasive. He admitted having told the officer that he wouldn't give more than $400 for marihuana and having said, "Well, it's probably not worth more than $400." When Jacobs was arrested along with Limon, Jacobs had a plastic bag of marihuana on his person and 15 pounds of it in his vehicle outside the house. When we consider the evidence of joint ownership, the proof of extensive drug activity in the house, Limon's apparent negotiations to buy marihuana at $400 a pound, and the close proximity between the $3,000 and the cocaine and drug paraphernalia in the kitchen, we are convinced that the preponderance of the evidence clearly shows that the $3,000 as well as the $1,770, was subject to forfeiture.

Affirmed on direct appeal, reversed on cross appeal.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I agree with the majority that forfeiture is a civil action and is to be decided by a preponderance of the evidence. I further agree that we are not supposed to upset the trial judge's findings unless they are clearly erroneous. I cannot understand why the majority believes that the trial court was clearly in error. Apparently the decision is based primarily on the fact that the $3,000 was found in a plastic bag in the kitchen. Officers

also found aluminum foil and no doubt knives, forks and spoons. Why not go ahead and forfeit the china, utensils and the oven, which no doubt were in close proximity to the plastic bags and aluminum foil? It seems to me that the trial court's decision was based upon that portion of Ark. Stat. Ann. § 82-2629(a)(6) which states in part: "[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or ommission [sic] established by him to have been committed or omitted without his knowledge or consent." There is no evidence that the transactions here considered were with the owner's consent or knowledge.

In order to forfeit this $3,000, the trial court would have had to find that the money was furnished or intended to be furnished in exchange for a controlled substance, or that it was in close proximity to contraband or paraphernalia. If the appellant intended to buy a controlled substance, there is no evidence that this particular money would have been used. Why should he have used Ms. Taylor's money when he had more than enough money readily available? I think the trial court was correct in ordering the other money forfeited because it was in close proximity to controlled substances and paraphernalia. Jennifer Taylor testified without contradiction that this money was hers and was to be used to purchase a car. She furnished undisputed evidence that she had received more than this amount of money for the sale of her car. There is absolutely no evidence in the record that she was in any way involved in dealing in controlled substances. She was neither charged nor arrested. It seems abundantly clear to me that Ms. Taylor overcame the rebuttable presumption, if such presumption applies. It must be remembered that before the presumption can arise, there must be evidence that this particular money was furnished or intended to be furnished in exchange for a controlled substance or was in the proximity of drug paraphernalia. It is a cardinal principle that forfeitures are not favored and statutes imposing forfeitures must be strictly construed. It seems to me that the $1,700 found in close proximity to one ounce of marijuana was the type of property the legislature intended to be forfeited. The majority, in my opinion, had to resort to conjecture and speculation that the $3,000 did not

belong to Ms. Taylor, in spite of the fact that appellant stated he considered what was hers to be his also, or that it was intended to be exchanged for a controlled substance. Next, I suppose all containers, on the premises, including cooking utensils, will be forfeited if a gram of cocaine or a marijuana roach is found in an ashtray or is deposited on the property without the knowledge or consent of the owner. In my opinion the trial court was absolutely correct in finding the presumption did not apply to the $3,000 or that if it did the owner overcame the presumption by proof that any dealing involving her money was without her knowledge and consent. Such transactions of a spouse take away the property or money of the other spouse when such spouse is completely innocent. There is no due process of law in such cases.

I would affirm the decision of the trial court.

# TRUCK TRANSPORT, INC. *v.* MILLER TRANSPORTERS, INC.

84-271 685 S.W.2d 798

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Lincoln & Orsini, P.A.,* by: *Bob Lawson, Jr.,* for appellant.

*Henry & Duckett,* by: *James M. Duckett,* for appellee.

GEORGE ROSE SMITH, Justice. The question is: In the circumstances of this case, was the appellant, Truck Transport, entitled to appeal to the circuit court from an order of the Arkansas Transportation Commission without first filing a motion asking the Commission to reconsider its decision? The circuit court held that Truck Transport, by failing to ask for a reconsideration of the Commission's decision, had not exhausted its administrative remedies. The

appeal to the circuit court was accordingly dismissed. Our jurisdiction of the case is under Rule 29 (1) (c).

Truck Transport and the appellee, Miller Transporters, successfully opposed the application of a third contract carrier for authority to transport bauxite and lime. The Commission, however, in its order denying that application, apparently went beyond the issues in the matter by unexpectedly enlarging Miller Transporters' authority to transport cement and bulk lime. Truck Transport's appeal to the circuit court was based on the contention that Miller Transporters' authority had not been in issue, that no hearing had been conducted on that matter, and that the Commission's enlargement of Miller Transporters' authority as a contract carrier should therefore be set aside.

There is no statute or Commission rule requiring a litigant to file a motion for reconsideration or a petition for rehearing as a necessary condition to an appeal to the circuit court. We are not laying down a rule that such a step is ordinarily necessary. To the contrary, it would be pointless to compel a litigant to incur the trouble and expense involved in the presentation of a motion simply repeating arguments already heard and rejected.

Nevertheless, in this case the circuit court was right in holding that the Commission should have been given an opportunity to reconsider its action. The Commission's procedural rules would have permitted such a request, either by petition or by formal complaint. Even though the Commission's enlargement of an existing authorization may have been unexpected and beyond the issues, the Commission should have been afforded an opportunity to correct its asserted error. Our discussion in *Ark. Cemetery Board* v. *Memorial Properties*, 272 Ark. 172, 616 S.W. 2d 713 (1981), is applicable to the present case:

> It is an elementary principle of administrative law that an issue must be raised at the lower level to be pursued on appeal. This was clearly stated in *Hennesey* v. *SEC*, 285 F. 2d 511 (3d Cir. 1960), where the court said:

> It is well established that issues not effectively presented to an administrative agency, where ample opportunity to do so has been afforded, cannot be raised on appeal of that agency's decision. This principle may be viewed as one facet of the judicial doctrine of "exhaustion of administrative remedies."

The United States Supreme Court stated the same concept in *Unemployment Comm'n* v. *Aragon*, 392 U.S. 143 (1946):

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

The analysis set forth in the foregoing quotation explains why we are affirming the trial court's decision in the case at bar. In closing, however, we add that Truck Transport has not argued the case on its merits, having preferred to base its appeal on the procedural point alone. In fact, we could not reach the merits even if we were inclined to do so, because the parties by agreement have so severely abbreviated the record that facts bearing upon the merits of the Commission's action are not before us.

Affirmed.

Mary Belle WOODS *v.*
Edwin P. WOODS, Jr.

84-260 686 S.W.2d 387

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Guy Jones, Jr., P.A.*, for appellant.

*Richard L. Smith, P.A.*, by: *Daniel R. Carter*, for appellee.

ROBERT H. DUDLEY, Justice. The issue on appeal is whether a former wife may maintain an action for alimony and marital property against her former husband, notwithstanding a valid absolute divorce previously procured by the wife in a foreign jurisdiction, solely upon constructive service.

Mary and Edwin Woods were married for 31 years. During the marriage Edwin retired from the Air Force after 20 years of service and moved to Faulkner County. Mary filed suit for divorce in Faulkner County on March 15, 1983. Edwin filed an answer and indicated that he would contest the action. Mary dismissed her complaint on August 12. Four days later, on August 16, she filed suit for divorce in New Mexico. Edwin made a special appearance and objected

to personal jurisdiction. The New Mexico court ruled that it had jurisdiction over marital status but had no personal jurisdiction over Edwin. Mary later registered the New Mexico decree in Faulkner County and by this independent action sought alimony and to divide the marital property. The trial court held that Mary did not have an independent cause of action. We reverse.

The New Mexico decree granting a no-fault divorce is valid and entitled to full faith and credit recognition as terminating the marital status of the parties without a determination of fault. A division of marital property and an award of alimony were not at issue in the foreign jurisdiction. The foreign court did not have jurisdiction over both parties. See *Knighton* v. *Knighton,* 259 Ark. 399, 533 S.W.2d 215 (1976). No provision of the Federal Constitution compels this Court to recognize the foreign no-fault divorce as terminating the spouse's cause of action for marital property or alimony. *Pawley* v. *Pawley,* 46 So. 2d 464, (Fla. 1950), 28 A.L.R.2d 1358, *reh'g. den.* 47 So. 2d 546, *cert. den.* 340 U.S. 866.

Mary voluntarily left the state of matrimonial domicile, Arkansas, and at the time of the divorce and at the time of the filing of this action was a resident of New Mexico. Edwin has been a resident of Arkansas at all material times. Neither party contests the application of the law of this forum. See Morris, *Divisible Divorce,* 64 Harv. L. Rev. 1287 (1951).

In *Bowman* v. *Worthington,* 24 Ark. 522 (1867), a case almost identical to the one at bar, this Court held that the right to maintain a proceeding for alimony cannot survive a dissolution of marriage. The rationale was that alimony after divorce was entirely dependent upon statutory law, and the "peculiar phraseology of our statute" provides for alimony only "when a decree shall be entered." That statute, Arkansas Statute Ann. § 34-1211 (Supp. 1983), remains unchanged. However, twenty-four years later, in *Wood* v. *Wood,* 54 Ark. 172 (1891), we noted that a different statute, § 34-1201, contemplated two separate actions, either alimony or divorce. That statute provides: "The action for alimony or divorce shall be by equitable proceeding." In

*Wood,* Justice Hemingway wrote: ". . . the act contemplated two separate actions, and the legislature did not use the term 'action for alimony or divorce,' as the equivalent of 'action for divorce, or action for divorce and alimony'." *Id.* at 177. Since *Wood, supra,* we have consistently held that Ark. Stat. Ann. § 34-1201 provides that an independent action will lie for alimony. See e.g. *Savage* v. *Savage,* 143 Ark. 388, 220 S.W. 459 (1920); *Harmon* v. *Harmon,* 152 Ark. 129, 237 S.W. 1096 (1922). Also, since *Wood, supra,* we have not followed the *Bowman* statutory interpretation that alimony may be awarded only as an incident to divorce. However, all of the cases deal with alimony before divorce or as an incident to it. Ordinarily, a separate suit for alimony after a final decree of divorce is granted will not be successful because of the doctrine of res judicata. See *Boyles* v. *Boyles,* 268 Ark. 120, 594 S.W.2d 17 (1980). However, by applying the concept of divisible divorce, it becomes apparent that the doctrine of res judicata is not applicable to the issue of alimony in this case. Only Mary and the marital status were before the foreign court. That court had no jurisdiction over either Edwin or the issue of alimony. Therefore, in determining whether a separate action will lie for alimony after divorce, we only need to interpret our statute, quoted above. It simply refers to an "action for alimony or divorce." It makes no distinction between before or after divorce, and so we must construe the statute as authorizing the action at either time. "It is a rule in this State, long and well established, that where a limited jurisdiction is conferred by statute, the construction ought to be strict as to the extent of the jurisdiction, but liberal as to the proceeding." *Wood,* 54 Ark. at 178. Moreover, the statute at issue is a part of the original civil code. "The rule of common law that statutes in derogation thereof are to be strictly construed shall not be applied to the Code. The provisions of the Code, and all proceedings under it, shall be liberally construed, with a view to promote its object and to assist the parties in obtaining justice." Ark. Stat. Ann. § 27-131 (Repl. 1979). Accordingly, we interpret Ark. Stat. Ann. § 34-1201 as allowing an independent proceeding for alimony when alimony could not have been considered in the divorce action. The trial court erred in summarily dismissing the action for alimony.

Similarly, that part of the complaint which asked for a division of marital property should not have been summarily dismissed. Prior to 1977, the Supreme Court of the United States ruled that spouses must be treated equally in the absence of a valid reason for making a distinction. In response, in 1979, the General Assembly enacted the law which created "marital property." Ark. Stat. Ann. § 34-1214 (Supp. 1983). The legislation was intended to create a new form of property, and we must construe the act in harmony with that intent. The statute defines marital property as all property acquired by either spouse subsequent to the marriage with exceptions not important here. All marital property is to be divided equally unless a court finds that division is inequitable. The statute mandates that courts of this state divide marital property upon granting a divorce. This concept of the division of marital property requires that marital property be divided even when a divorce is granted upon constructive service in a foreign state. An independent action will lie for the division of marital property.

Appellant also contends that the trial court erroneously refused to compel answers to interrogatories. There is no merit in the argument. Rather, we note that Rule 33(e) provides that the cost of answering interrogatories may be assessed against a party who propounds an unnecessary number of interrogatories.

Reversed and remanded.

HICKMAN, J., dissents in part and concurs in part.

DARRELL HICKMAN, Justice, dissenting in part; concurring in part. This is not the first time Arkansas has recognized the concept of divisible divorce. In *Rice* v. *Rice,* 213 Ark. 981, 214 S.W.2d 235 (1948), we held that a husband who had obtained an Arkansas divorce upon constructive service and without provision for alimony was not allowed to assert the divorce as a bar to the wife's action for arrearages arising from a prior New York decree for separate maintenance of which the husband had had notice. The doctrine of divisible divorce was developed in *Estin* v. *Estin,* 334 U.S. 541 (1948), a case which had very close facts to the *Rice* case and which we used as precedent there.

I have no quarrel with the doctrine. In both of the above cases, however, there were support orders entered prior to the divorce. Whether the rule should be extended to a case where there is no prior order of support is a question not presented by this case. There has been a divergence of views when that question has been presented. See Morris, *Divisible Divorce,* 64 Harv. L. Rev. 1287 (1951).

Under these facts I do not believe that the concept of divisible divorce should be applied, because to do so would ignore the policy reason underlying the concept. The reason for the development of the rule, that a valid foreign ex parte divorce terminates the marital status but not the right to alimony, is that the state of the spouse entitled to support has a legitimate interest in protecting the abandoned spouse from being left impoverished and becoming a public charge. See *Estin* v. *Estin, supra,* at 547.

Mrs. Woods is not an abandoned spouse. She was in a state which had jurisdiction over both her and her husband, she filed the divorce action here, but then voluntarily chose to dismiss the action and obtain the divorce in another state. She sought a forum where she knew she could not get an *in personam* judgment against her husband without his consent. It was her right to obtain a divorce quickly and without having to prove fault. However, she should not be allowed to return and litigate the issue of alimony under the concept of divisible divorce. She had the chance and by her own action abandoned that opportunity.

Similar reasoning was relied upon in *Glennan* v. *Glennan,* 197 Misc. 899, 97 N.Y.S.2d 666 (Sup. Ct. 1950) where the court refused to apply the doctrine of divisible divorce, holding that a wife who changes her domicile to obtain a valid ex parte divorce in another state cannot enforce a prior New York support order because by her conduct she had forfeited her right to support. The court stated, "The plaintiff cannot avoid the effect of her divorce in Ohio which she brought about." See also *McFarlane* v. *McFarlane,* 43 Ore. 477, 73 P. 203 (1903).

Nor do I agree that the fact that Arkansas allows an

"independent action for alimony" not incident to divorce dictates this result. Our cases have held that an action for alimony can be maintained where no divorce is sought or where one was sought but not granted. See *Wood* v. *Wood,* 54 Ark. 172 (1891); *Savage* v. *Savage,* 143 Ark. 388, 220 S.W. 459 (1920). The independent cause of action for alimony is now called an action for "separate maintenance." See *Rosenbaum* v. *Rosenbaum,* 206 Ark. 865, 177 S.W.2d 926 (1944). Those holdings and our recognition of the cause of action for separate maintenance have no bearing on this case where the wife's own conduct prevented litigation of the alimony issue.

The majority cite those holdings to interpret Ark. Stat. Ann. § 34-1201 as allowing a proceeding for alimony before or after divorce. They say they are liberally construing the statute "to assist the parties in obtaining justice." I'm confused as to which reason the majority actually relies on but none of those reasons (Arkansas having a cause of action for separate maintenance, liberal construction of the statute, or the concept of divisible divorce) allow the result reached here under these facts.

This is an opinion which will be relied upon to uphold forum shopping by divorce litigants and will cause some divorce proceedings to be endless. See *Knighton* v. *Knighton,* 259 Ark. 399, 533 S.W.2d 215 (1976).

I concur with that part of the opinion which allows the appellant to claim property rights.

# Charles D. RAGLAND, Commissioner of Revenues, State of Arkansas, *v.* ALPHA AVIATION, INC. and Tom W. and Betty ROGERS

84-214 686 S.W.2d 391

Supreme Court of Arkansas
Opinion delivered March 11, 1985
[Supplemental Opinion on Denial of Rehearing April 29, 1985.]

*Kelly S. Jennings,* for appellant.

*Walker & Campbell Law Firm,* by: *Gail Inman-Campbell,* for appellee.

STEELE HAYS, Justice. The single issue presented by this appeal is whether a proposed tax assessment under Ark. Stat. Ann. § 84-4718 (Repl. 1980), if contested, will toll § 84-4715(a), which limits the time in which an assessment can be made to three years.

The appellant, Charles D. Ragland, Commissioner of Revenues, conducted a gross receipts (sales) tax audit of the books and records of appellee, Alpha Aviation, Inc., for the audit period April 1, 1977 through November 30, 1979. The appellant also conducted an individual income tax audit of the appellees, Tom W. and Betty Rogers for the years 1976, 1977, and 1978. Mr. Rogers was the president and majority shareholder of Alpha, and certain deductions involving Alpha were disallowed on Mr. and Mrs. Rogers' individual income tax returns for the years in question. The appellees were sent a notice of proposed assessment as required by § 84-4718(a)[1]. After receipt of the notice the appellees pursued and exhausted the administrative remedies set forth in § 84-4720. At the termination of the administrative proceedings, which was more than three years after appellees had filed their returns, a notice of final assessment was sent to them as provided by § 84-4712 and § 84-4720.

[1]§ 84-4718(a). If any taxpayer fails to file any return as required by any State tax law, the Commissioner, from any information in his possession or obtainable by him, may determine the correct amount of tax for the taxable period. If a return has been filed, the Commissioner shall examine the return and make any audit or investigation that he considers necessary. When no return has been filed and the Commissioner determines that there is a tax due for the taxable period, or when a return has been filed and the Commissioner determines that the tax disclosed by the return is less than the tax disclosed by his examination, the Commissioner shall propose the assessment of additional tax plus penalties, as the case may be, and shall give notice of the proposed assessment to the taxpayer. The notice shall explain the basis for the proposed assessment and shall state that a final assessment, as provided by Section 12 [§ 84-4712], will be made if the taxpayer does not protest such proposed assessment as provided at [by] Section 12 [§ 84-4719].

Unsuccessful at the administrative level, appellees filed suit in chancery court pursuant to the provisions of § 84-4721. In a motion for summary judgment, appellees then contended that the term "assessment" as used in § 84-4715(a) actually referred to a notice of *final* assessment. The pertinent section of § 84-4715(a) provides:

> Except as otherwise provided in this Act [§§ 84-4701 —84-4744], no assessment of any tax levied under the State tax law, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires later. The Commissioner shall not begin court proceedings after the expiration of the three (3) year period unless there has been a previous assessment for the collection of the tax.

The appellees argued that under § 84-4715(a) the failure of the appellant to provide a notice of final assessment within three years from the time they filed a return effectively barred the appellant from further collection efforts.

The Chancellor found that appellees received a notice of proposed assessment within the three year statute of limitations. However, he also determined that the term "assessment" as used in § 84-4715(a) meant "final assessment." As the final notice was not sent out until after the three year limitation the Chancellor issued an order abating all tax, penalty or interest assessed against the appellees. The Commissioner has appealed.

It is a general rule of construction that statutes establishing procedures for collection and assessment of taxes will be construed in favor of the government. "[A]s a general rule courts have been tolerant in construing statutes prescribing the procedure for assessment . . . A statute barring the state's right to bring actions for taxes is usually strictly construed in favor of the government." Sutherland, Statutory Construction, (3rd. Rev. 1974) § 66.06; see also 84 C.J.S. Taxation, § 393; *R. J. Reynolds Tobacco* v. *Carson,* 213 S.W.2d 45 (Tenn. 1948); *Southern Pac. Ry. Co.* v. *State,* 284 P. 117 (N.M. 1930). "The existence of a time limit beyond

which the government may not sue to recover unpaid taxes is therefore dependent upon some express statutory provision, and provisions limiting the time for the collection of taxes are strictly construed in favor of the government." *Jensen* v. *Fordyce Bath House,* 209 Ark. 478, 190 S.W.2d 977 (1945).

The primary rule in the construction of statutes is to ascertain and give effect to the intention of the legislature. It is the court's duty to look to the whole act and, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious and sensible. *Shinn* v. *Heath,* 259 Ark. 577, 535 S.W.2d 57 (1976). We also decline an interpretation that results in absurdity or injustice, leads to contradiction, or defeats the plain purpose of the law. *Carter* v. *Bush,* 283 Ark. 16, 677 S.W.2d 837 (1984); *Berry* v. *Gordan,* 237 Ark. 547, 376 S.W.2d 279 (1964).

Considering the Tax Procedure Act (§ 84-4701—§ 84-4744) as a whole, and applying the applicable rules of construction and law, we find that under these circumstances the legislature intended the proposed assessment to toll the statute of limitations.

The limitation statute can serve two purposes. The first limits the time for which a taxpayer must be responsible for answering to an assessment. The notification for such an assessment can be accomplished through either the proposed or final assessment which states the amount owed. The second arises in the situation where a proposed assessment is made. In that case, the proposed assessment fulfills the first purpose; but a final assessment must also be sent out for reasons of certainty and finality. Here, the proposed assessment meets the substantive requirements of the limitations statute, but under the procedural scheme, when a proposed assessment is challenged, there is no provision for a final notice until the termination of the administrative proceedings. It is the obvious result as well as the general rule that the pendency of the hearing must toll the running of the statute, for the final assessment.

In this case an "assessment" defined in the statute as a "determination and imposition of the amount of any state

taxes due and owing" [§ 84-4703(a)] had been made within the three year limitation through the proposed assessment sent to appellees. The substance of the requirement was met through the proposed assessment by informing appellees of the Commissioner's action and the deficiency amount assessed. There is no surprise or prejudice to the taxpayer if the statute of limitation is effectively extended under these circumstances. To the contrary, it is only because of the procedure of redress afforded to and pursued by the appellees that the time when a final notice could be sent out was delayed. See Ark. Stat. Ann. § 84-4720. Under § 84-4720 the commissioner is not authorized to send out anything other than a proposed assessment once a taxpayer challenges that assessment under the act. He is not directed to send a final notice until the completion of the administrative proceedings. [§ 84-4720(d)].

As the legislature has provided proceedings for taxpayer redress which would be of uncertain duration, and at the same time given no authorization for a final assessment until the termination of such proceedings, we believe a tolling of the statute was assumed by the drafters of this legislation. Such a statutory scheme by its nature incorporates the analogous and established principle that the pendency of litigation will suspend the running of the statute of limitations. See *Dendy* v. *Greater Damascus Bapt. Church,* 247 Ark. 6, 444 S.W.2d 71 (1969). Where an individual is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right . . . 54 C.J.S., Limitations of Actions, § 247.

To hold otherwise and adopt the appellees' interpretation would bring about an incongruent result. It would require the Commissioner to anticipate potential protests by a taxpayer, and somehow determine with accuracy and make allowance for the time required by the taxpayer to exhaust all administrative remedies provided under the act, and by calculating backwards from the limitation period, send out the proposed assessment early enough that the final assessment would fall within the three years allowed. Even if that

could be done effectively and consistently, a doubtful assumption at best, contingencies could be expected to arise in many cases to delay the administrative process and prevent the giving of a final notice within the three year period. This interpretation would result in thorough confusion in the collection of taxes and deprive the Commissioner of the three year time period allotted him under our statutes dating back to 1929 in which to file a proposed assessment. (See Act 140 of 1939, § 4, and Act 135 of 1947, § 5). Such an implausible interpretation would put the Commissioner in a most difficult position and would in any case severely reduce the three year time period we think was plainly intended under the act to allow for an assessment on the taxpayer. It could not have been the intent of the legislature to allow the taxpayer to forestall the sending of a final notice past the deadline by protesting and pursuing an administrative remedy.

Appellees submit that § 84-4715(c) provides a means by which the taxpayer and the Commissioner may agree in writing to extend "the time within which the Commissioner may make a final assessment, as provided in Section 12," and, therefore, § 84-4715(a) must be read as referring to the *final* assessment, rather than to the proposed assessment. We reject the argument. The provision is permissive only, allowing an extension by mutual agreement. Its evident intent is to provide a means of extending time limits under the act without forcing the taxpayer to protest. There may be situations where it is advantageous to both side to extend the time limits provided in the act.

We conclude the statute was tolled at the time the appellees initiated their administrative remedies pursuant to § 84-4719 and § 84-4720. The Chancellor was incorrect in his finding that because the final assessment was not sent within three years the Commissioner was precluded from any further tax collection efforts.

Reversed.

HICKMAN, J. and PURTLE, J., dissent.

JOHN I. PURTLE, Justice, dissenting. I understand only enough of the majority opinion to know I disagree with it. The only issue before us, as I understand it, is whether the Commissioner tolled the limitations of Ark. Stat. Ann. § 84-4715(a) by sending the taxpayers notice of proposed assessment pursuant to Ark. Stat. Ann. § 84-4718. I do not believe he did so.

When a statute is plain and unambiguous it needs no interpretation and we cannot seek other aids of interpretation. *Ellison* v. *Oliver,* 147 Ark. 252, 227 S.W. 586 (1921). Statutes and constitutional provisions are considered in the same manner. *Snodgrass* v. *City of Pocahontas,* 189 Ark. 819, 75 S.W.2d 223 (1934). We approach a statute or constitutional provision with the idea that it says that it means and means what it says. *Hargraves* v. *Solomon,* 178 Ark. 11, 9 S.W.2d 797 (1928). We should not be concerned with the wisdom or expediency of the Constitution or legislative enactments. It is our duty to carry out the provisions of the law as indicated by its plain language. *Hargraves* v. *Solomon,* supra. If it becomes necessary to construe a statute, it is our duty to ascertain and give effect to the intention of the legislature. *Shinn* v. *Heath,* 259 Ark. 577, 535 S.W.2d 57 (1976).

We are dealing here with that part of Ark. Stat. Ann. § 84-4715(a) which states: "The Commissioner shall not begin court proceedings after the expiration of the three (3) year period unless there has been a previous assessment for the collection of the tax." The appellant's whole argument appears to be that this statute does not mean what it says or say what it means. The argument boiled down to its simplest form is that "assessment" means "notice of proposed assessment" as described in Ark. Stat. Ann. § 84-4718 (a). Both terms are used in the same act; therefore, they surely have different meanings.

I think Ark. Stat. Ann. § 84-4715 (a) says that the commissioner cannot commence court proceedings unless an *assessment* was made before the expiration of three years. The statute is clear and unambiguous. Therefore, we should

not resort to other aids in interpreting the act.

I would affirm the trial court.

HICKMAN, J. joins in this dissent.

Supplemental Opinion on Denial of Rehearing
April 29, 1985

688 S.W.2d 301

STEELE HAYS, Justice. In this supplemental opinion we address appellee's continued insistence that Ark. Stat. Ann. § 84-4715(a) imposes on the Commissioner of Revenues a duty to issue the *final* assessment within three years or lose the right to pursue further efforts to collect a deficiency in income tax, an issue which has given us considerable difficulty. Restated, the question is whether the legislature intended by § 84-4715(a) to allow three years in which the commissioner could *commence* a challenge to the sufficiency of an income tax return, or to allow three years in which the commissioner must *complete* the process of challenging a return, including any time necessary for administrative review. We held in our opinion on March 11, 1985, that the three year limit applies to the commencement of the process, interpreting the word "assessment," as used in § 84-4715(a), to refer to the *proposed* assessment. Of course, if the process must be *completed* in three years (unless extended by agreement between the commissioner and the taxpayer) then the word "assessment" refers to the *final* assessment.

We adhere to our original position for the reasons stated previously and because we believe the history of our income tax laws supports that conclusion. Our initial income tax legislation, the Income Tax Act of 1929 (Act 118) provided

that if the commissioner determined that an income tax return was deficient he had two years within which to act by giving notice to the taxpayer, who then had thirty days in which to confer with the commissioner "as to the *proposed assessment.*" (Our italics.) See Section 26 of Act 118. No other administrative review was provided.

Ten years later, Act 140 of 1939 was adopted amending Act 118. As with Act 118, no other administrative review was provided, except that the taxpayer was given thirty days in which to confer with the commissioner over "the proposed assessment." The 1939 Act, however, did include a provision permitting the taxpayer and the commissioner to extend the time by written agreement. The amendments included a provision increasing the time allowed the commissioner to commence the process from two years to three years. This same limitation of time was included in the provisions of Act 401 of 1979, "The Arkansas Tax Procedure Act."

The 1939 amendment makes it entirely clear the assessment which must occur within the three years is not the *final* assessment, as appellee urges, but the *proposed* assessment, as the amendment uses the identical language used in Act 118, i.e. "The taxpayer against whom such assessment has been made shall have an opportunity within thirty days to confer with the commissioner as to the *proposed assessment.*"

When the Tax Procedure Act of 1979 (Act 401) was adopted, this provision allowing three years appeared in restructured form (See § 15) and the rewording failed to make it clear that the assessment referred to is the proposed assessment and not the final assessment. However, nothing in Act 401 suggests there was any intent by the legislature to shorten the three year period which had prevailed over forty years in which the commissioner could commence his challenge to an income tax return by issuing the *proposed* assessment.

The petition for rehearing is denied.

# ALCOHOLIC BEVERAGE CONTROL DIVISION *v.* Edna BARNETT

84-248 685 S.W.2d 511

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Donald R. Bennett,* for appellant.

*Milas H. Hale,* for appellee.

STEELE HAYS, Justice. The Alcoholic Beverage Control Division has appealed from an order of the Pulaski Circuit Court reversing the Division's cancellation of the permit of Delmer Barnett[1], appellee, to sell beer at his grocery store on Kellogg Road in North Little Rock, lying in Gray Township.

In 1981 the Division discovered that a part of Gray

[1]Delmer Barnett died on August 4, 1984 and this litigation proceeded under an order substituting Mrs. Edna Barnett as petitioner. ARCP Rule 25.

Township thought to be "wet," was actually "dry" as a result of a 1956 local option election. That fact had not been reported to the Division and consequently, three permits to dispense alcoholic beverages in the dry area had been issued prior to the discovery, one of which was held by the appellee.

In September, 1982 the Director of the Division notified the three permittees of the problem and of a scheduled hearing. The facts developed before the Director were not disputed: in December, 1954 Gray Township held a local option election and voted dry by a vote of 528 to 473. In February, 1956 the Pulaski County Court entered an order altering the boundaries of several townships. Gray Township was enlarged and the added tract included the locations of the appellee and the other two permittees. The following November a wet-dry election was held in Gray Township, as newly composed, and the drys won, by a vote of 421 to 219. On these grounds the Director ordered the permits cancelled, allowing ninety days for the permit holders to apply for transfer to other locations.

On appeal to the Alcoholic Beverage Control Board the permit holders argued that the two publications of notice of the 1956 local option election were deficient in that the notices failed to include the full text of the proposal, as required by Ark. Stat. Ann. § 2-307 (Repl. 1976).

The published notices informed the public of a local option election affecting Gray Township to be held on November 6, 1956, the date of the next general election. The notice stated, "the text of this measure and its ballot title read as follows:

> GRAY TOWNSHIP INITIATIVE ACT NO. 1. AN ACT TO LEGALIZE THE MANUFACTURE, SALE, BARTERING, LENDING AND GIVING AWAY OF INTOXICATING LIQUOR WITHIN GRAY TOWNSHIP, PULASKI COUNTY, ARKANSAS. FOR PROPOSED INITIATIVE ACT NO. 1. _____ AGAINST PROPOSED INITIATIVE ACT NO. 1. _____

Had the full text of the proposed act been published, it would have included the following:

> "Be it enacted by the people of Gray Township, Pulaski County, Arkansas: Section 1. The manufacture, sale, bartering, lending, or giving away of intoxicating liquor is legal within Gray Township, Pulaski County, Arkansas, and License shall be granted for said purposes."

On January 17, 1983, the Board reached a decision granting the permittees an additional five and a half months to find alternate locations, failing in which the permits would be cancelled as of June 30, 1983.

Appellee Barnett filed a petition in the Pulaski Circuit Court to review the Board's decision pursuant to the Arkansas Administrative Procedure Act (Ark. Stat. Ann. § 5-701, et seq., Repl. 1976), and obtained a stay of the cancellation pending the appeal.

On June 25, 1984, the Circuit Court reversed the Board upon findings that the administrative ruling of the Board was based on an error of law in that the Board failed to recognize that the 1956 local option election was void because the notice failed to publish the full text of the proposed act as required by Ark. Stat. Ann. § 2-307 (Repl. 1976) and because the election in 1956 violated Ark. Stat. Ann. § 48-802, which requires that two years elapse between local option elections.

The Division's appeal to this court is predicated on two arguments: the Circuit Court had no jurisdiction in 1984 to decide an election matter which occurred in 1956, and the Cirucit Court erred in ruling the 1956 election was void because two years had not elapsed; inasmuch as the boundaries of Gray Township changed between the two elections. We sustain the arguments.

The dispute over the timing of the two elections can be

easily disposed of — it was not raised by the appellee or by either of the other two permit holders before the Board. In *Arkansas Cemetery Board* v. *Memorial Properties, Inc., d/b/a North Hills Memorial Gardens,* 272 Ark. 172, 616 S.W.2d 713 (1981), we said this is essential to a judicial review under the Arkansas Administrative Procedures Act. We quoted from a decision of the United States Supreme Court in *Unemployment Commission* v. *Oregon,* 329 U.S. 143 (1946):

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

See, *Truck Transport, Inc.* v. *Miller Transports, Inc.,* (decided March 11, 1985).

On the remaining point the Division submits that election contests must be brought within twenty days of certification (Ark. Stat. Ann. § 3-1001, Repl. 1976) and Circuit Court has no jurisdiction to settle such disputes nearly thirty years later. It points to those cases holding that compliance with pre-election requirements is mandatory before an election and becomes discretionary afterwards. *Gay* v. *Brooks,* 251 Ark. 565, 473 S.W.2d 441 (1971).

In response, appellee contends that this is not an election contest, but an action on review to prevent an administrative agency from enforcing the results of an election held on November, 1956 which was null and void. *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S.W.2d 26 (1937). We agree to this extent — this is a proceeding to review an administrative agency, brought expressly under the Administrative Procedure Act, but that very reason compels us to a different result. We need not decide the timeliness of this dispute, because the issue is not the power of the Circuit Court to examine the election results, but whether the Alcoholic Beverage Control Division has a duty under our statutes to look beyond the results of a wet-dry election,

however recent or distant in time. The Circuit Court was not hearing this case de novo, but on review to determine whether the Division's order was in excess of the agency's authority, or was affected by an error of law, or was arbitrary, capricious or an abuse of discretion, or breached any of the six considerations listed in Ark. Stat. Ann. § 5-713(h) (Supp. 1983). We hve referred to the appellate review under the act as "narrowly prescribed" [*Arkansas Poultry Commission* v. *House,* 276 Ark. 326, 634 S.W.2d 388 (1982)] and as being "a role of limited scope" [*City of Newport* v. *Emery, et al,* 262 Ark. 591, 559 S.W.2d 707 (1977)].

While our statutes impose a variety of assignments on the Alocholic Beverage Control Division, they can be described in general as limited to the issuance and revocation of licenses for dispensing intoxicants and overseeing the enforcement of laws and regulations pertinent to that responsibility. We find nothing in the statutes suggesting that it is intended the Division, through its five member board who are not expected to be proficient in the law, to undertake the often difficult task of deciding whether election procedures have been complied with. That role has been handled, more or less effectively, by the judicial branch and we think the clear intent of our statutory scheme is such that the Division is not expected to look beyond the results of wet-dry elections in discharging the functions assigned to it. Whether appellee could still challenge the results of the 1956 election, we are not deciding, but the forum for that effort is the courts, rather than an administrative agency, and the Administrative Procedures Act makes express provision for recourse to other remedies. § 5-713(a).

The effect of the Circuit Court's order would thrust a difficult and unintended assignment on the Division — to decide the legality of wet-dry election procedures. That would result in a dilemma for the Division. Section 48-802 directs the Division, in the event a majority of the electors vote against the sale of intoxicating liquors, to *immediately* cancel any permit for the sale of intoxicants within the territory covered by the election. Obviously, the Division cannot effectively enforce the provisions directly imposed

upon it by law, if at the same time it must decide whether pre-election procedures were observed.

For the reasons stated, the order of the Circuit Court is reversed.

## Craig WILLIAMS et al *v.* VILLAGE CREEK, WHITE RIVER AND MAYBERRY LEVEE AND DRAINAGE DISTRICT

84-246 685 S.W.2d 797

Supreme Court of Arkansas
Opinion delivered March 11, 1985
[Rehearing denied April 15, 1985.]

*Thaxton & Hout,* by: *Phillip D. Hout,* for appellants.

*Pickens, McLarty & Watson; Boyce & Boyce;* and *Friday, Eldredge & Clark,* by: *James A. Buttry* and *Robert S. Shafer,* for appellee.

DAVID NEWBERN, Justice. The question presented here is whether a drainage district may add lands, after the improvements have been completed, on the basis that the lands to be added benefit from the improvements. The answer to this question requires interpretation of Ark. Stat. Ann. § 21-514 (Repl. 1968), thus our jurisdiction rests on Arkansas Supreme Court and Court of Appeals Rule 29 1.c.

It is undisputed that the improvements constructed by the district were completed prior to its petition to add to the district lands owned by the appellants and others. There are provisions for adding lands benefited by a district's improvements after completion. Ark. Stat. Ann. §§ 21-534, 21-536 and 21-537 (Repl. 1968). However, they permit annexation only when a "slough, marsh or lake" has benefited by having been connected to drainage ditches or conduits constructed by the district.

The district did not rely on §§ 21-534, 21-536, and 21-537. It has from the outset contended that it could annex the

lands of the appellants pursuant to Ark. Stat. Ann. § 21-514 (Repl. 1968) despite the undisputed fact that the district's improvements had been completed some four years prior to the filing by the district in the circuit court below of its petition seeking to add the new lands.

Section 21-514 provides that if the district's commissioners determine that "lands not embraced within the boundaries of the district will be affected by the proposed improvement" they should report their assessment of the estimated benefits to the court. The lands may be added if it is found they will benefit. The district would have us ignore the word "proposed" in the statutory language, yet it has supplied neither reason nor authority for us to do so.

We need not recite the entire statutory scheme for creation of drainage districts to point out that it makes sense to follow the literal meaning of § 21-514. It is enough to note that it gives owners of the land to be added notice that they are likely to be assessed for the benefit to them of the proposed improvement. It allows them to protest the construction of the improvement before their lands are affected.

In *Bayou Meto Drainage Dist. of Lonoke County* v. *Ingram,* 165 Ark. 318, 264 S.W. 947 (1924), a district was allowed to alter its plan prior to completion of the improvement. The alteration resulted in benefits to lands not theretofore included in the district. We looked to the general legislative purpose of drainage districts and said an improvement would not be deemed to have been completed if it were found to be abortive just prior to finishing the planned construction. The additional construction needed to complete the improvement was allowed, and we said:

> If the statute authorizes the change of plans and extension of boundaries after the approval of the original plans and the assessment of benefits, then it follows that it may be done at any time before the improvement is completed, for there is no other period in the proceedings at which the authority may be limited. [165 Ark. at 326; 264 S.W. at 949]

While the *Bayou Meto* opinion seemed primarily to rely on other sections, although mentioning § 21-514, its theme is obviously consistent with the notion expressed here that landowners whose property is to be assessed to pay for an improvement should have notice and an opportunity to object before the "benefit" is conferred upon them.

The principal case cited by the district is *Mudd* v. *St. Francis Drainage District,* 117 Ark. 30, 173 S.W. 825 (1915). As other cases cited by the district, the *Mudd* case involved a district created by a special legislative act and added to by a further legislative act. The district would have us find this special legislative action to be persuasive toward holding lands benefited may be added to a district where the construction is complete. To the contrary, we find those special legislative Acts have nothing to do with the interpretation of § 21-514 which both parties assert as controlling the outcome of this case.

In permitting the district to proceed with the proposed addition of the land of the appellants and others, the circuit court apparently misinterpreted § 21-514 to allow the addition despite the fact that the improvement was no longer "proposed" but had been completed.

Reversed.

H. Wayne MEACHUM *v.* WORTHEN BANK & TRUST COMPANY, N.A.

85-19 685 S.W.2d 173

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Haley, Polk & Heister, P.A.,* by: *Peter B. Heister,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

PER CURIAM. Petition for review is denied.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I write merely to note that at the first opportunity I intend to re-examine the holding in *SD Leasing, Inc.* v. *Al Spain & Assoc., Inc.,* 277 Ark. 178, 640 S.W.2d 451 (1982).

William F. BRENTS *v.* STATE of Arkansas

CR 85-29 686 S.W.2d 395

Supreme Court of Arkansas
Opinion delivered March 11, 1985

*Felver A. Rowell, Jr.*, for appellant.

No response.

PER CURIAM. Petitioner William F. Brents was found guilty by a jury of theft by receiving and sentenced to a term of 20 years imprisonment and a fine of $10,000. The Court of Appeals affirmed. *Brents* v. *State,* CACR 82-5 (June 20, 1984). Petitioner seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37 on the ground that his counsel was ineffective at trial and on appeal.

In 1982 the Court of Appeals reinvested the trial court with jurisdiction to reconstruct and settle the trial record. After both the petitioner and the state made corrections in the record, the trial court entered a final order settling the record. Petitioner alleges that counsel was incompetent in that he failed to object to the order, but he has neither stated a basis for an objection nor demonstrated that counsel's conduct impeded appellate review of the trial. Factual support and some showing of actual prejudice must underlie an allegation of ineffective assistance of counsel before this Court will grant postconviction relief. *Strickland* v. *Washington,* ___U.S. ___, 104 S. Ct. 2052 (1984). Also, the issue of the completeness of the record was raised on appeal despite the lack of an objection to the final order, and the appellate court found no error. The question cannot be raised again under the guise of a claim of ineffective assistance of counsel. *See Guy* v. *State,* 282 Ark. 424, 668 S.W.2d 952 (1984).

Petitioner next asserts that the appellate court opinion sets out the shortcomings of counsel and is evidence of his ineffectiveness. We have held that all grounds for postconviction relief and factual support for such grounds must be contained in the petition itself. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980). Since petitioner is contending that counsel's representation on appeal was inadequate, however, the opinion will be considered at least insofar as it pertains to that issue.

Petitioner argued on appeal that certain evidence was improperly admitted into evidence. The court affirmed on the point pursuant to Rule 9(e)(2) of the Rules of the Supreme Court and Court of Appeals because it found that "appellant has failed to clearly frame the evidentiary issue which he apparently contends represents reversible error." Petitioner states that the evidentiary issues which were not fully developed in counsel's brief were the questions of whether petitioner was held in custody without an arrest warrant, whether there was probable cause for his arrest and the concomitant question of whether evidence obtained as a result of the arrest was admissible. Petitioner specifically cites as error admission into evidence of money in the

possession of petitioner's wife but he fails entirely to explain how this was the fruit of an illegal arrest or state the basis for a claim of error on any other ground.

It is not clear whether petitioner is contending in regard to these evidentiary questions that counsel's conduct at trial was in some unspecified way inadequate or whether he is arguing that counsel's failure to raise the issues properly on appeal constituted incompetence. In either case, we do not find grounds for postconviction relief in this petition.

First, petitioner would not be entitled to a new trial in the event the arrest was found illegal. A flaw in the manner of arrest is not sufficient cause to set aside a judgment of conviction. *Singleton* v. *State,* 256 Ark. 756, 510 S.W.2d 283 (1974). Secondly, the record indicates that various evidence was introduced which was obtained sometime after petitioner's arrest, but petitioner does not say which particular evidence was inadmissible as a result of the arrest. In any event, petitioner was not arrested until it was learned that six one-hundred dollar bills taken in the robbery could be traced directly to him.

An examination of the record and briefs in this case, paticularly the State's brief, indicates that the appellant may well have made the only arguments he could make with regard to the evidence. The fact that he was unable to prevail on them in the appellate court is not in itself evidence that counsel was ineffective. Success at trial or on appeal is not the criterion for gauging effective assistance of counsel. *See Fink* v. *State,* 280 Ark. 281, 658 S.W.2d 359 (1983). It is a matter of pure speculation and hindsight at this point whether counsel did everything he could at the appellate level to obtain a favorable decision.

Petition denied.

Herman KINARD, et al *v.*
CACHE RIVER BAYOU DeVIEW
IMPROVEMENT DISTRICT

84-233 686 S.W.2d 407

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Woodruff & Huckaby,* for appellant.

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

JACK HOLT, JR., Chief Justice. This case involves a petition filed by the commissioners of the Cache River Bayou DeView Improvement District seeking permission in circuit court to alter the plans for the district. The petition was granted and this appeal is brought by the landowners who oppose the proposed changes. Our jurisdiction is under Sup. Ct. R. 29(1) (c) as we are being asked to interpret a statute.

The improvement district was established by court order entered on July 21, 1958, pursuant to Ark. Stat. Ann. §§ 21-1001 to 21-1003. Its purpose was to channelize the Cache River and Bayou DeView to create a large channel or ditch to drain an extensive area of land surrounding the rivers. The Corps of Engineers made plans and estimated costs for the project but it was never completed and work ceased.

The commissioners for the district petitioned the circuit court in 1983 for an order extending and enlarging the powers of the improvement district to include those rights, powers and privileges of drainage districts as provided by Ark. Stat. Ann. §§ 21-501 to 21-581. The commissioners sought the order because the rivers were not navigable, and the lands in the district were suffering from floods and lack of drainage because of the failure to complete the original project.

The extension and enlargement of powers was sought pursuant to Ark. Stat. Ann. § 21-1026 (Supp. 1983) which provides:

> By such Order of the Circuit Court the powers of such an improvement district shall be enlarged and extended

> to embrace all the powers, rights, and privileges of drainage districts organized under the existing laws of the State of Arkansas. . .The purpose of this extension of powers shall be to complete the improvements contemplated by the Act of Congress and the plans of the Corps of Engineers. . .which were filed with and made a part of the petition for the establishment of the improvement district. . .

Protests, which included a claim that the altered plans do not complete the improvements contemplated by Congress as required by Ark. Stat. Ann. § 21-1026, supra, were filed by landowners in Poinsett County. After a hearing on October 4, 1983, the trial court granted the petition to acquire powers of drainage districts and ordered the commissioners to proceed with the steps required by law for determination of the work to be done under the proposed project and for the assessment of benefits.

Ark. Stat. Ann. § 21-1025 (Supp. 1983) provides:

> The order of the Circuit Court enlarging the powers of the district shall have all the force and effect of a judgment. Any owner of real property within the district may appeal from said judgment within thirty (30) days after the same has been made, but if no appeal is taken within that time, the judgment authorizing the enlargement of the powers of the district shall be deemed conclusive and binding upon all the property within the boundary of the district and upon the owners thereof. . .

Nevertheless, the order of October 4, 1983, was not appealed. Subsequently the commissioners filed a petition for alteration of the plans of the district on March 28, 1984. The petition was filed in accordance with Ark. Stat. Ann. § 21-517 (Repl. 1968) which states:

> The commissioners may at any time alter the plans of the ditches and drainage [drains], but, before constructing the work according to the changed plans, the changed plans, with accompanying specifications,

> showing the dimensions of the work as changed, shall be filed. . . and notice of such filing shall be given. If by reason of such change of plans, . . . any property owners deem that the assessment on any property has become inequitable, they may petition the county court.

With the petition, the commissioners filed a proposed work map and cost schedule detailing the changes. The plan provided for the removal of blockage, drifts, trees, stumps, and silt from the stream beds. The petition stated that the improvements originally proposed would be too expensive for the district's present assets and that therefore, "It has been determined by the Board of Commissioners that the altered plans will provide relief presently needed by the landowners of the District and will relieve a considerable part of the existing flood damage which occurs periodically, at a cost within the means of the District."

After hearing testimony on behalf of the commissioners and the opposing landowners, the court on May 2, 1984, approved the alteration of plans and directed the commissioners to proceed with the plans and to reassess the property. The court further provided that the property owners would be given an opportunity "to appear and present their view for or against the proposed assessment of benefits." This appeal results from the court's May 2, 1984 order approving alteration of plans, rather than the previous order of October 4, 1983, enlarging the district.

The abstract is deficient in several aspects, making it difficult for this court to assess the issues raised by this appeal. However, we will address the merits upon the materials presented utilizing the points relied upon by appellants.

I.

APPELLEES HAVE FAILED TO COMPLY WITH ARK. STAT. ANN. § 21-1026

Initially the appellants contend that the appellees failed to comply with § 21-1026, supra, inasmuch as the statute

provides that the purpose of an extension of powers "shall be to complete the improvement contemplated by the Act of Congress and the plans of the Corps of Engineers." Yet it is alleged that the plans as altered do not complete the Corps' original plan.

This point raised by the appellants, that the altered plans do not comport with the original purpose of the project, is not timely made. The same argument was presented to the trial court by the appellants in their amended protest to the petition for enlargement and was the subject matter of the earlier hearing on October 4, 1983, which resulted in the court entering final judgment in favor of appellees. The appellants, protesting landowners, were entitled to appeal from such a ruling within 30 days of the date the judgment was entered. § 21-1025. No appeal was taken from this ruling. Instead an appeal was filed seven months later from the court's order of May 2, 1984, approving the alteration. Likewise, appellants did not object to the petition for alteration based on the appellee's failure to comply with § 21-1026. This argument therefore cannot be resurrected on appeal by the appellants in their protest to the petition for alteration. Issues raised for the first time on appeal are not considered. *Green* v. *Ferguson,* 263 Ark. 601, 567 S.W.2d 89 (1978). The trial court is therefore affirmed on this point.

II.

## APPELLEES HAVE FAILED TO SHOW THE PROPOSED PLAN IS IN THE BEST INTERESTS OF THE LANDOWNERS

The appellants argue that the appellees have failed to show by a preponderance of the evidence that the proposed plan is in the best interest of the owners of the real property within the district.

The appellants state that no landowner other than a commissioner testified on behalf of the appellees' plan, while several landowners testified in opposition. This statement overlooks the fact that the nine commissioners

who presented the petition to the court calling for extension and enlargement of this district are landowners from each of the counties making up the district. § 21-1003. By comparison, the opposing landowners who testified came from only three of the same nine counties.

In order to sustain appellant's contentions, we must find that the trial judge's findings were "clearly erroneous (clearly against the preponderance of the evidence) and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ark. R. Civ. P. 52(a); *Superior Improvement Co.* v. *Mastic Corp.,* 270 Ark. 471, 604 S.W.2d 950 (1980); *Ford Motor Credit* v. *Yarbrough,* 266 Ark. 457, 587 S.W.2d 68 (1979).

The trial judge in his findings labored over the stormy history of the Cache River Bayou DeView project. He gave considerable thought to expert testimony that current plans will give partial relief to landowners in the district by getting at least 50% of the flood waters off of the land and out of the area in question, as opposed to the testimony of the protesting landowners who sincerely feel that the project is of little or no value and that it should be stopped, thus maintaining and preserving the status quo. Weighing the interests of all parties, the trial judge stated:

> There are other landowners, since the evidence says there is nearly a million acres involved here, that have an interest in what the Court does today. I must be concerned with and take into consideration their interest and the overall ultimate benefit, if a benefit is to be derived from this plan.

In further deliberations, the court concluded:

> It is a plan which will, in the Court's humble opinion, improve, enhance and benefit the vast majority affected within the area.

By approving the plan, we cannot say the trial court clearly acted against the evidence. *Harrell Motors, Inc., et al* v. *Flanery,* 272 Ark. 105, 612 S.W.2d 727 (1981). "In

reviewing the sufficiency of the evidence on appeal to support the decision of a trial judge sitting as a jury, we consider the evidence in the light most favorable to the appellee and affirm unless the trial court's decision is clearly erroneous. . . . It must be remembered that the credibility of the witnesses is determined by the fact finder, not this Court." *Orsby* v. *McGee,* 271 Ark. 268, 608 S.W.2d 22 (1980). *See also, Bass* v. *Koller,* 276 Ark. 93, 632 S.W.2d 410 (1982).

Our ruling does not preclude the opposing parties, many of whom are named in supporting petitions which are part of the trial record, from presenting their views on the tax assessments of their property when the commissioners make that determination. Ark. Stat. Ann. § 21-1028 (Supp. 1983).

Affirmed.

HICKMAN and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. This is a suit of vital public interest to all Arkansans. It concerns the Cache River and Bayou DeView and is still another attempt to alter the natural state of those streams and to destroy what little remains of the benefits they offer Arkansas as a habitat for wildlife. The drainage area affected is one of the prime locations in Arkansas for waterfowls; consequently, it is one of the best duck hunting areas in the state.

The reasons for the proposed change is to make it possible for some landowners in the northern part of the basin to clear and cultivate their lands. This was clearly stated in a question by counsel for the district when he said: "But what we are trying to do is make it possible for a man that wants to clear his [land] can clear it. . . ."

A preponderance of the evidence revealed that the proposal should be rejected for various reasons. Some landowners opposed it because of the estimated cost of $3,500,000, the vague plans by the district, the lack of approval by the Corps of Engineers, the Environmental Protection Agency and all other interested agencies, and

because more questions were raised than were answered. Others simply felt that the Cache River needed to be left alone, that it did not need "improving;" yet others, more alert to the potential damages to the natural state of the area, envisioned the plan as draining the area and damaging the "wet" areas protected by the Environmental Protection Agency. One witness from Newport said that the plan would essentially dry up the Cache River in his area.

John Eldridge, a resident of Woodruff County and a landowner on Bayou DeView and the Cache River, pointed out that the value of land in the area was greater in its natural state than cleared. He said:

> With the advent of duck hunting and fishing in that area the land from a purely economical standpoint has become more valuable, believe it or not, as wild land than cultivated land. I won't get into the mechanics of that, but we are diametrically opposed, at least I am, and I think I am representing a number of people in my county to any sort of work being done on existing so-called channel.
>
> * * * * * *
>
> I don't own just wood land, I own some other cultivated land and my tract of wood lands means more to me really than my cultivated land and I suspect it is more valuable. So we just sort of wish that the project would go away and I realize it is not.

The real issue was put in focus by the following question and the answer given by Eldridge:

> Q. I said you and those who are in your position are demanding that your duck hunting rights be preserved at the expense of the others who are being flooded and don't use them for duck hunting; is that true?
>
> A. I look at it a little bit different. They have got clear land and infringe upon our rights to keep it like it is to be perfectly frank with you, so it sort of depends on

> whose ox is gored. And we feel like our ox has been gored because we are taking it as God made it and we would like to keep it that way.

The only real evidence in support of the district was the testimony by its engineer. He emphasized in his written report that "[t]his program will not and is not intended to be a flood control project." Yet the main thrust of his testimony was that "we will increase the water runoff some fifty to sixty percent; two: we will have a navigable stream where fishermen and you and your sons can get into a boat and you might be able to motorize yourself up Cache River to Grubbs or thereabouts." That is flood control. He said there would be no dredging, but, according to him, there might be some removal of sandbars. The operation was primarily intended to remove three large log jams or blockages in the river.

It is undisputed that the Arkansas Game and Fish Commission, which is a landowner in the area, has not consented to the proposal; neither has the Corps of Engineers nor the Soil and Conservation Agency. In fact no agency involved in the long history of the Cache River has consented to this proposal. However, there are inferences that there also may be no real objections by these agencies to the proposal. Only one landowner testified in favor of the proposal. Yet the trial court was convinced the project should be approved. It said:

> It is the opinion of the Court that the modified and limited plan not to change the channel, not to increase the depth, but merely to remove those blockages and obstructions along the existing water route is a reasonable plan. It is a plan which will, in the Court's humble opinion, improve, enhance and benefit the vast majority affected within the area.

The majority addresses mostly the legal aspects of this case and has fairly set forth the questions raised. I cannot disagree that it appears that the appellee has not been as diligent as it could have been in pursuing its case. However, in a case of public interest, we are not bound by the usual rules of appellate procedure. *Arkansas State Nurses Associa-*

*tion* v. *Arkansas State Medical Board,* 283 Ark. 366, 677 S.W.2d 293 (1984).

If there was ever a case of public interest, it is this one; not only are a million acres of Arkansas land affected by this decision but also at issue is what will be preserved of the natural state of the Cache River and Bayou DeView. The evidence is persuasive that little benefit will be gained by the proposal. When the interest of all the landowners along the Cache River and Bayou De View are considered, together with the interests of those who enjoy these rivers, it is not even a close question. Those streams ought not to be sacrificed for a few crops on land that is not naturally suitable for cultivation. Ironically, those landowners who seek to use this land as they see fit, by controlling flooding, want someone else to pay for changing the river. There is, of course, more at stake than just the narrow interests of some landowners and duck hunters. Essentially, Arkansas' future is at stake because the quality of life here will determine our future. The distinction Arkansas has to offer its residents and visitors is its streams and forests. If those are destroyed, we will lose our most valuable natural asset. Besides the narrow interests of the parties, we have an obligation to consider the irreparable effects of our decision on our state. The treasure of those streams is a legitimate consideration which must weigh in the outcome of this case.

Moreover the appellants have raised a legal question with merit regarding the authority of the district to make such a proposal. Ark. Stat. Ann. § 21-1026 (Supp. 1983) extends the powers of the district to include the powers of a drainage district created under the general drainage district laws of this state, such as the power to alter the original plans. However, this extension of powers is limited to the sole purpose of completing the improvements provided for in the original plan enacted by Congress and drafted by the Corps of Engineers. The proposed changes are in opposition to the Corps' plan. The Corps' plan was to channelize the river and streams, changing the channel and increasing the depth. The proposed changes are to clear the waterways of obstacles. The proposal presented here is clearly contrary to the Corps' plan. Therefore, the proposed changes are not

for the purpose of completing the Corps' plan, but to alter the natural state of the district, and, as such, are not authorized under Ark. Stat. Ann. § 21-1026 (Supp. 1983).

I would reverse the judgment.

HAYS, J., joins in this dissent.

Dewey STILES, Director of Labor,
KELLY SERVICES, and PUBLISHER'S BOOKSHOP
*v.* Shelley COIT

84-279 686 S.W.2d 405

Supreme Court of Arkansas
Opinion delivered March 18, 1985
[Rehearing denied April 15, 1985.]

*Allan Pruitt,* for appellant.

*Gale Stewart,* for appellee.

JACK HOLT, JR., Chief Justice. At issue in this case is appellee's claim for unemployment benefits. The appellee was denied the benefits by the employment agency, the Arkansas Appeal Tribunal and the Board of Review of the Department of Labor based on a finding that she quit her last work without good cause connected with her work, pursuant to Ark. Stat. Ann. § 81-1106 (a) (Supp. 1983). The appellee appealed that decision to the Court of Appeals who reversed the board's findings. *Coit* v. *Stiles, et al,* 12 Ark. App. 397, 678 S.W.2d 373 (1984). We granted the director of the board's petition for review to be certain the court did not misconstrue the statute. We agree with the Court of Appeals.

Arkansas Stat. Ann. § 81-1106 (a) provides;

> For all claims filed on and after July 1, 1973, if so found by the Director an individual shall be disqualified for benefits:

> (a) [voluntarily leaving work.] If he voluntarily and without good cause connected with the work, left his last work. . .
>
> Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification;

The appellee was employed for ten years by Publisher's Bookshop in Little Rock. She was laid off on March 17, 1983, and began receiving unemployment benefits. In June, 1983, the appellee obtained part-time employment with Kelly Services. On September 15, 1983, the appellee quit her job at Kelly Services to move to Arizona with her husband, whom she married on October 8, 1983. At that time the appellee again filed for unemployment benefits based on her employment at Publisher's. In denying the claim, the board found the appellee was not entitled to benefits because she voluntarily quit her last work, at Kelly Services, without good cause.

On appeal, the appellee has contended that the board erred when it concluded that her last employment was with Kelly Services rather than with Publisher's Bookshop.

The court of appeals relied on an earlier case, *Hopkins* v. *Stiles, Director,* 10 Ark. App. 77, 662 S.W.2d 177 (1983), for the finding that "a claimant should not be disqualified from receiving unemployment benefits as a result of her accepting part-time employment when no suitable full-time employment is available." This court reversed the *Hopkins* decision on procedural grounds, finding the issue was not properly raised. *Stiles & Sears Portrait Studio* v. *Hopkins,* 282 Ark. 207, 666 S.W.2d 703 (1984). The issue is properly raised by this case however and we concur with the court of appeals' reliance on the rationale used in *Hopkins.*

In making its determination, the court of appeals quoted the decisions of several other courts. In *Tomlin* v.

*California Unemployment Insurance Appeals,* 82 Cal. App. 3d 642, 147 Cal. Rptr. 403 (1978), the California court interpreted their unemployment compensation benefit statute which precludes benefits if an employee left his "most recent work" voluntarily and without good cause. The court said:

> [T]he phrase "most recent work" should not be construed to mean merely the last employment of *any* kind prior to filing for benefits. It must refer to significant or regular employment in order to effectuate the purposes of the act. The most reasonable meaning for the term "most recent work,". . .is the most recent primary or principal or full-time employment of the individual. . .Therefore, if an individual had a full time job, on the basis of which he is now eligible for unemployment insurance benefits, his qualification for benefits is not totally eliminated because he voluntarily leaves a part-time job.

*Accord: Gilbert* v. *Hanlon,* 214 Neb. 676, 335 N.W.2d 548 (1983); *Unemployment Comp. Bd. of Review* v. *Fabric,* 24 Pa. Commw. Ct. 238, 354 A.2d 905 (1976); and *Neese* v. *Sizzler Family Steak House,* 404 So. 2d 371 (Fla. App. 1981).

The board argued that the statute was unambiguous and therefore not subject to interpretation. Both our decision and that of the court of appeals are consistent with priniciples of statutory construction. The Nebraska court in *Gilbert,* supra, relied on an Iowa decision for the proposition that a provision disqualifying an individual from benefits if he or she "has left work" voluntarily needed interpretation because it did not specify whether it meant "all his work" or "any of his work" or "part of his work". "It seems not to recognize that there might be more than one 'work' and two or more concurrent employers. Some construction or interpretation thus becomes necessary of a statute otherwise 'plain and unambigous.' " *Gilbert,* supra. Similarly, here the phrase "left his last work" does not specify whether the work must have been full-time or whether it could include part-time employment and therefore it must be interpreted.

In *Whitlow* v. *American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ark. App. 1980), the court of appeals stated that in interpreting § 81-1106 (a) it must be remembered that "the basic design of the Act is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, the Act should be liberally construed." We find that a liberal construction of this statute requires a finding that the appellee is entitled to benefits based on her job at Publisher's subject only to a reduction in benefits to the extent that her part-time wages compel that result. We need not reach the other issues raised by the appellee.

Affirmed.

Helen STEELMAN *v.*
PLANTERS PRODUCTION CREDIT ASSOC.

85-12 685 S.W.2d 800

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Young & Finley,* by: *James K. Young,* for appellant.

*Penix, Penix, Mixon & Lusby,* for appellee.

JACK HOLT, JR., Chief Justice. This appeal presents a question of whether actions can be maintained in separate counties to foreclose on parcels of land in each county constituting security for a single note and mortgage when a judgment has already been entered on the note and mortgage in one of the counties.

This case was transferred from the Court of Appeals to this court under Sup. Ct. R. 29 (4) (a) since it involved the interpretation of a statute.

Ark. Stat. Ann. § 27-601 (Repl. 1979), provides in part:

> Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof is situated, . . .

Third, For the sale of real property, under a mortgage, . . .

Ronald L. and Anne W. Archer owned lands in both Pope and Randolph Counties, which were subject to a single note and mortgage held by Planters Production Credit Association (PCA), the appellees.

Prior to filing the present suit, PCA obtained a consent judgment and decree of foreclosure on the note and the Randolph County lands. No attempt was made to foreclose on the realty in Pope County, although the same note and mortgage was involved.

After perfecting foreclosure in Randolph County, PCA filed this action to foreclose the Pope County land. After a hearing, the trial court awarded PCA judgment against the Archers and declared PCA third in priority over Helen Steelman, an intervenor, who was found by the court to hold a fourth lien.

Steelman contends that PCA did not have a right to maintain its action in Pope County in light of the Randolph County proceeding. PCA insists that Ark. Stat. Ann. § 27-601 requires this action to be brought in Pope County because subject matter jurisdiction and venue lie in Pope County for the Pope County land, and in Randolph County for the Randolph County land. The chancellor agreed with PCA and Steelman appealed. We reverse and dismiss.

The statute in question does not require isolation of causes of action for the sale of mortgaged real property to the extent that the Randolph Chancery Court could not take jurisdiction over lands in Pope County which were subject to a common note and mortgage with Randolph County lands. To the contrary, in *Wasson Bank Comm'r* v. *Dodge, Chancellor,* 192 Ark. 728, 94 S.W.2d 720 (1936), this court stated that the Jefferson Chancery Court was the proper forum to exercise foreclosure over lands in Jefferson and Pulaski Counties, and that no other court of equal dignity, or one having concurrent jurisdiction, had any right to interfere.

The Randolph Chancery Court had rightfully acquired jurisdiction of the necessary parties, included PCA, and the subject matter of the indebtedness of the Archers, secured by note and mortgages on the lands in both counties. That the appellant was not a party to the Randolph County litigation is immaterial.

When the appellee PCA obtained judgment against the Archers in Randolph County, it substituted the judgment for its note which constitutes a merger.

The Restatement (Second) of Judgments § 18 (1982) states:

> JUDGMENT FOR PLAINTIFF — THE GENERAL RULE OF MERGER. When a valid and final personal judgment is rendered in favor of the plaintiff:
>
> (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and
>
> (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

This position is also supported by Hazard and James in their treatise, *Civil Procedure* pp. 542-543 (2d ed. 1977). The authors point out:

> A good place to start critical analysis of the whole matter is with the question: why should not a party be compelled to join all the claims which he *may* join? . . .Wherever there will be a large overlap of issues of evidence if two trials are held, it is wasteful to society and harassing to the adversary to have more than one, and there should be no more than one unless there is some very good reasons. This will be the case in many situations where the evidence and issues are not identical.

*See also* 46 Am. Jur. 2d, *Judgments*, § 383, p. 552 (1969).

When PCA obtained judgment on its note, it could have asked the Randolph Chancery Court to foreclose on both tracts of land, appointing a commissioner to sell the lands in Pope County. Ark. Stat. Ann. § 30-501 (Repl. 1979). This it did not do. It would be unreasonable and unfair to permit PCA to take this same note, which has been reduced to judgment, and sue again for a separate judgment in another court. "Upon the merger of the cause of action in a judgment the old debt ceases to exist and the next judgment takes its place". 46 Am. Jur. 2d, *supra* § 384, p. 553.

The Randolph Chancery Court, having assumed jurisdiction for one purpose, has retained it for all and can grant all of the relief, legal and equitable, to which the parties are entitled. *Merchants & Farmers Bank* v. *Harris,* 113 Ark. 100, 167 S.W. 706 (1914). Therefore, the Pope Chancery Court is without jurisdiction in this matter. *Wasson Bank Comm'r, supra.*

The question of the reasonableness of the consideration paid for the Randolph County land by PCA should be addressed to the Randolph Chancery Court for the reasons stated.

Reversed.

John W. HALL, Sr., et al
*v.* Jimmie Lou FISHER, et al

84-212 685 S.W.2d 803

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*John Wesley Hall, Jr.;* and *Henry & Duckett,* by: *Stephen L. Curry,* for appellant.

*Steve Clark,* Att'y Gen., by: *Curtis L. Nebben,* Deputy Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice.The State of Arkansas, like most states, assists its counties financially by distributing part of the State's revenues, called county turnback funds, to the counties every year. Since the enactment of the 1973 Revenue Stabilization Act, the formula for distribution has been to divide 75% of the funds equally among the 75 counties and to divide the other 25% proportionately by

population according to the most recent federal decennial census. Ark. Stat. Ann. § 13-523 (C) (Repl. 1979).

This suit for a declaratory judgment invalidating the statute was brought by certain Pulaski County taxpayers, who assert that the distribution formula has no rational basis and is therefore an illegal exaction and a denial of equal protection. The original defendants were the State Treasurer and other state officers. Pulaski County intervened as a plaintiff, and the other 74 counties were brought in as defendants. After a trial during which much testimony and many exhibits were introduced, the chancellor dismissed the suit with prejudice, finding that the plaintiffs had not sustained their burden of proving that there is no rational basis for the formula.

The single argument for reversal is that the trial court's finding is clearly erroneous. We cannot agree.

The plaintiffs admittedly had the burden of proving the absence of any rational basis for the formula. *Schweiker* v. *Wilson,* 450 U.S. 221 (1981); *Streight* v. *Ragland,* 280 Ark. 206, 655 S.W.2d 459 (1983). In *Schweiker* the court pointed out that if a classification in economic legislation has some reasonable basis, it is not invalid even though it lacks mathematical nicety and results in some inequity. It was also said:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

Pulaski County's grievance centers on proof that, although its population gives it the largest sum received by any county in turnback aid, on a per capita basis it received, in 1982 for example, only $2.63 per person, the lowest amount for any county, in contrast with the maximum of $33.24 per person received by Calhoun County. If the counties are classified in larger groups, in 1980 those having

a population of more than 45,000 received an average of $3.65 per person, those in the middle group an average of $7.34 per person, and those below 20,000 in population an average of $14.68 per person.

All the proof shows, however, that population is by no means the only factor to be considered. Primarily, turnback funds reimburse the counties at least in part for the cost of services that counties are required by state law to provide. Among the services specifically mandated are the administration of justice by means of the courts, law enforcement protection, the maintenance of jails, the assessment and collection of property taxes, the keeping of public records, and all services required to be performed by county officers and departments. Ark. Stat. Ann. § 17-3802 (Repl. 1908). In addition to the costs of the required services, the maintenance of each county's road system creates a financial problem that varies from county to county. Other services provided voluntarily by some counties include fire protection and waste disposal.

The existing formula undoubtedly benefits the poorer and less populous counties at the expense of the richer and more populous ones, but the evidence does not show that such a state policy is without a rational basis. Moreover, there are indications that still other weighty factors to be considered in arriving at a fair distribution formula include comparative local wealth, total assessed property values with possible adjustments for differences in the percentage of market value being assessed, the extent to which the residents of each county have taxed themselves to the full extent allowed by state law, and the total area of federally owned tax-exempt land within each county. For the most part, those important elements in the general problem cannot be determined with any measure of certainty, so that among many possible formulas there is necessarily much leeway for the exercise of sound legislative judgment.

The plaintiffs' two principal witnesses both testified that in their opinion there is no rational basis for the existing formula, but neither witness was a disinterested expert. Rather to the contrary, one was the incumbent

Pulaski County county judge and the other a professor who had worked for four years in Little Rock's budget department and for two years as the county's budget director. Their opinions were opposed by that of Dr. Frank Troutman, who testified that there is a rational basis for the State's policy and who supported his conclusion with calculations tending to demonstrate a close inverse correlation between the ranking of the counties in order of wealth and their ranking in the amount of turnback funds being received.

The chancellor was right in concluding from the proof that the plaintiffs had failed in their difficult task of proving a negative, that the legislative formula has no rational basis whatever. In closing, we emphasize two matters that are of particular significance. One, no witness for the plaintiffs suggested a specific formula that would be superior to the one that has been in force for more than ten years. There were many general criticisms of the State's formula and much discussion of the factors that ought to be considered, but no concrete remedy was offered. Two, of all the important factors that have been brought up for consideration, the only one that can be determnined with certainty is comparative population. It is also a factor that affects many other lesser elements in the problem, such as the need for courts, for police protection, and indeed for most county services. And that very factor is the one selected by the legislature as part of a formula otherwise based on numerical equality. Perhaps a larger allocation on the basis of population might have been more equitable, but that is a determination to be made by the General Assembly, where all the counties are represented by comparative population, not by the courts on the basis of the testimony in this case.

Affirmed.

Max A. TAUSCH *v.* STATE of Arkansas

CR 85-4 685 S.W.2d 802

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Tucker & Thrailkill,* by: *Patricia A. Tucker* and Danny Thrailkill, for appellant.

*Steve Clark,* Att'y Gen., by: *Joyce Rayburn Greene,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is another in a number of cases questioning the validity of the Omnibus DWI Act. Act 549 of 1983. In this case Tausch pleaded guilty in the municipal court to a first DWI offense, but he contested the charge in the circuit court. After a non-jury trial the circuit court made a finding of guilty and imposed the same punishment as that in the municipal court: Twenty-four hours in jail, a 90-day suspension of Tausch's driver's license, and a $500 fine. Among many arguments presented to the circuit court, only two are asserted on appeal.

First, it is argued that the statute violates the constitutional separation of governmental powers by prohibiting

trial judges from suspending the execution of the sentences mandated by the act. In a supplemental opinion on rehearing in *Lovell* v. *State,* 283 Ark. 434, 681 S.W.2d 395 (1984), we held that as a matter of statutory interpretation the sentencing provisions of the Omnibus DWI Act are mandatory. The constitutional question was not then before us, but we have no hesitancy in upholding the validity of the act. In *Hill* v. *State,* 276 Ark. 300, 634 S.W.2d 120 (1982), we adhered to our many prior cases holding that the courts have no inherent authority to suspend the execution of sentences; the power to grant or withhold that authority rests with the General Assembly. Those cases are controlling here.

The appellant's second argument, that under the act the blood-alcohol level creates a conclusive presumption of guilt and compels a person to incriminate himself, has been rejected in earlier cases construing the Omnibus DWI Act. *Steele* v. *State,* 284 Ark. 340, 681 S.W.2d 354 (1984); *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318 (1984).

Affirmed.

# FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS, et al. *v.* Eddie WRIGHT

84-203 686 S.W.2d 778

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Barrett, Wheatley, Smith & Deacon,* for appellant, Farm Bureau Mutual Ins. Co.

*Friday, Eldredge & Clark,* by: *Michael G. Smith,* for appellant Continental Grain Co.

*Steve Clark,* Att'y Gen., by: *Robert R. Ross,* Deputy Att'y Gen., as amicus curiae.

*Rice L. VanAusdall,* for appellee.

DARRELL HICKMAN, Justice. The primary question presented in this case is whether, since the passage of Act 401 of 1981, a farmer who orally sells his grain to a licensed grain warehouseman, who subsequently goes bankrupt, can void the sale and recover the unpaid purchase price from the company that purchased the grain from the warehouseman. The trial court held that the farmer, appellee Wright, is entitled to recover. We disagree.

We believe the purpose of Act 401 is to protect farmers who have stored their grain in warehouses, not those who have made an outright sale of their grain to a warehouseman. Here there was a sale. Act 401 was passed in response to a farm market crisis created by storage elevators going bankrupt and placing farmers, who had stored their grain, at odds with banks, lienholders and creditors over the ownership of the grain. Wayne Cryts, a Missouri farmer, became

the focus of national attention in the James Brothers case[1] when he removed his grain from a bankrupt elevator in violation of bankruptcy court orders. Shortly after the Cryts incident, Act 401 was passed. The history of the act is set out in detail in Note, Act 401 of the *Public Grain Warehouse Law: An Exception to the U.C.C. Concept of Voidable Title,* 37 Ark. L. Rev. 293 (1984). In commenting on the purpose of Act 401, the author said.

> While there has been much discussion in the wake of the James Brothers case as to needed changes in laws governing grain warehouses, Arkansas is the only state which has varied from the U.C.C. to allow a grain depositor to recover against a warehouse grain buyer in the ordinary course of business. Since unauthorized sales 'are void and convey no title,' the farmer can sue to recover from the purchaser, assuming that he has not signed the written instrument required by Act 401, and the identity of the purchaser can be determined. This change is significant because failing grain warehouses have been known to sell depositors' grain to avoid bankruptcy, although such action usually postpones bankruptcy only briefly.

In this case Eddie Wright sold his soybeans to Harrisburg Elevators, Inc., in February, 1983. It was a "spot sale" at his farm for a quoted price. Payment was to be made March 1. It is undisputed that Wright was selling the soybeans, not storing or depositing them with the Harrisburg grain elevator. The beans were taken by Harrisburg to their elevator merely to weigh them and then carried to Memphis and sold there to Continental Grain Company, a federally licensed warehouseman. Continental paid Harrisburg, and Harrisburg gave Wright a check for the purchase price, $73,932, which was dishonored. Wright later received a cashier's check for $17,000 and a personal check for $56,832. The personal check was dishonored. Because of its financial trouble, the State Plant Board closed Harrisburg and Harrisburg soon filed for bankruptcy. Before Harrisburg filed, it paid Wright another $12,000. Wright filed suit for

[1]*Missouri* v. *United States Bankruptcy Ct.,* 647 F.2d 768 (8th Cir. 1981).

conversion against Continental Grain Company and Farm Bureau Mutual Insurance Company, which was Harrisburg's bonding company, for the balance of the sale price. The trial court held that Continental and Farm Bureau were jointly and severally liable.

First, we discuss Farm Bureau's appeal. Their defense was that their bond applied only to grain stored in Harrisburg's elevators, and we agree. Under the statute licensing bonded grain warehousemen, the bond is to be conditioned upon the warehouseman's delivering all stored grain or paying its value upon surrender of the warehouse receipt. Ark. Stat. Ann. § 77-1315(a) (Repl. 1981). The amount of the bond is to be determined by the capacity of the warehouse. Ark. Stat. Ann. § 77-1316(a) (Repl. 1981). Statutory bonds are to be construed as if the terms of the statute were written into them. *Empire Life & Hospital Ins. Co.* v. *Armorel Planting Co.*, 247 Ark. 994, 449 S.W.2d 200 (1970). We think it clear that the bond is to protect only the holders of warehouse receipts. Since Wright does not fall within that class, he is not entitled to judgment against Farm Bureau. That conclusion also disposes of Wright's cross-appeal, by which he seeks to recover penalty and attorney's fee from Farm Bureau.

It is not so easy to dispose of Continental's appeal. The trial court ruled that under Act 401 the sale by Harrisburg to Continental was void because Wright had not executed a written document conveying title to the soybeans. We find that ruling to be wrong because in our judgment the act only applies to grain which is stored, not sold outright to the warehouseman. The basis of the trial court's decision and the heart of Act 401 is Section 4, which reads:

> 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 Com-

> mercial Code (Act 185 of 1961 [§ 85-1-101 et seq.], as 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 public grain warehouseman.

A first reading of this section might lead one to conclude that a farmer could void any transaction with a grain warehouseman. But this section does not say a farmer can void an outright sale he makes to a warehouseman; only a sale made by a warehouseman of grain delivered to him for storage can be voided.

There are several reasons for our conclusion. First, the act does not expressly purport to apply to sales by a farmer to the warehouseman. The sales that the act voids are sales of grain *delivered* to a warehouseman and sales of grain within the warehouseman's *possession*. This was the conclusion of the writer of the article noted before who stated: "the farmer who has sold his grain would be estopped from asserting his rights under Ark. Stat. Ann. § 77-1340." See Note, *supra*, 37 Ark. L. Rev. 293, 304. It is usual for a warehouseman to act both as a warehouseman who stores grain and as a dealer in grain. These are two distinct roles. Act 401 regulates warehousemen only when they are acting as warehousemen. Arkansas has no statutory regulation of grain dealers.[2] Section 3 of Act 401 recognizes this dual role when it refers to "a warehouseman who is also in the business of buying and selling such goods. . . ."

We are also especially persuaded by the emergency clause which reveals the true purpose of the act:

> It is hereby found and determined by the General Assembly that Arkansas grain producers are experiencing severe losses due to their *stored grain* in public warehouses being sold or encumbered by the public

[2] Some states do have such regulations. See e.g., Ill. Ann. Stat. § 114 Par. 701 et seq. (Supp. 1984); Mo. Stat. 276-401 *et seq.* (Supp. 1985); Wyo. Stat. § 11-11-101 *et seq.* (1983).

> grain warehousemen without their authorization, and that this Act is immediately necessary to clarify the law and grant protection to Arkansas farmers. (Italics supplied.)

It is a rule of statutory construction that the emergency clause of an act can be used in determining the intent of the legislature. *Missouri Pacific Railroad Co.* v. *Kincannon,* 203 Ark. 76, 156 S.W.2d 70 (1941). This clause is consistent with the title of the act which reads:

> An ACT to Provide That Ownership of Grain Shall Not Change by Reason of *Delivery* Thereof to Public Warehousemen and Title to Grain in the Possession of Public Grain Warehousemen Does not Pass to Such Warehousemen Unless the Owner of the Grain Has by Written Document Signed by the Owner of the Grain Transferred Title to the Warehousemen; and for Other Purposes (Italics supplied).

Furthermore, the Arkansas State Plant Board, which is the agency charged with admninistering Act 401, interprets the act to apply only to grain stored, not sold. The trial court ignored evidence of this interpretation and only allowed a proffer of the testimony. It was not only admissible, it was relevant because an administrative interpretation is to be regarded as highly persuasive. *Bramley School Dist. No. 35* v. *Kight,* 206 Ark. 87, 173 S.W.2d 125 (1943).

The act specifically amends by reference the Uniform Commercial Code provision which allows buyers in the ordinary course of business to take free of any claim under a warehouse receipt. Ark. Stat. Ann. § 85-7-205 (Supp. 1983). Section 3 of Act 401 amends that code provision so that soybeans and other specified grains are excepted; no longer is title voidable — it is void unless a farmer signs a document authorizing the sale or encumbrance of his grain. This was a radical step by the General Assembly pertaining to warehouse receipts but to conclude that the intent was to make it possible to void all sales as well would be to rewrite the act. There was no warehouse receipt in this case.

For all these reasons we conclude that the trial court was wrong in applying Act 401 in this case. We need not address the other questions raised by Continental. Neither party vigorously contended that Continental was not an innocent purchaser; i.e., that Continental was aware that Harrisburg did not have good title to the grain. There was only testimony by one of Continental's managers that he had heard rumors that Harrisburg was having financial trouble and that they heard the same about many elevators at the time.

In order to defeat the sale, Wright would have had to prove that Continental was not a good faith purchaser for value. Ark. Stat. Ann. § 85-2-403 (Repl. 1981). Since that was not proven, Wright cannot recover from Continental.

Reversed.

GEORGE ROSE SMITH and DUDLEY, JJ., dissent.

GEORGE ROSE SMITH, Justice, dissenting. The statute in question was undoubtedly passed to provide farmers with additional protection against improvident or dishonest grain warehousemen, but the majority's narrow interpretation of the act has deprived Wright and other farmers of the protection that was intended. We must assume that the legislature was familiar with the evil it was trying to correct. When I look at the facts which gave rise to the enactment of the statute, facts which the majority have quite properly omitted in stating their views, I am convinced that the act had a remedial purpose and should be liberally construed to achieve that purpose.

According to the proof, 98% of the public grain warehousemen in Arkansas are primarily engaged in buying and selling grain, not in storing it. Harrisburg Elevators, for example, bought 140,000 bushels of soybeans in January and February, 1983, the month pertinent here, but it had only about 7,000 bushels in storage. The average farmer does not have the tractor-trailers and equipment necessary for him to sell and deliver his own crop. Consequently he is compelled, as Wright was compelled, to sell his crop to a

grain warehouseman. In that situation the application of the statute is clear.:

> 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.

The act declares that title shall not pass by the farmer's "delivering" his grain to a public warehouseman, but the majority hold that the legislators really meant to say "delivering for storage." Why? Most grain is not delivered for storage. The farmer who does deliver his crop for storage, a comparatively rare transaction, has scant need for the new statute. He receives a warehouse receipt for his grain, and if the warehouseman cannot honor the receipt the farmer is protected by the warehouseman's surety bond, required by law. Futhermore, the farmer who merely stores his grain still owns it. There is not the slightest reason for him to transfer title to the warehouseman by written document, as the same sentence in the act contemplates. To the contrary, he does *not* intend to pass title when he stores his crop. Yet, as the majority interpret the statue, he must make a written transfer of title to obtain the protection intended by the act. All that Harrisburg had to do in buying Wright's crop was to have him sign any piece of paper transferring title. It was Harrisburg, knowledgeable in the business, who was at fault, not Wright. But it is Wright who suffers the consequences.

I would construe the statute to give effect to the purpose for which it was passed. I agree that the judgment should be reversed as to the bonding company, but I would affirm on the principal issue.

DUDLEY, J., joins in this dissent.

# Edwin L. MENDENHALL *v.* SKAGGS COMPANIES, INC., d/b/a SKAGGS ALPHA BETA

84-227 685 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Bob Scott* and *Tom Hinds,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

DARRELL HICKMAN, Justice. Edwin L. Mendenhall, the appellant, was arrested for shoplifting at one of the appellee's Little Rock stores. Wilbur Page, an off-duty policeman employed by the appellee as a detective, testified that he observed Mendenhall place two bottles of men's cologne in a paper bag and leave the store. Page followed Mendenhall from the store, stopped him, identified himself as a police officer, took Mendenhall to the store office, and arrested him. A store supervisor corroborated Page's testimony. Mendenhall denied he had stolen the items but maintained that he brought the items in to exchange them. Mendenhall was convicted of theft of property in municipal

court. On appeal to the circuit court, the jury was unable to reach a verdict, and a mistrial was declared. Mendenhall sued the appellee for false arrest and false imprisonment. The jury found for the appellee and we affirm.

On appeal Mendenhall argues that the court erred by instructing the jury that probable cause is a defense to false arrest by a private citizen for a misdemeanor. This is the instruction given to which Mendenhall objected at trial:

> Where a person has probable or reasonable cause to believe that another person is attempting to take property without payment, he is legally justified in detaining the person for a reasonable length of time for the purpose of making an investigation in a reasonable manner. It is for you to determine whether any restraint or detention shown by the evidence in this case was reasonable in time and manner.

This is the instruction proffered by Mendenhall and rejected:

> An arrest by a private person for a misdemeanor is legally justifiable only if the Plaintiff is guilty of the offense for which it is claimed he was arrested, and the Plaintiff is not bound to show either want of probable cause or malice to entitle him to recover.

Mendenhall argued at trial that the instruction given was erroneous because he was "arrested" rather than "detained." He also contends it was wrong to give instructions which track the theft of property statute (Ark. Stat. Ann. § 41-2203 [Repl. 1977]), the shoplifting presumption statute (Ark. Stat. Ann. § 41-2202 (2) [Repl. 1977]), and the shoplifting detention statute (Ark. Stat. Ann. § 41-2251 [Supp. 1983]). The Arkansas shoplifting statute, Ark. Stat. Ann. § 41-2251, provides in relevant part:

> (a) A person engaging in conduct giving rise to a presumption under Section 2202 (2). . . may be detained in a reasonable manner and for a reasonable length of time by a peace officer or a merchant or a

merchant's employee in order that recovery of such goods may be effected. Such detention shall not render such peace officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment or unlawful detention.

* * * * * * * * * * *

(c) A peace officer may arrest without a warrant upon probable cause for believing the suspect has committed the offense of shoplifting. Sufficient probable cause may be established by the written statement by a merchant or merchant's employee to the peace officer that the affiant has observed the person accused committing the offense of shoplifting. The accused shall be brought before a magistrate forthwith and afforded the opportunity to make a bond or recognizance as in other criminal cases.

Mendenhall's argument, which is more clearly presented on appeal than below, is that the shoplifting statutes are not applicable because in this case the policeman was employed by Skaggs, and was, therefore, an employee of the appellee and could only "detain" Mendenhall rather than "arrest" him under Ark. Stat. Ann. § 41-2251. The appellee admitted that Page was acting as its employee when he arrested Mendenhall. Mendenhall argues that a private person can only arrest one committing a felony; that a private person cannot arrest a misdemeanant even upon probable cause; and since shoplifting is only a misdemeanor and Page was acting as a private person, probable cause is no defense.

We reject this argument. Unlike some other states, we have recognized for some time that probable cause is a defense to a civil action for false arrest or false imprisonment in connection with a misdemeanor. In *Kroger Grocery & Baking Co.* v. *Waller,* 208 Ark. 1063, 189 S.W.2d 361 (1945), we rejected an instruction which stated that the grocery store could justify an arrest for shoplifting *only* by showing that the plaintiff *actually* committed a misdemeanor. We plainly stated that this was not the law. We held that if the store

employee acted in good faith in stopping the plaintiff and causing her arrest then no civil action would lie against the defendants. In so holding we affirmed the rule of *Mo. Pac. R.R. Co.* v. *Quick,* 199 Ark. 1134, 137 S.W.2d 263 (1940), that, as a matter of law, probable cause would defeat an action for false arrest.

Mendenhall asks us to ignore these precedents since in his case he was actually *arrested* by a store employee rather than just detained. Does it matter that the merchant or his employee actually arrested, rather than just detained, the suspect? The appellant would argue so. There is no doubt that if a merchant detains a person, calls the police and *causes* the arrest, probable or reasonable cause is a defense. *Kroger Grocery & Baking Co.* v. *Waller, supra;* Ark. Stat. Ann. § 41-2251 (Supp. 1983). [1]

In this case, without objection, the jury was instructed that if they found Skaggs was not "legally justified" in arresting the appellant *or* in falsely imprisoning him it should find for the appellant, and the converse. Was Page detaining Mendenhall as an employee of Skaggs but arresting him as a police officer? This question was never presented to the jury. While the appellant asked the word "policeman" be changed to "employee" in one of the instructions, the argument the appellant makes was never clearly made to the court. Neither was an instruction requested which explained the distinction. The proffered instruction would have been meaningless to the jury without an instruction asking the jury to decide if the policeman was acting in his official capacity or as an employee of Skaggs when he detained and arrested the appellant. See *Dillard Dept. Store* v. *Stuckey,* 256 Ark. 881, 511 S.W.2d 154 (1974). It was appellant's duty to present his theory of the case through his instructions. Since he did not present instructions which embodied his theory, we find no

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[1]. The distinction in the shoplifting statute between "detain" and "arrest" may be insignificant so far as a civil suit for false arrest is concerned. See W. Ringle, *Searches & Seizures, Arrests and Confessions,* 928.3 (c)(1984).

error. *Bovay* v. *McGahhey,* 143 Ark. 135, 219 S.W. 1026 (1920).

Affirmed.

PURTLE, DUDLEY, and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The appellant is correct in his contention that a private citizen cannot arrest on the basis of probable cause to suspect commission of a misdemeanor. For the contrary proposition the majority cites *Kroger Grocery & Baking Co.* v. *Waller,* 208 Ark. 1063, 189 S.W.2d 361 (1945), and *Mo. Pac. R.R. Co.* v. *Quick,* 199 Ark. 1134, 137 S.W.2d 263 (1940). In the *Kroger* case the arrest was made by a police officer who was presumably called to the scene by a store employee. In the *Mo. Pac.* case, the opinion is based on the assumption, although the testimony left some doubt, that the person making the arrest was an "officer."

The distinction drawn by the appellant between "detention" and "arrest" is a legitimate one. Ark. Stat. Ann. § 41-2202(2) (Repl. 1977) provides,

> Shoplifting Presumption. The knowing concealment, upon his person or the person of another, of unpurchased goods or merchandise offered for sale by any store or other business establishment shall give rise to a presumption that the actor took goods with the purpose of depriving the owner, or another person having an interest therein.

Ark. Stat. Ann. § 41-2251(a) (Supp. 1983) provides,

> A person engaging in conduct giving rise to a presumption under Section 2202(2) [§ 41-2202(2)] of the Arkansas Criminal Code may be detained in a reasonable manner and for a reasonable length of time by a peace officer or a merchant or a merchant's employee in order that recovery of such goods may be effected. Such detention by a peace officer, merchant or merchant's employee shall not render such peace

> officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment or unlawful detention.

This statute makes it clear that one may be detained "in a reasonable manner and for a reasonable length of time" for the purpose of recovering a merchant's goods.

"Arrest" is quite a different matter.

> An arrest is the taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law. [A.L.I., Rest. Torts 2d (1965)]

Our statutory scheme for arrests begins by saying an arrest may be made either by a private person or by a peace officer. Ark. Stat. Ann. § 43-402 (Repl. 1977). It then specifies the circumstances under which a peace officer may arrest as follows:

> First. In obedience to a warrant of arrest delivered to him.
>
> Second. Without a warrant, where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony. [Ark. Stat. Ann. § 43-403 (Repl. 1977)]

It further specifies when a private person may arrest as follows:

> A private person may make an arrest, where he has reasonable grounds for believing that the person arrested has committed a felony. [Ark. Stat. Ann. § 43-404 (Repl. 1977)]

At no point does our statutory law provide that a private person may arrest on the basis of probable cause to suspect a misdemeanor has been committed.

There is no doubt that Page arrested, rather than detained, Mendenhall. There is no question in my mind that he would have had no authority to do it if he had been a private person, and I fear the majority opinion will be read as permitting such arrests.

An off-duty peace officer does not lose his status as a policeman either by virtue of the fact he is off-duty or acting in the course of employment for another. *Meyers* v. *State,* 253 Ark. 38, 484 S.W.2d 334 (1972). Had Page been the defendant here, I could have concurred in a holding he had authority to make an arrest. However, the defendant in this case is Skaggs, so the question becomes whether Skaggs may immunize itself from liability for false arrest by employing persons who have independent authority to arrest which Skaggs does not have.

In *Dillard Department Stores* v. *Stuckey,* 256 Ark. 881, 511 S.W.2d 154 (1974), we specifically rejected Dillard's contention it was immune from liability for false arrest because of its employee's independent obligation as an off-duty policeman to make an arrest. In the *Dillard* case we held there is a fact question to be answered as to whether a private person had probable cause to summon a policeman and instigate an arrest. To my knowledge we have never held a private entity, such as Skaggs, may arrest one who assuredly has, or is legitimately suspected of having, committed a misdemeanor.

The instruction given by the trial court on reasonableness of detention was inapplicable. Skaggs, through its agent Page, was not merely detaining Mendenhall, it arrested him. Arrest is more than detention for a reasonable time. It involves custody and loss of freedom for an indefinite time. The majority suggests we should ignore the appellant's proffered instruction because the jury was not asked to decide whether Page was acting as a police officer or as Skaggs' agent. As noted earlier, the *Dillard* case makes it clear that it does not matter that Page was an off-duty policeman. Any such instruction would have been superfluous.

"False arrest" is just another name for "false imprisonment." W. Prosser, Law of Torts, p. 42 (4th Ed., 1971). Our law permits imprisonment by a merchant to the extent of detaining a shoplifter for a reasonable time. It does not permit a merchant to imprison a shoplifter to the extent of arresting him, either personally or by agent.

While I am not certain all of the proffered instruction was correct, I am certain it more accurately described the applicable law than did the instruction given. Therefore, I respectfully dissent.

Justices Purtle and Dudley join in this dissent.

C & L TRUCKING, INC. and Kelly CAPPS
*v.* Donna ALLEN, et al

84-252 686 S.W.2d 399

Supreme Court of Arkansas
Opinion delivered March 18, 1985
[Rehearing denied April 22, 1985.]

*Paul Petty,* for appellant.

*Edward O. Moody,* for appellee.

DARRELL HICKMAN, Justice. This is an appeal of a wrongful death action arising from a truck accident in Akron, Ohio, in which the driver of the truck, Dennis Lee Allen, was killed. The appellees, Allen's wife and heirs, filed this lawsuit against C & L Trucking, which owned the trailer, Kelly Capps, who owned the tractor, and Junior Landis, who owned J & L Trucking, Dennis Allen's employer. The appellees had already recovered workers' compensation benefits from J & L Trucking. Junior Landis was dismissed as a party during the trial. The jury found for the appellees. The trial court signed the judgment of joint and several liability in the amount of $152,000. On appeal the appellants make several arguments which were either not timely made to the trial court, are unsupported or are unconvincing. We, therefore, affirm.

First, it is argued that the action against C & L Trucking is barred because C & L and J & L are so interrelated that they are one and the same company, that they were both Dennis Allen's employer; therefore, since the appellees had already recovered from J & L, the tort action against C & L is barred. This argument was first raised at the close of the appellees' case. The basis of the argument was that the same court had ruled in another case that employees of J & L are, in fact, employees of C & L. At that point the only evidence concerning the ownership of the companies was that Junior

Landis testified that he and his wife were partners in J & L and that Dennis Allen was paid by J & L. The trial court ruled that the prior case was not *res judicata* on the issue; that the issue of that case was commingling assets and employees of the two companies for purposes of determining workers' compensation insurance premiums.

The argument was not raised again at the close of the case. The appellees made a *prima facie* case that C & L and J & L operated as separate entities. It was shown that C & L owned the trailer, that Capps owned the tractor and leased it to C & L; that Capps worked for C & L and that Allen was paid by J & L. Junior Landis testified during the appellees' case as follows:

> Q. Mr. Allen the decedent was an employee of J & L, is it correct?
>
> A. Yes.
>
> Q. What is the relationship between J & L Trucking and C & L Trucking, Inc.?
>
> A. J & L, we had a few trucks, me and my wife ourselves, two or three trucks. We own C & L. We personally own both companies. We had our insurance under J & L Trucking.
>
> Q. Was there a distinction in how you handled your books? Is J & L's books different than C & L's books. Were they all handled as one set of books in conjunction with profits of C & L?
>
> A. All profits and losses.
>
> Q. And expenses?
>
> A. And expenses and everything went through C & L's books.

On cross-examination Landis said that C & L stood for "Capps and Landis." He said that Capps leased trucks to C &

L, and that C & L owned about 40 trucks and that J & L owned 6 or 8 trucks. Then Landis was asked:

> Q. Does your CPA keep your records on C & L Trucking?
>
> A. Yes.
>
> Q. Aren't the J & L records kept in your office?
>
> A. I think so, if there is any records.

In a motion for a new trial, the appellants raised the argument again and attached an affidavit signed by Mr. and Mrs. Junior Landis which averred that J & L's trucks are used and directed by C & L, that J & L does no hiring because C & L handles all personnel matters, and that although checks are written on J & L's account, all money received is from C & L's business.

When the trial court rejected this argument, there was no convincing evidence before it that the companies were one and the same. After some evidence of interrelation was presented during the appellants' case, the argument was not raised again. In the motion for a new trial the appellants made the same argument and tried to introduce more evidence in support of the argument. That evidence could have been introduced at trial but was not. At the time the court rejected the argument, there was no evidence from which we could say that the court was clearly wrong in its decision. ARCP Rule 52. The argument could have been raised again at the close of the appellants' case but was not. Therefore, we find no error.

The appellants also argue that Dennis Allen had been loaned by J & L to C & L and, therefore, C & L was the employer at the time of Allen's death so that the only remedy against C & L would be worker's compensation. The trial court ruled before trial that the issue could be presented to the jury. There is no evidence, however, that the appellants ever raised the question again or asked that the issue be resolved by the jury. No instruction was requested or

proffered. Therefore, we will not consider the issue on appeal. See *Bovay* v. *McGahhey,* 143 Ark. 135, 219 S.W.2d 1026 (1920).

The argument that C & L and J & L were joint venturers and therefore immune from tort liability under workers' compensation law was not raised to the trial court, nor submitted to the jury, and we will not consider it. *Sanders* v. *Newman Drilling Co.,* 273 Ark. 416, 619 S.W.2d 674 (1981).

The appellants argue that the appellees did not sustain their burden of proving that their negligence was the proximate cause of Allen's death. Appellees produced two witnesses that testified that the accident was caused by worn tires on the truck. One of the witnesses was an expert, the other was the Ohio policeman who investigated the accident. Proximate cause is ordinarily a question for determination by the trier of facts. *Cragar* v. *Jones,* 280 Ark. 549, 660 S.W.2d 168 (1983); *Keck* v. *American Employment Agency,* 279 Ark. 294, 652 S.W.2d 2 (1983). We find substantial evidence to support the jury's verdict.

The jury returned a verdict which stated: "We the jury find in favor of the Plaintiffs against the defendant C & L Trucking, Inc., on the issue of liability." Written out was the following notation: "Equally liable w Capps." It was signed by the foreman and then written below was "50% liability" and it was again signed. The same verdict was returned against Capps with the same notations. The trial judge sent the jury back to determine damages and said: "In addition to that for clarity in the record, the Court would like to give you back the verdict forms that were signed and returned, and ask you to prorate on the basis of percentages equalling what you think is appropriate with regard to these two Defendants in this case." The jury returned a verdict against Kelly Capps for $76,000 and against C & L for $76,000. This all occurred without objection. The trial court entered a judgment finding Capps and C & L jointly and severally liable in the amount of $152,000. The judgment was approved by both attorneys.

The appellants argue that they are not jointly and

severally liable and, if they are, they are only liable for $76,000. After trial C & L filed a bond admitting liability in the amount of $152,000 and gave land as collateral. The appellees objected. The trial court ruled that an appropriate bond must be posted. C & L convinced the court to amend the judgment so that the words "jointly and severally" were stricken. C & L then posted a bond for $76,000. The appellees petitioned this court for a writ of mandamus. We held that the amended judgment should be set aside and that a supersedeas bond should be secured in the amount of $152,000. We are convinced we were right because to hold otherwise would be to ignore that the jury found these joint tortfeasors to be equally liable. The jury returned separate verdicts against Capps and C & L finding each to be liable in the amount of $76,000. We cannot assume from the verdicts rendered that the jury intended to limit damages to only $76,000. Neither the judge nor the attorneys made that assumption when the judgment was entered without objection. Each was found to have negligently caused Allen's death. They were joint tortfeasors and were, therefore, jointly and severally liable for the judgment returned against them. See Ark. Stat. Ann. § 34-1001 et seq. (Repl. 1962); see also *Scalf* v. *Payne,* 266 Ark. 231, 583 S.W.2d 51 (1979).

Affirmed.

Paul C. LOU and WALGREENS COMPANY
*v.* Charlotte SMITH

84-281 685 S.W.2d 809

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Wright, Lindsey & Jennings,* for appellant.

*Raymond R. Abramson,* for appellee.

DARRELL HICKMAN, Justice. Paul C. Lou, a pharmacist with twelve years experience, received a prescription calling for the drug Reglan, at a dosage of 1 milligram, four times daily. Because Lou had only 10 milligram tablets of the drug, and because he assumed the prescription was for an adult and that the doctor had made an error, he wrote in a zero after the "1" on the prescription slip so that it prescribed 10 milligrams, four times a day. It was, in fact, a prescription for Charlotte Smith's four month old daughter, Sarah. When Mrs. Smith returned home that evening and gave Sarah the dosage, she suffered severe reactions. The child was taken to the hospital immediately and survived apparently without permanent injury. Charlotte Smith, her husband, and Sarah filed suit against the pharmacist and his employer, the Walgreens Company, for damages. The jury returned a verdict awarding compensatory damages to the mother in the amount of $3,250, $2,000 for the daughter, and punitive damages in the amount of $3,750 in favor of the mother, father and the daughter. On appeal there is only one real issue and that is whether the court was right in allowing the jury to consider awarding the mother damages for mental anguish alone when she suffered no physical injuries. We affirm the judgment.

The appellee filed suit for damages based on the allegation that Charlotte Smith had suffered mental anguish which was caused by the willful and wanton misconduct of the pharmacist with his company liable as his employer. As early as 1920 we recognized that there is a right to recovery for mental anguish without contemporaneous physical injury where the anguish resulted from a willful wrong directed at a person other than the plaintiff. *Rogers* v. *Williard,* 144 Ark. 587, 223 S.W. 15 (1920).[1] While we denied the parents of a child any recovery for mental anguish in a case a year later, *Miles* v. *American Railway Express Co.,* 150 Ark. 114, 233 S.W. 930 (1921), it was because there was no willful misconduct, only negligence.

In *M.B.M. Co.* v. *Counce,* 268 Ark. 269, 596 S.W.2d 681 (1980), we traced the law regarding recovery for mental

[1]In *Rogers* there was bodily injury *resulting* from the emotional disturbance.

anguish and reaffirmed the common law rule that "there can be no recovery for fright or mental anguish caused by mere negligence, but a recovery may be had where fright or mental anguish is caused by willful conduct." *Counce* extended the law to allow recovery for intentional or willful and wanton misconduct which results in emotional disturbance without any physical consequences whatsoever. See also R. Leflar *Mental Suffering and Its Consequences - Arkansas Law,* 7 Ark. L.S. Bull. 43 (1937).

This case does not present some of the problems often encountered in cases where the wrongful conduct is not directed at the plaintiff such as determining the relationship between the plaintiff and the victim or the proximity of the plaintiff to the injury. Here, the plaintiff is the mother of the child who was injured by the wrongful conduct in her presence. The father, who was not present, did not seek damages for his suffering. Therefore, we only have to determine whether there was indeed willful and wanton misconduct in this case.

The appellants argue that Lou's conduct in adding the zero was mere negligence rather than willful and wanton misconduct. The evidence revealed that Lou received the prescription from Tammy Kelly, Charlotte Smith's friend, who was holding a baby at the time and had several children with her. The prescription slip had a blank for the patient's age which was not filled in. Lou conceded that he did not ask the age but could have. He said that he did not call the doctor because it was after five o'clock, and that when prescriptions are for children, they are usually prescribed in liquid form. Lou maintained that the doctor in this case should have instructed him to prepare the dosage in syrup form. However, Lou admitted that he knew at the time how to convert a 10 milligram tablet into a one milligram dose. Lou testified that he knew of the dangerous consequences of a Reglan overdose.

The appellee presented a pharmacist as an expert witness who testified that the prescription could have been filled as written and that altering a prescription under these circumstances violated the standards of practice. The

prescribing doctor testified that the prescription could have been filled by suspending it in syrup and that if Lou had been unable to fill the prescription as written, he should have telephoned the doctor or refused to fill it. He said that where a pharmacist alters a prescription so that the dosage is changed, that is totally unacceptable.

In *Ellis* v. *Ferguson,* 238 Ark. 776, 385 S.W.2d 154 (1964), we described willful and wanton misconduct:

> . . . . [O]ne who willfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. It is not necessary to prove that the defendant deliberately intended to injure the plaintiff. It is enough if it is shown that, indifferent to consequences, the defendant intentionally acted in such a way that the natural and probable consequence of his act was injury to the plaintiff.

As a matter of law the court was right in submitting the issue to the jury and on appeal if there is substantial evidence to support the finding of the jury, we affirm. *E.I. DuPont De Nemours and Co.* v. *Dillaha,* 280 Ark. 477, 659 S.W.2d 756 (1983). We conclude there is substantial evidence which would support a finding that the appellants were guilty of willful and wanton misconduct.

The appellants argue that since there was no willful and wanton misconduct the award for punitive damages should have been dismissed. They concede that this argument depends upon our answer to the first argument. Since we have found substantial evidence that Lou's conduct was willful and wanton, the appellants cannot prevail on this issue.

The appellee cross-appeals on the issue of whether the court was right in refusing to allow her to introduce the financial worth of the defendants. It is not a true cross-

appeal. The appellee does not request us to reverse the case. She only requests that if we reverse, we rule in her favor on this issue. Therefore, we do not address the issue. *Myers* v. *Muuss,* 281 Ark. 188, 662 S.W.2d 805 (1984).

Affirmed.

FORD MOTOR CREDIT COMPANY
*v.* Ross H. NESHEIM, et al

85-34 686 S.W.2d 777

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Meredith Wineland;* and *Boswell, Smith & Clardy,* by: *David E. Smith,* for appellant.

*Griffin Smith,* and *W. R. Nixon, P.A.,* for appellee.

DARRELL HICKMAN, Justice. This motion to dismiss the appeal arises out of the same case as *Ford Motor Credit Co.* v. *Rogers,* 84-290, decided February 25, 1985, where we denied a petition for a writ of prohibition. Contemporaneously with its petition for a writ of prohibition, Ford Motor Credit sought an appeal of the order of the trial court certifying the case as a class action under A.R.C.P. Rule 23. We denied

prohibition because the court had *jurisdiction* to decide if the case ought to be maintained as a class action. The question presented in this appeal is whether the action certifying the case was correct. This motion raises the issue of whether the order is one that is final and, therefore, appealable. Ark. R. App. P.2.

Ford Motor Credit concedes it has no right to appeal from the trial court's order of certification because the decision was not a final or appealable order as defined in Ark. R. App. P. 2 but asks us to change our rule. The respondents rely on that rule in seeking dismissal.

We have never had a case in which a party sought to appeal from an order certifying a class action. We have only had appeals from orders denying requests for certification. Clearly, such an order of denial is a final disposition of the case as to those who would be joined as class members and is appealable under Rule 2. *Drew* v. *First Federal S & L Assn.*, 271 Ark. 667, 610 S.W.2d 876 (1981); *Ross* v. *Ark. Communities, Inc.*, 258 Ark. 925, 529 S.W.2d 876 (1975).

We did not adopt the federal rule of civil procedure pertaining to class actions. See Fed. R. Civ. P. 23. However, we believe it would be best to allow appeals from such orders and our reasoning is the same given by the United States Court of Appeals for the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2nd Cir. 1973):

> An order sustaining a class action allegation involves issues 'fundamental to the further conduct of the case'; . . . the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court many years later decides such an action does not conform to the requirements of Rule 23, is evident.

Therefore, we amend Ark. R. App. P. 2 to permit an appeal from an order certifying a case as a class action. Issued contemporaneously is a *per curiam* order to that effect.

Denied.

PURTLE, J., dissents.

NEWBERN, J., not participating.

JOHN I. PURTLE, Justice, dissenting. I cannot understand why the majority has, without notice to the bench and bar or opportunity for adequate consideration, suddenly decided to change horses in the middle of the stream. Ordinarily we do not change our rules to accommodate the litigants in a case pending before us. In fact we have in every instance since I have been on the court discussed the proposed change for several weeks or referred it to the appropriate committee for consideration and comment.

The order certifying the class action in this case is conditional and is not final in other respects, in my opinion. We have many times stated that in order for a judgment to be final and appealable it must dismiss a party from court, discharge him from the action, or conclude his rights to the subject matter in controversy. *Hall* v. *City of Bentonville,* 275 Ark. 210, 628 S.W.2d 326 (1982). The order in the present case does none of the above.

With our rules and case law holding this order not to be an appealable order, I think the trial court and the litigants are entitled to proceed through this trial without the unprecedented action taken by this court today. I believe the action taken by the court at least has the appearance of unfairness. Henceforth trial judges and lawyers will be even more uncertain as to what this court will do in situations previously considered settled.

I would dismiss the appeal.

Barry CARTER *v.* STATE of Arkansas

CR 84-163 685 S.W.2d 812

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*John L. Kearney,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Barry Carter, through his attorney, negotiated a plea of guilty to a first degree murder charge for a sentence of 40 years imprisonment, consecutive with one he was serving. Thirteen days later, with new counsel, Carter sought to set aside the plea and sentence. The ground for the motion was essentially mental incompetence. The trial judge, noting a review of the record, denied the motion without a hearing.

On appeal it is argued that the court should have held a hearing before acting, and, further, the motion should have been granted. It was filed pursuant to A.R.Cr.P. Rule 26.1, which provides that a plea may be withdrawn upon a timely motion to correct a manifest injustice. The motion was meritless as a matter of law because it must be made prior to sentencing. *Rawls* v. *State,* 264 Ark. 954, 581 S.W.2d 311 (1979); A.R.Cr.P. Rule 26.1 (e).

Affirmed.

Gerald WILSON *v.* STATE of Arkansas

CR 85-3 685 S.W.2d 811

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Henry & Mooney,* by: *John R. Henry,* for appellant.

*Steve Clark,* Att'y Gen., by: *Sandra Partridge,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. This appeal comes before us under Rule 29(1)(c) as one in a series of cases in which we construe and interpret the Omnibus DWI Act of 1983, Ark. Stat. Ann. § 75-2501—75-2514 (Supp. 1983). We affirm the judgment finding the appellant guilty.

Appellant first argues that he should not have been convicted of operating a motor vehicle while intoxicated because the state failed to introduce evidence of a chemical test to prove intoxication. The argument is without merit. Ark. Stat. Ann. § 75-2503 (a) (Supp. 1983) provides that it is illegal for anyone to operate a vehicle while intoxicated. Subsection (b) of the same statute provides that it is illegal for anyone to operate a vehicle with a blood alcohol content of .10% or more. Proof of the blood alcohol content is not necessary for a conviction under subsection (a), driving

while intoxicated. However, such proof is admissible as evidence tending to prove intoxication. *Yacono* v. *State,* 285 Ark. 130, 685 S.W.2d 500 (1985).

The appellant next argues that he was charged under subsection (b) of the act but was convicted under subsection (a) of the act, and therefore, his conviction must be reversed. Again, the argument is without merit. The charging instrument, whether a citation or information, is not in the record. The municipal court appeal transcript reflects that appellant was "charged with the offense of DWI one." Other parts of the record indicate that he was charged with "DWI one." Such a charge is sufficient for a conviction under either subsection (a) or (b), even though the evidentiary requirements of the subsections are different. *Yacono* v. *State, supra.*

Affirmed.

Harold Lee MORRIS *v.* John GARMON

84-267 686 S.W.2d 396

Supreme Court of Arkansas
Opinion delivered March 18, 1985
[Rehearing denied April 22, 1985.]

*Martin, Vater & Karr,* by: *Charles Karr,* for appellant.

*Bethell, Callaway, Robertson & Beasley,* by: *Edgar E. Bethell,* for appellee.

STEELE HAYS, Justice. By this appeal we are asked to reverse a probate court finding that Mrs. Alren Morrison was domiciled in Ft. Smith, Arkansas when she executed a will in November, 1979, and when she died in August, 1983. This dispute over a part of her estate is between her brother, the devisee under her will, and her son-in-law and two granddaughters, the appellees.

Mrs. Morrison and her husband had lived in Ft. Smith for many years. After Mr. Morrison's death in 1975 she continued to live in the home until 1979, when she fell and broke her hip. When she was ready to leave the hospital her adopted daughter, Andrea Garmon, arranged for her to be moved to a Norman, Oklahoma, nursing home, near where Mrs. Garmon lived.

In September of that year, Mrs. Garmon died from a recurrence of hepatitis. Some days later, Mrs. Morrison executed a will leaving her estate to John Garmon, expressing confidence that he would care for her two minor granddaughters, Kristin Garmon and Katherine Garmon. John Garmon and his daughters are the appellees. On Mr. Garmon's petition, Mrs. Morrison's assets were placed in a conservatorship. In October, 1979, Mrs. Morrison's brother, appellant Harold Morris, moved Mrs. Morrison to a nursing home in Ft. Worth.

In November of 1979, shortly after arriving in Ft. Worth, Mrs. Morrison executed a new will leaving everything to Harold Morris, or if he failed to survive her, to another brother, and if he failed to survive, to a niece. In August, 1983, Mrs. Morrison died in Ft. Worth.

Harold Morris offered the will for probate in Tarrant County, Texas, and letters testamentary were issued. He then obtained an order in Oklahoma, directing the con-

servator to deliver the Oklahoma assets to him as executor.

In January, 1984, John Garmon petitioned the Sebastian Probate Court for letters of administration on the grounds that Mrs. Morrison was domiciled in Ft. Smith when she died and that her two granddaughters were pretermitted heirs under the Texas will. Harold Morris responded, alleging that Mrs. Morrison was a domiciliary of Ft. Worth. The probate judge found Mrs. Morrison to have been domiciled in Ft. Smith when she executed the second will and when she died, that the will should be construed according to Arkansas law, under which Mrs. Morrison's granddaughters were undisputably pretermitted heirs. The order directed Mr. Morris to deliver to the administrator the assets he was holding as executor.

Two points are presented on appeal: The Sebastian Probate Court erred in failing to give full faith and credit to the order of the Tarrant County Probate Court, admitting the will to probate in Texas, and the finding that Mrs. Morrison was domiciled in Ft. Smith is clearly erroneous.

The appellees maintain the full faith and credit argument was not presented to the probate judge, and the record bears out this contention. We find no mention of the argument in the proceeding below. The appellant introduced the will, the order of probate and other filings from the Texas and Oklahoma proceedings, but those documents were offered on the issue of domicile and do not impliedly express a full faith and credit argument not otherwise stated. Moreover, at the outset of the hearing below both sides informed the probate judge that the disputed issue was whether Mrs. Morrison was domiciled in Arkansas or in Texas when her will was made and when she died. We conclude the constitutional argument was not presented to the trial court and, hence, cannot be raised on appeal. *Gay* v. *Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983).

Appellant argues the issue of domicile is res judicata as that question was decided between these parties in connection with the Oklahoma proceedings. As with the full faith and credit issue, the point was not presented nor ruled on below.

Appellant's argument fails in any case. The Arkansas court could properly address the issue of domicile, as such a finding by a foreign court in a probate proceeding goes to jurisdiction and can be considered collaterally by a second state without a violation of the full faith and credit clause. See Leflar, American Conflicts Law, pp. 411-412; Wills, 80 Am. Jur.2d § 1056, p. 185; *Matter of Will of Lamb,* 30 N.C. 452, 279 S.E.2d 781 (1981); *Burbank* v. *Ernst,* 232 U.S. 162 (1914); *Re: Clark's Estate,* 148 Cal. 108, 82 P. 760 (1905); *Smith* v. *Normart,* 75 P.2d 38 (Ariz. 1983); *Scripps* v. *Durfee,* 131 Mich. 265, 90 N.W. 1061 (1902). And see *Phillips* v. *Sherrod Estate,* 248 Ark. 605, 453 S.W.2d 60 (1970).

With respect to the second point, we cannot say the finding as to domicile was clearly erroneous. "To effect a change of residence or domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home." *Phillips* v. *Sherrod Estate, supra; Oakes* v. *Oakes,* 219 Ark. 363, 252 S.W.2d 128 (1951). The intent to abandon one's domicile and take up another must be ascertained from all the facts and circumstances in any particular case. *Oakes* v. *Oakes, supra.*

Here, the decedent was a long time resident of Ft. Smith. After her fall there was no one to care for her in her home so she was moved to nursing homes, first to Oklahoma, then to Texas. While in the Ft. Worth nursing home, she fell again, prolonging her convalescence in Ft. Worth.

After Mrs. Morrison was moved to Oklahoma, and thereafter in the Texas nursing home, her home in Ft. Smith was kept in a state of readiness for her return. None of the furniture was removed, utilities were kept on, her car was parked in the carport and the yard was regularly maintained, all with her knowledge and approval. She maintained her membership in the First United Methodist Church of Ft. Smith and on numerous occasions expressed to her grandchildren and to neighbors a steadfast hope of returning to her home in Ft. Smith — to be with friends, and to engage in

normal activities. Although there was evidence of a contrary intent, we cannot say the finding of the probate judge was clearly erroneous. ARCP 52(a).

Our holding in *Oakes* v. *Oakes, supra,* is instructive. Mrs. Oakes, an Arkansas domiciliary, developed tuberculosis and entered a sanitarium in New Mexico in 1947. She took only her clothing, leaving her furniture and household goods in her home in Arkansas. Her two children went to live with grandparents in Texas. She returned to Arkansas three years later to testify in the divorce case she had filed against her husband. She told the court she planned to return to the sanitarium for an indefinite duration. We found no evidence that Mrs. Oakes had acquired a new domicile and added: "A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long."

Affirmed.

Melvin TUCKER, as Director of the Arkansas State Plant Board and Public Grain Warehouse Commissioner *v.* Leslie E. DURHAM, d/b/a Durham Grain Company, Farm Bureau Mutual of Arkansas, Inc.

84-378 686 S.W.2d 402

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*Steve Clark,* Att'y Gen., by: *Robert R. Ross,* Dep. Att'y Gen., for appellant.

*Rice L. VanAusdall,* for appellees.

DAVID NEWBERN, Justice. The appellant, Tucker, in his capacity as public grain warehouse commissioner, became the receiver, pursuant to Ark. Stat. Ann. § 17-1344 (Supp. 1983), for the appellee, Durham, who was a public grain warehouseman. Appellee Farm Bureau, which had issued its bond covering Durham, was made a party to the receivership proceeding. The only grain in Durham's warehouse when the receivership was created was a small amount belonging to Durham, so the purpose of the receivership proceeding became to divide the bond proceeds among persons who had claims to grain which should have been in the warehouse.

Tucker, in accordance with Ark. Stat. Ann. § 77-1345 (Supp. 1983), filed a distribution plan with the court. Kenneth Branum, Parker Farms, Inc., and the R.G. Lamb Trust intervened and objected to the proposed plan because they held receipts for grain they had delivered to Durham, but they were not included in the plan for bond money distribution. Each of these depositors had received an advance payment on grain delivered to Durham, and Tucker contended they had thus sold the grain to Durham. The trial court held these depositors were entitled to participate in the bond money. Thus the first issue in this appeal is whether a depositor who takes an advance payment for grain is considered to have sold the grain to the warehouseman and

thus removed himself from protection of the warehouseman's bond. It is not suggested that one who has sold grain to the warehouseman, as opposed to one who has stored it with the warehouseman, is entitled to the protection of the warehouseman's bond for money which might remain owing on the purchase price.

Tucker's plan also excluded from participation in the bond money another intervenor named Maddox. Unlike the other intervenors, Maddox had signed a deferred pricing contract by which he explicitly transferred title to Durham of the grain he deposited with Durham. The trial court found that the agreement Maddox had signed had been obtained by fraud. Thus the agreement was declared void, and Maddox was allowed a share of the bond money. The second issue in this appeal has to do with whether the trial court's action was error because, the appellant contends, fraud upon Maddox was not sufficiently pleaded or proven.

Because we must interpret various statutory provisions our jurisdiction rests upon Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

*1. Sale or No Sale*

The Arkansas Public Grain Warehouse Law, Ark. Stat. Ann. §§ 77-1301 through 77-1338 (Repl. 1981 and Supp. 1983), governs transactions between grain producers and warehousemen licensed as public warehousemen by Tucker. The Uniform Commercial Code, Ark. Stat. Ann. §§ 85-1-101 through 85-9-507 (Add. 1961 and Supp. 1983), governs to the extent it is not inconsistent with the Warehouse Law. Ark. Stat. Ann. § 77-1303(b) (Repl. 1981). In his argument Tucker notes that the Warehouse Law's purpose is to protect those who store grain, and that stored grain is defined in § 77-1302(d) as:

> Any grain received in any public grain warehouse located in this state, if same is not purchased and beneficially owned by the public grain warehouseman.

He argues further that because the Warehouse Law does not

define "purchase" and "beneficial ownership" we are relegated to the U.C.C. and Black's Law Dictionary. Nothing cited in either of those sources is specific or very useful in solving the problem.

We need not look outside the Warehouse Law. It, as noted, protects storers of grain, and it has an explicit provision on relinquishment of that protection. Section 77-1340 is as follows:

> 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 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.

Tucker argues we should not be guided by this language because its only purpose is to limit the warehouseman in selling stored grain to third parties and voiding such sales when title has not been conferred, in writing, by the producer upon the warehouseman. The Warehouse Law, however, makes it clear that unless transfer of title from the producer to the warehouseman has occurred, the grain is to be regarded as stored rather than sold, so the giving and taking of an advance payment does not remove the storer from the bond's protection. This position happens to be consistent with Article 2 of the U.C.C. in which "sale" is defined to include passing title from the seller to the buyer for a price. Ark. Stat. Ann. § 85-2-106(1) (Add. 1961).

*2. Fraud*

In contrast with the other depositors discussed above,

Maddox had entered a written deferred pricing contract with Durham. This contract was meant to remove Maddox from protection as a storer of grain. It specifically provided that the title to the grain was transferred to Durham.

Based on testimony and the contract instrument, the trial court found the contract to have been "back dated" and "fraudulently secured." Testimony showed Maddox's beans were delivered to Durham and those beans had been disposed of by Durham as of January 25, 1983. Yet Durham induced Maddox on February 3, 1983, to sign the deferred pricing contract. Maddox testified he did not notice the date on the instrument when he signed it. When it was introduced in evidence, the instrument was dated "10-19-82."

Tucker contends fraud was neither pleaded with particularity sufficient to satisfy Ark. R. Civ. P. 9(b) nor proven by clear and convincing evidence. We are not nearly as concerned about the pleading point as we would be had Tucker shown any prejudice resulting from the alleged lapse. Paragraph 3. of the "objection to plan" filed by Maddox was as follows:

> On or about February 3, 1983, Petitioner needed additional money, and went to Durham and drew the sum of $7,000.00. At that time, Petitioner signed a deferred price contract, which did recite he transferred title to the Defendant. However, at that time, it is believed Defendant had already sold, transferred and disposed of his beans, without first obtaining a written document transferring title. That the attempted transfer was void, and because it is void, Petitioner should be permitted to share in the bond proceeds.

The allegation is clear that Durham had disposed of Maddox's beans before Maddox had given Durham title to them. The *conclusion* of fraud, which Maddox was not required to plead, *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981), is evident.

The requirement of particularity of pleading fraud did not come into Arkansas law altogether with the advent of

Rule 9. It had previously been required, especially when pleaded as an affirmative defense. Evidence of fraud was taken at the trial, and nothing abstracted from the record shows any objection to introduction of that evidence was raised. When evidence of fraud is admitted and the issue is tried without objection, we regard the pleading as amended to conform to the proof. *Van Houten* v. *Better Health Insurance Association of America,* 238 Ark. 815, 384 S.W.2d 465 (1964).

Nor are we in doubt about the proof. Exhibits consisting of the contract instrument dated "10-19-82" and a check to Maddox from Durham dated "2-3-83," which Maddox testified he received on the day the contract was executed, are sufficient to justify the trial court's finding that the contract was "fraudulently secured." Maddox testified, again without contradiction, he received an advance payment of $7,000 from Durham when he signed the contract, and that he was induced to sign by this payment. As the beans had already been disposed of by Durham, the evidence showed clearly a misrepresentation by Durham that Durham still had the beans and Maddox was to receive more money later. But for the contract, Maddox would have been as entitled as other storers to participate in the bond proceeds. Obviously Maddox would not have signed the contract had he known Durham had already illegally disposed of his beans.

The trial court's finding that the contract was fraudulently induced was justified, and it was not error to set the contract aside and allow Maddox to participate in the bond proceeds.

Affirmed.

Garry DOTY *v.* STATE of Arkansas

CR 84-159 686 S.W.2d 413

Supreme Court of Arkansas
Opinion delivered March 18, 1985

*McDaniel, Gott & Wells, P.A.*, by: *Bobby McDaniel,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

PER CURIAM. This appeal of a conviction under the new Omnibus DWI law is affirmed. All the arguments raised have been rejected in prior or contemporaneous cases.

The act is not void for vagueness. *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318 (1984) reh. den. 283 Ark. 434, 681 S.W.2d 395 (1984); *Long* v. *State,* 284 Ark. 21, 680 S.W.2d 686 (1984); *Steele* v. *State,* 284 Ark. 340, 681 S.W.2d 354 (1984). Doty's argument that the act violates his Sixth Amendment right to confrontation was rejected in *Southern* v. *State,* 284 Ark. 572, 683 S.W.2d 933 (1985), and *Wells* v. *State,* 285 Ark. 9, 684 S.W.2d 248 (1985). The act does not unconstitutionally shift the burden of proof, *Lovell* v. *State, supra,* or violate the separation of powers doctrine. *Lovell* v. *State, supra; Lovell* v. *State,* 283 Ark. 434, 681 S.W.2d 395 (supplemental opinion on rehearing) (1983); *Sparrow* v. *State,* 284 Ark. 396, 683 S.W.2d 218 (1985); *Southern* v. *State,*

*supra; Tausch* v. *State,* 285 Ark. 226, 685 S.W.2d 802 (1985).

Doty's argument that the intoximeter test violates his right against self-incrimination has been considered and rejected. *Steele* v. *State, supra.* He argues that convictions under the former driving under the influence law should not be used to enhance a sentence under the new act. That argument was rejected in *Lovell* v. *State, supra.*

Affirmed.

Charles "Tubby" WILSON
*v.* STATE of Arkansas

CR 84-219 686 S.W.2d 414

Supreme Court of Arkansas
Opinion delivered March 25, 1985

*Felver A. Rowell, Jr.*, for appellant.

*Steve Clark*, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. This appeal is from the denial of separate motions for new trial in two different cases involving Charles "Tubby" Wilson, the appellant. The first case was a prosecution for theft by receiving and the second was for felon in possession of a firearm. This appeal is before us under Sup. Ct. R. 29(1)(e) as the motions seek relief under Ark. R. Crim. P. 37.

The facts are as follows: Wilson, a previously convicted felon, was charged with theft by receiving. At the trial one of the State's witnesses, Jimmy Hern, testified that he burglarized several houses, stealing mostly guns, stereos and televisions. He stated that he took some guns and a stereo to the appellant who gave him marijuana in exchange. Wilson's wife testified that Hern brought guns only to their house, but that the appellant loaned Hern money and kept the guns merely as security on the debt. The appellant was convicted, sentenced to 15 years imprisonment and fined $15,000. That conviction has been affirmed. *Wilson .v State,* 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Because numerous shotguns, rifles and handguns were found in his home when the officers were searching for stolen property, a separate charge was filed for a felon being in possession of firearms. During the course of a trial on this separate charge, Hern changed his testimony and stated that he left the guns with the appellant in exchange for money which the appellant and his wife loaned to him. Hern's testimony at the second trial was similar to Mrs. Wilson's

testimony at the first trial. The appellant was convicted of the second charge.

The appellant filed two motions for relief which are consolidated for appeal. The first motion seeks a new trial on the theft by receiving charge on the basis of the change in Hern's testimony. The second motion for new trial claims error in permitting the prosecution to inquire into the theft by receiving conviction during the course of the felon in possession trial in that "said inquiries were erroneous and their prejudicial effect far outweighed their probative value."

Both motions filed by the appellant seek relief under Ark. R. Crim. P. 37.1(d) which provides that a prisoner may file a motion seeking a new trial if the sentence is otherwise subject to collateral attack. Rule 37.1, however, only applies to a prisoner "whose case was not appealed to the Supreme Court."

Rule 37.2(a), as amended by this court, provides:

> (a) If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court.

*In Re: Amendment of Rule 37.2(a) of the Rules of Criminal Procedure,* 283 Ark. 559 (1984).

The appellant's conviction for theft by receiving was affirmed by the Court of Appeals. We have held that "once a case is appealed, the trial court's jurisdiction is lost and cannot be regained without our permission . . . Rule 37.2(a) clearly limits the jurisdiction of the trial court in post-conviction proceedings . . . The petition to proceed is absolutely required. (citations omitted)." *Coston* v. *State,* 283 Ark. 155, 671 S.W.2d 738 (1984). Since the petitioner failed to seek prior permission from this court to proceed under Rule 37, the trial court was without jurisdiction to hear the appellant's motion for new trial on the theft by

receiving charge. The appeal from the first conviction is accordingly dismissed.

The appellant's second Rule 37 petition was properly submitted to the trial court since the conviction for felon in possession of a firearm has not been appealed to the Supreme Court or to the Court of Appeals. The appellant argues that it was error for the trial court to allow the prosecution in this case to inquire into the conviction received by the appellant for theft by receiving. This argument is based on the assumption that the trial court would grant appellant's motion for new trial in the theft by receiving case. Since the trial court did not grant the motion for new trial and we are dismissing the appeal of the motion for a new trial, appellant's argument is moot.

Dismissed in part; affirmed in part.

SIMMONS FIRST NATIONAL BANK,
Administrator, et al. *v.*
James THOMPSON et al.

84-254 686 S.W.2d 415

Supreme Court of Arkansas
Opinion delivered March 25, 1985

*McMath Law Firm, P.A.,* by: *Winslow Drummond,* for appellants.

*Barber, McCaskill, Amsler, Jones & Hale,* by: *Robert L. Henry, III,* for appellee James Thompson.

*Shackleford, Shackleford & Phillips,* by: *Dennis L. Shackleford,* for appellee Gerald Golden.

*Anderson & Kilpatrick,* by: *Overton S. Anderson,* for appellee Don Crysell.

*Allen, Cabe & Lester,* by: *V. Markham Lester,* for appellee Eric Smith.

GEORGE ROSE SMITH, Justice. This multi-party action

for personal injuries and wrongful deaths arose out of a 1981 accident at the International Paper Company's paper mill in Pine Bluff. Separate crews at the mill permitted two different chemicals to flow into the mill's sewer system. The chemicals intermingled at some point in the system and reacted to create a poison gas that entered the atmosphere through an open grate sewer covering. At least two employees died from the effects of the gas; others were injured. All the employees were covered by the workers' compensation law.

This tort action was brought by injured employees and by the personal representatives of two that died. The four defendants are supervisory employees of the company: the mill manager, the pulp mill superintendent, the superintendent of engineering, and the supervisor of safety. None of the defendants was present at the place of the accident or had any active part in the work that caused the chemicals to enter the sewer. The complaint alleged negligence on the part of each defendant in failing to discharge his responsibility to make the premises safe.

Upon proof of the foregoing essential facts the trial court sustained the defendants' motion for summary judgment, on the ground that as supervisory employees the defendants are protected from personal liability by the same immunity that the statute confers upon the employer itself, the remedies provided by the statute being exclusive. Ark. Stat. Ann. § 81-1304 (Supp. 1983). For reversal the appellants argue that on the facts of this case the supervisory employees should not be immune from liability for their own negligence.

Our cases have not passed upon this problem. Our two most pertinent decisions lie at opposite ends of the spectrum. In *Neal* v. *Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969), relied on by the defendants, the employer was an incorporated laundry owned by Oliver and his wife and son. Oliver himself was the president and general manager. The plaintiff was an employee who had been injured while operating a defective ironing machine. In a tort action against Oliver we held that he was not liable because "he was also the appellant's employer."

On the other hand, immunity was denied in *King* v. *Cardin,* 229 Ark. 929, 319 S.W.2d 214 (1959), relied on by the plaintiffs. There two fellow employees, a truck driver and a laborer, were working with others on a highway paving project. King, the truck driver, backed up his truck negligently and struck Cardin's decedent, who was killed. We permitted an action against the truck driver for wrongful death, under the section of the statute providing that an employee's compensation claim against the employer does not affect his right to sue a "third party." Section 81-1340 (Repl. 1976). Our reasoning, supported by cases from other jurisdictions: "Under a statute like ours a negligent co-employee is regarded as a third person."

This case falls between the two extremes. Professor Larson's own view, expressed without regard to the cases, would unhesitatingly deny liability in this case. He insists that workers' compensation coverage should be viewed neither as a branch of tort law nor as a system of social insurance. He says, in part: "Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy." Larson, Workmen's Compensation Law, § 1.20 (1984). After pointing out that the "tort-connection fallacy" can at times be harmful to the employee and at times to the employer (*ibid.*), Larson sums up the problem quite simplistically:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee; the same award issues.

> Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

As our own *Neal* and *King* cases, supra, illustrate, the courts have not uniformly adopted Larson's reasoning nor uniformly reached his recommended results. Nevertheless, with respect to the liability of supervisory employees the great majority of the decisions are in harmony with Larson's conclusions. Their reasoning has usually been that since an employer is immune under the statutes from a negligent failure to provide employees with a safe place to work, the same immunity protects supervisory employees when their general duties involve the overseeing and discharging of that same responsibility. Typical recent decisions include *Vaughn* v. *Jernigan,* 144 Ga. App. 745, 242 S.E.2d 482 (1978); *Kerrigan* v. *Errett,* 256 N.W.2d 394 (Iowa 1977); *Athas* v. *Hill,* 458 A. 2d 859 (Md. Spec. App. 1983); *Dawley* v. *Thisius,* 231 N.W.2d 555 (Minn. 1975); *Greco* v. *Farago,* 477 A. 2d 98 (R.I. 1984); *Blumhardtr* v. *Hartung,* 283 N.W.2d 229 (S.D. 1979); and *Laffin* v. *Chemical Supply Co.,* 77 Wis. 2d 353, 253 N.W.2d 51 (1977).

A Missouri court gave a persuasive practical justification for the majority view in *State ex rel. Badami* v. *Gaertner,* 630 S.W.2d 175 (Mo. App. 1982):

> Under present day industrial operations, to impose upon executive officers or supervisory personnel personal liability for an accident arising from a condition at a place of employment which a jury may find to be unsafe would almost mandate that the employer provide indemnity to such employees. That would effectively destroy the immunity provisions of the workmen's compensation law.

We are solidly in agreement with the majority view. As we all know, the purpose of workers' compensation statutes was to change the common law by shifting the burden of all work-related injuries from individual employers and em-

ployees to the consuming public. In that effort the matter of fault, as Larson points out, is ordinarily immaterial. Employers were compelled to give up the common-law defenses of contributory negligence, fellow servant, and assumption of risk. Employees were compelled to give up the chance of recovering unlimited damages in fault-related cases in return for a certain recovery in *all* work-related cases. The plaintiffs here are attempting to return to the common-law system based on fault, when it is to their advantage to do so, but at the same time to retain the assured benefits of workers' compensation regardless of fault. The invalidity of their position is too plain to require further discussion.

Affirmed.

William M. JANES and
Deanna JESSON *v.* STATE of Arkansas

CR 84-192 686 S.W.2d 783

Supreme Court of Arkansas
Opinion delivered March 25, 1985

*Warner & Smith,* by: *Joel D. Johnson,* for appellants.

*Steve Clark,* Att'y Gen., by: *Joyce Rayburn Greene,* Asst. Att'y Gen., for apellee.

GEORGE ROSE SMITH, Justice. At separate trials in municipal court William M. Janes was convicted of DWI, second offense, and Deanna Jesson was convicted of DWI, first offense. On appeal to the circuit court the cases were consolidated and tried together. No witnesses testified, the case being submitted to the trial judge, without a jury, on documentary evidence introduced by the State and on a memorandum brief submitted on behalf of both defendants by their attorney. The court found each defendant guilty and imposed sentences within the limits set by Act 549 of 1983, the Omnibus DWI Act. This case, like many other DWI cases on the docket, comes to us under Rule 29(1)(c). Three arguments are presented.

First, it is argued that the act is unconstitutional because it permits the punishment for a second offense to be enhanced without regard to whether the first conviction was counseled or uncounseled. A sufficient answer to this argument is that if a defendant did not have counsel and did not waive counsel when he was first convicted, that conviction cannot be used for enhancement, and if it is so used the error can be corrected on appeal. *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318, 681 S.W.2d 395 (1984). There was no need for the lawmakers to recite in the act a rule that would be applicable anyway.

Though not argued in the brief, it has been suggested at our conference that the State's proof is insufficient because

its documentary evidence did not include a copy of Janes's previous conviction, nor is there any other evidence about that conviction. That objection was not made below. At the trial defense counsel elected not to argue the case except by the submission of a written brief. The brief contains on this point only the argument we have mentioned, that the statute is unconstitutional. Janes has not denied that he has a prior DWI conviction. We have consistently held that where there is a particular defect in the State's proof that might readily have been corrected had an objection been made, the absence of any objection prevents the point's being raised for the first time on appeal. For instance, where the State's proof by accomplices is not corroborated, the absence of an objection on that ground at the trial waives the omission. *Harris* v. *State,* 262 Ark. 506, 558 S.W.2d 143 (1977). In another analogous situation we said in *Eskew* v. *State,* 273 Ark. 490, 621 S.W.2d 220 (1981):

> The second argument by appellants is that the evidence was insufficient to support the appellants' conviction for class A felony kidnapping. This may well be true but the fact remains that the appellants never requested an instruction on class C kidnapping, and the matter is raised for the first time on appeal. We need not cite authority for the proposition that we do not consider matters raised for the first time on appeal.

The appellants' second contention is that the DWI statute violates the constitutional separation of governmental powers. That contention has been considered in prior cases involving this statute and need not be reconsidered. *Tausch* v. *State,* 285 Ark. 226, 685 S.W.2d 802 (1985); *Williford* v. *State,* 284 Ark. 449, 683 S.W.2d 228 (1985).

The third argument is that the statute's requirement of a pre-sentence report compels the defendant to incriminate himself. Ark. Stat. Ann. § 75-2506 (Supp. 1983). The act does not require a defendant to take any action whatever in response to the State's proof or to the pre-sentence report; so

obviously there is no compulsory self-incrimination.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think the majority is in error in stating that appellant Janes did not object to the consideration of a prior conviction for the purpose of enhancing his sentence. Appellants stated in a brief submitted to the trial court: "Defendants further contend that sections 1(b) and 4 of said Act render it constitutionally infirm in that such sections purport to permit imposition of enhanced sentences and imprisonment for prior convictions without regard to whether such convictions were counseled or uncounseled." They cited and relied upon *Baldasar* v. *Illinois,* 446 U.S. 222 (1980), a case we frequently cite as authority for exactly the same proposition as appellants were arguing. This argument was presented to the court in written form on the same day the judgment was entered, August 1, 1984. The argument was taken under consideration by the trial court prior to sentencing. In order to utter the exact words to comply with the majority opinion, an attorney would have to have clairvoyant powers to foresee what the judge would eventually enter into the record on appeal. Therefore, the objection was in rather broad language. Surely the trial court and members of this court fully understood the appellants were objecting to the use of prior convictions, whether counseled or uncounseled. The prior convictions in the case before us stand silent as to whether they were counseled or uncounseled. In argument before the trial court, counsel for appellants cited *Baldasar* for the proposition that the United States Supreme Court has ruled that uncounseled misdemeanor convictions may not be used to enhance penalty statutes to felony status. We have spoken to the situation of a silent record before. In *McConahay* v. *State,* 257 Ark. 328, 516 S.W.2d 887 (1974) we stated: "It is well settled that 'presuming waiver of counsel from a silent record is impermissible'." We have also held that the introduction of a previous conviction document, where that record concerning the level of the previous conviction is "silent," amounts to prejudicial error. *Roach*

v. *State,* 255 Ark. 773, 503 S.W.2d 467 (1973). When the record of prior convictions does not show that the defendant was represented by counsel, or that he voluntarily waived counsel, the conviction cannot be used to enhance the penalty. *Wilburn* v. *State,* 253 Ark. 608, 487 S.W.2d 600 (1972). We have even held that when the record of a prior conviction was certified by the wrong person it could not be used for enhancement purposes. *Richards* v. *State,* 254 Ark. 760, 498 S.W.2d 1 (1973).

When we first started considering appeals of convictions pursuant to the Omnibus DWI Act (Act 549 of 1983), we were confronted with this same issue. In *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318, 681 S.W.2d 395 (1984), we stated: "A prior conviction cannot be used collaterally to impose enhanced punishment unless the misdemeanant was represented by counsel or validly waived counsel. *Baldasar* v. *Illinois,* 446 U.S. 222 (1980); *State* v. *Brown,* 283 Ark. 304, 675 S.W.2d 822 (1984). Waiver of counsel may not be presumed from a silent record."

No citation is needed to support the rule that the state has the duty to prove every essential element of a charge. Certainly it is essential to prove prior convictions to obtain a valid conviction under enhancement statutes. It is fundamental law that a record silent on whether prior convictions were counseled or uncounseled is inadmissible to enhance a penalty. The duty being on the state to prove a case, we surely should have held that the "silent" record will not support the conviction here.

We should either reverse and remand or adjust the punishment here as we were used to doing.

# FORT SMITH SYMPHONY ORCHESTRA, INC. *v.* FORT SMITH SYMPHONY ASSOCIATION, INC.

84-294 686 S.W.2d 418

Supreme Court of Arkansas
Opinion delivered March 25, 1985

[redacted]

*Martin, Vater & Karr,* by: *Charles Karr,* for appellant.

*Warner & Smith,* by: *L. Cody Hayes* and *G. Alan Wooten,* for appellee.

DARRELL HICKMAN, Justice. Dissension arose in the Fort Smith Symphony Association when their conductor of 14 years, Walter Minniear, resigned in 1984. Some performing members wanted more voice in the decisions made by the board of directors which was made up primarily of non-performing members. About half of the performers resigned or disassociated themselves from the orchestra in May of 1984 and formed a new organization; it was incorporated as a non-profit corporation named Fort Smith Symphony Orchestra, Inc. The old organization, which had existed since the late 1920's, the Fort Smith Symphony Association, Inc., filed suit in chancery court, seeking an injunction to prevent the new organization from using the name "Fort Smith Symphony Orchestra." Two days after the appellant was served, the chancellor held a hearing and issued a temporary injunction. The older organization was required to post a $10,000 bond to cover any damages that might occur in the event the injunction was not later made permanent. The new organization brings this appeal from the temporary order, which is permissible under Ark. R. App. P. 2.

Three errors are alleged: the chancery court should have dismissed the complaint because no irreparable harm was alleged by the appellees and because the circuit court, rather than the chancery court, had jurisdiction; notice was insufficient; and the chancellor was wrong in issuing a temporary injunction. The order is affirmed.

While there are no cases directly in point in Arkansas,

other jurisdictions in similar cases have made decisions that support the finding of the trial court in this case. See 37 ALR3d 277 (1971).

In *Missouri Federation of the Blind* v. *Nat'l. Federation of the Blind,* 505 S.W.2d 1 (Mo. 1974), it was held that a not-for-profit organization has the right to adopt a name by which it will be known and to reap the benefits of the good will it derives under that name, just as a profit-making organization has that right. The same principle was affirmed in *Metropolitan Opera Assn.* v. *Metropolitan Opera Assn.,* 81 F. Supp. 127 (D.C. Ill. 1948), where an Illinois opera began using the name of the world renowned opera company in New York. The district court held that the use of the name by the local company was likely to mislead the public into believing that the two organizations were somehow connected and that injunctive relief was proper. The basis for the decision was that a misleading name is likely to deceive the public and that an organization has the right to protection of the good will and reputation it has developed over time.

Although the issue has never arisen in Arkansas in a case involving a not-for-profit corporation, we have afforded protection on the same basis to ordinary corporations where we have found the names to be confusing and likely to mislead. *Clyde Campbell University Shop* v. *Campbell-Bell, Inc.,* 243 Ark. 937, 422 S.W.2d 875 (1968); *Liberty Cash Groceries, Inc.* v. *Adkins,* 190 Ark. 911, 82 S.W.2d 28 (1935). We do not hesitate to extend the principle to non-profit corporations.

In this case we agree with the chancellor that the name "Fort Smith Symphony Orchestra" has been used in such close association with the appellee that the use of the name by the appellant could lead to confusion on the part of the public and, as a result of that confusion, injury to the appellee. The evidence of the close association is overwhelming. For example the appellee introduced programs printed with that name, correspondence by the appellee using that name, and a proclamation by the mayor in 1982 declaring the week to be "Fort Smith Symphony Orchestra

Week" with reference to the appellee. There was some evidence that people in the community were confused by the situation. The appellant planned concerts in the same auditorium that the appellee had always used. The appellee provided evidence that it was supported in great part by ticket sales, gifts and donations. This evidence is more than adequate to sustain the chancellor's action in issuing the injunction.

The complaint did not use the words "irreparable harm" and for this reason the appellant argues the case should have been dismissed. The complaint did state facts which in our judgment would allow the chancellor to hear evidence regarding injunctive relief. The complaint also stated that there was no adequate remedy at law. Pleadings shall be liberally construed so that effect is given to the substance of the pleading rather than the form. *Home Ins. Co.* v. *Williams,* 252 Ark. 1012, 482 S.W.2d 626 (1972). Furthermore, the evidence presented at the hearing amounted to at least a *prima facie* showing that irreparable harm could result in the absence of injunctive relief. See *Paccar Financial Corp.* v. *Hummell,* 270 Ark. 876, 606 S.W.2d 384 (Ark. App. 1980).

We do not agree with the appellant's argument that the circuit court had jurisdiction of this case since that is where non-profit organizations file their articles of incorporation. Ark. Stat. Ann. § 64-1905 (Repl. 1980). The appellee simply sought an injunction which is an equitable remedy within the jurisdiction of the chancery court. *McKenzie* v. *Burris,* 255 Ark. 330, 500 S.W.2d 357 (1973).

The two day notice of the hearing given the appellant, while somewhat short, was not so inadequate as to void the proceedings. A temporary injunction may issue without any hearing where there are affidavits or a verified complaint alleging irreparable harm without relief. ARCP Rule 65(a)(1). The injunction in this case was not issued until the trial court had heard from four witnesses and considered a number of documents. Necessarily, the trial court must have some discretion in setting a hearing for a temporary injunction. No abuse of that discretion will be found unless

the notice is patently unfair and prejudicial. The appellant has been unable to demonstrate such an abuse.

Affirmed.

Lewis McCAMMON and Johnnie McCAMMON, and the BOARD OF ZONING ADJUSTMENT and BOARD OF ZONING and PLANNING COMMISSION *v.* Larry BOYER and Martha BOYER

84-255 686 S.W.2d 421

Supreme Court of Arkansas
Opinion delivered March 25, 1985

## ERRATA

*285 ARKANSAS REPORTS at page 288*

Detach at perforation, moisten the back, and paste over the sixth line up from the bottom of page 288 of *McCammon v. Boyer:*

✱ HEALTH AND WELFARE — Individual property rights are

*Gordon & Gordon, P.A.,* by: *Allen Gordon,* for appellants.

*Joe Cambiano, P.A.,* for appellees.

JOHN I. PURTLE, Justice. The circuit court on appeal reversed the decision of the Morrilton Planning and Zoning Commission. On appeal to this court the Commission argues: I) the trial court erred in receiving testimony outside the hearing before the Commission; II) the court erred in finding the Commission acted arbitrarily, capriciously or unreasonably; III) the court erred in finding that the Commission failed to consider the effect of the action taken on the neighborhood; IV) the court erroneously held the appellees had standing to appeal to the circuit court; and V) the court erred in holding part of the ordinance unconstitutional.

City of Morrilton Ordinance #10 of 1979 provided a procedure to follow in order to place a mobile home in an R-2 district, provided the neighbors within 300 feet of the proposed mobile home site are polled and not more than 20% of them object. Permission to place a mobile home in an R-2 district was granted to appellants McCammon on November 5, 1983. The proceedings of the Commisison were not

reported verbatim. The minutes were constructed in a narrative conclusional form which stated Ordinance #10 had been complied with so far as necessary in order to permit the variance. At the appeal hearing the court took testimony from the appellees and other witnesses. Some of the evidence considered was merely repetition of evidence presented to the Commission and some was new. The court looked behind the Commission's statement that the requirements of Ordinance #10 had been met. The appellees, who had not testified at all at the November 5, 1983, hearing before the Commission, were allowed to testify. The circuit court overruled the objection on standing of the appellees to appeal and held that the Commission did not poll the property owners within 300 feet of the site proposed for the mobile home. Additionally, the court held subsection three of Ordinance #10 was arbitrary for lack of guidelines for the Commission to make a proper determination.

Subsection 3 of Ordinance #10 reads as follows:

3. A mobile home may be placed in an R-2 district provided all conditions for placement in an R-3 district are met along with the following:

a. An application shall be filed with the City Building Inspector. Such application shall show the location, lot size, proof of lot ownership by applicant and any other information pertinent to the request.

b. The City Building Inspector shall poll property owners within a three hundred foot (300′) radius of the desired location of the mobile home. Should not less than twenty percent (20%) of the neighboring property owners object to the placement of the mobile home, the application shall be disapproved.

c. After the above requirements are met, the applicant shall present all pertinent information to the Planning and Zoning Commission. The Commission shall review the application, the poll taken by the City Building Inspector, the effect of such proposed use on the character of the neighborhood,

the location of public utilities, all information presented at the public hearing and any other matters pertaining to the general welfare of the citizens of Morrilton and transmit its findings to the applicant within 45 days.

d. Any mobile home in an R-1 or R-2 district may not be replaced with another mobile home unless a new application for permit is approved according to the above conditions.

We must first determine the standard of review in an appeal from a city commission such as the Board of Adjustment. Apparently the entire Planning Commission sat as the Board of Adjustment in the present case. The City of Morrilton followed the law in establishing its Planning Commission.

The General Assembly established the procedure for judicial review of actions taken pursuant to planning and zoning regulations. Ark. Stat. Ann. § 19-2830.1 (Repl. 1980). However, this court held the statutory procedure to be unconstitutional in the facts of *Wenderoth* v. *City of Ft. Smith,* 251 Ark. 342, 472 S.W.2d 74 (1971). *Wenderoth* basically held that the judicial review statute took away the discretionary power to perform legislative functions which the legislature gave to the cities by authorizing them to legislate in matters relating to planning and zoning regulations. Courts review such legislative enactments by municipalities only as to whether such actions are arbitrary or capricious. *Wenderoth,* supra. We again considered this subject in *City of Paragould* v. *Leath,* 266 Ark. 390, 583 S.W.2d 76 (1979). We cited *Wenderoth* and distinguished it, saying: "[T]he act here which provides for appeals from the Board of Adjustment is not subject to those constitutional limitations applicable to City Council actions in zoning because the Board of Adjustment acts administratively, not legislatively. Appeals to the circuit court from the Board of Adjustment are permitted."

The type of review from decisions of administrative agencies was considered by this court in *Goodall* v.

*Williams,* 271 Ark. 354, 609 S.W.2d 25 (1980) and in *Ark. Commission on Pollution Control & Ecology* v. *Land Developers, Inc.,* 284 Ark. 179, 680 S.W.2d 909 (1984) where we reviewed many of our earlier decisions. Both *Goodall* and *Land Developers* dealt with agencies exercising executive or legislative functions and both held that de novo review by the courts was improper. Although both cases cited *Wenderoth,* that case dealt with the legislative function of a city in exercising its delegated power to enact ordinances. Neither *Goodall* nor *Land Developers* is precedent for Planning Commission cases. *Wenderoth* declared the appeal provisions of Ark. Stat. Ann. § 19-2830.1 unavailable when applied to appeals relating to city ordinances because in such instances the action taken was legislative. However, the opinion expressly exempted the question of the constitutionality of the statute as it relates to city councils or other agencies acting in administrative or quasi-judicial capacities.

A common thread running through most of the above cited cases is that a trial de novo on appeal is improper and indeed unconstitutional if the objective of the appeal is to question legislative or executive wisdom. However, if the appeal involves a constitutionally or statutorily protected right or one preserved by private contract, then a trial de novo is proper. With this thought in mind we examine the facts of this case to determine to which category it belongs. The Planning Commission, sitting as a Board of Adjustment, has no power to legislate. The appellants and appellees dealt with the Commission on matters relating to the use of their properties. Relying upon the action taken by the Commission, appellants purchased substantial property. The Boyers already owned a home in the area. Individual property rights are secured by several provisions of our constitutions. Individuals are not constitutionally guaranteed the right to do with their property what they wish in all circumstances. The police power and health and welfare doctrines clearly mandate restrictions on ownership and use of property in such a manner as to prevent detriment to the rights of the public.

The record on appeal to the circuit court was com-

pletely inadequate to apprise the court of the manner and scope of the hearing before the Commission. The court was faced with the problem of returning the case to the Commission for a hearing or trying it de novo. When a record is completely inadequate or belies the truth there must of necessity be a remedy. Every person is entitled to a certain remedy for all injuries or wrongs suffered by him and he ought to obtain justice promptly and in conformity with the law. Ark. Const. Art. 2, § 13. If de novo review of actions by administrative boards and commissions were not allowed, a board or commission might act arbitrarily or unreasonably or even conceal the real facts and thereby protect such acts from proper review. Therefore, a de novo hearing on appeal is proper when the appeal is from actions taken by administrative boards, commissions and agencies exercising adjudicatory or quasi judicial functions.

An appeal from the Board of Adjustment is allowed by Ark. Stat. Ann. §§ 19-2829 and 19-2830.1. Although the latter does not authorize appeals contesting the validity of city ordinances, in *Leath* we held that the city had standing to appeal from a decision of a Board of Adjustment. Certainly the parties here have as much standing and should be allowed to take an appeal. In this case, the parties certainly consider themselves injured. We hold that the court had the power to grant a hearing de novo from the action by the Commission.

In holding a trial de novo it became unnecessary for the court to sua sponte hold portions of the ordinance unconstitutional. Therefore, the constitutionality of subsection 3 of Ordinance #10 should not have been addressed.

Affirmed.

Roosevelt TIPPITT *v.* STATE of Arkansas

CR 84-193 686 S.W.2d 420

Supreme Court of Arkansas
Opinion delivered March 25, 1985

*Jeff Rosenzweig,* for appellant.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of aggravated robbery and theft. He appeals from his conviction and thirty-five year sentence on the ground that his written statement should have been suppressed. Under the circumstances of this case we hold that the trial court properly refused to suppress the statement.

While in custody as a suspect in an aggravated robbery and attempted capital murder case, the appellant gave a written statement in which he admitted he was the driver of

the getaway car in the robbery under investigation. The attempt charge was the result of shots being fired at the police officer while the robbers fled the scene. Two accomplices were charged with aggravated robbery and attempted capital murder. The investigating officers agreed not to charge appellant with attempted capital murder in return for his statement, which was used against him at his trial on charges of aggravated robbery and theft.

The issue before us is whether the inculpatory custodial statement, given in exchange for a promise not to prosecute appellant for an additional crime, should have been suppressed. There is no dispute that the statement was given in exchange for the promise not to charge appellant with attempted capital murder. The *Miranda* warnings were given prior to the statement being made. Custodial statements are presumed involuntary and the state must overcome the presumption by a preponderance of the evidence. *Campbell* v. *State,* 281 Ark. 48, 661 S.W.2d 363 (1983). Statements given with hope of reward are not voluntary. *Hutto* v. *Ross,* 429 U.S. 28 (1976).

We considered this same problem in *Williams* v. *State,* 281 Ark. 91, 663 S.W.2d 700 (1983). Williams initiated the deal with the officers and the prosecuting attorney. Williams had an attorney but appellant here did not. In *Williams* we held that the promise of reward (to charge first degree murder rather than capital murder) was given in good faith and was kept. Considering the totality of the circumstances we held Williams's statement was properly admitted. A false promise which misleads an accused renders his statement involuntary. *Davis* v. *State,* 275 Ark. 264, 630 S.W.2d 1 (1982).

Under the facts and circumstances of this case, when considered in their totality, we think the trial court was correct in admitting the statement. The appellant struck a bargain, which was closely related to a plea bargain, and both sides kept their promises. Most likely the deal was a wise one for the appellant. In any event we can find no prejudicial error.

Affirmed.

# Roy L. HOLMES *v.* CITY OF LITTLE ROCK, et al.

84-266 686 S.W.2d 425

Supreme Court of Arkansas
Opinion delivered March 25, 1985
[Rehearing denied April 29, 1985.*]

*PURTLE, J., would grant rehearing.

*Givens & Buzbee,* for appellant.

*Carolyn B. Witherspoon,* Acting City Att'y, by: *Victra L. Fewell,* Asst. City Att'y, for appellee.

ROBERT H. DUDLEY, Justice. The Board of Directors of the City of Little Rock adopted an ordinance which pro-

posed the annexation of fifteen separate tracts of land, designated "A" through "O." An election was held, and the vote was in favor of the annexation, both in the City and in the previously unincorporated area. Appellant, who owns land in tract H, and others challenged the annexation in circuit court. All of the challenges, excepting appellant's, were dismissed. Appellant contends that tracts A, B, C, G, K, and O were annexed in violation of Ark. Stat. Ann. § 19-307.1 (Repl. 1980). The trial court upheld the annexation. We affirm. Jurisdiction to construe the annexation statute is in this Court. Rule 29(1)(c).

The rules controlling appellate review of annexation cases in Arkansas are well settled. A majority of electors voting in favor of annexation make a *prima facie* case for annexation, and the burden rests on those objecting to produce sufficient evidence to defeat the *prima face* case. *City of Crossett* v. *Anthony,* 250 Ark. 660, 466 S.W.2d 481 (1971); *Faucett* v. *City of Atkins,* 248 Ark. 633, 453 S.W.2d 64 (1970); *Mann* v. *City of Hot Springs,* 234 Ark. 9, 350 S.W.2d 317 (1961). By the very nature of this type of litigation, there is a wide latitude for divergence of opinion and consequently, a high degree of reliance must be placed upon the findings of the trial judge. *Faucett* v. *City of Atkins,* 248 Ark. 633, 634, 453 S.W.2d 64, 66 (1970). This court's task is not to decide where the preponderance of the evidence lies, but solely and simply to ascertain whether the trial court's findings of fact are clearly erroneous. ARCP Rule 52.

Ark. Stat. Ann. § 19-307.1 in its pertinent part provides:

> Any municipality may . . . adopt an ordinance to annex lands contiguous to said municipality, provided the lands are either (1) platted and held for sale or use as municipal lots; (2) whether platted or not, if the lands are held to be sold as suburban property; (3) when the lands furnish the abode for a densely settled community, or represent the actual growth of the municipality beyond its legal boundary; (4) when the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or (5) when they are valuable by reason of their adaptability for prospective municipal uses.

> Provided, however, that contiguous lands shall not be annexed when they either: (1) have a fair market value at the time of the adoption of the ordinance of lands used only for agriculture [agricultural] or horticulture [horticultural] purposes and the highest and best use of said lands is for agricultural or horticulture [horticultural] purposes; . . . .

The statute is disjunctive, and the annexation of the land is proper when the proof sufficiently complies with any one of the conditions. *Faucett* v. *City of Atkins,* 248 Ark. 633, 636, 453 S.W.2d 64, 67 (1970); *Louallen* v. *Miller,* 229 Ark. 679, 317 S.W.2d 710 (1958).

Since the sufficiency of the evidence is questioned, it is necessary that we review the evidence.

The area in the fifteen tracts comprises 12.6 square miles and has approximately 11,000 residents. For the past six years the City has used a voluntary annexation procedure which has left a very irregular boundary. One of the primary goals of this annexation is to square as many boundaries as possible in order to alleviate the irregular boundary impediment to furnishing urban services. There was testimony to prove that the City could afford to extend city services to each of the areas annexed.

Nine years ago the City employed a consulting firm to recommend ways to prevent rapid sub-standard growth in adjacent unincorporated areas. Subsequently, the City adopted a series of policies to provide for the deliberate and orderly expansion of the city boundaries. The goal of the policies is to prevent poor quality development which would have to be remedied when the tracts were later annexed.

With regard to tract A, the trial court found:

> Tract "A" is an area of some seven hundred acres more or less. Located in this tract is a viable pecan orchard, some farm lands, and a substantial amount of lands being used for residential and commercial uses,

along with the Little Rock Airport's proposed expansion. This airport expansion would encompass some 20 acres of the northwest portion of the larger pecan orchard. Here again the lands in this tract are situated along the east belt freeway. Across that structure lies the rapidly developing industrial-port area. These lands have available development streets and all typical municipal utilities.

Various witnesses testified that: (1) there are a variety of land uses in the tract with 145 single-family units in existence for approximately 450 residents; (2) access to the tract exists by city streets; (3) city utilities are available; (4) the Municipal Airport Commission will purchase approximately one-fourth of the pecan orchard as a part of a fifty million dollar expansion of the airport; (5) the tract is surrounded on three sides by present city boundaries and on the fourth side by the Arkansas River; (6) the tract is substantially urbanized; and (7) the biggest part of the tract consists of platted residential development. The findings of the trial judge were not clearly erroneous, and the above constitutes evidence that the tract can be annexed as lands representing the actual growth of the City beyond its legal boundary. While a pecan orchard exists on a part of the tract, it is permissible to annex a tract of land if that tract is more valuable for city purposes than for agriculture, even if the one tract is more valuable for farming purposes than for city purposes. *Fowler* v. *Ratterree,* 110 Ark. 8, 160 S.W. 893 (1913).

The trial court's finding of fact described B as follows:

> Tract "B" of the annexed area has located within its boundary a mining pit which is in the northern portion of that particular tract. This is a quarry site. It is situated abutting the freeway and is adjacent to an area of residences to the east, thence into a commercial developed area and is also bounded by a rapidly developing port/industrial-commercial area to the north of the tract.

There was testimony that: (1) the tract has a population

of 369, with 119 single-family units, 21 commercial uses, and one industrial use on 107.9 acres; (2) it lies between two intersections of a major interstate highway and constitutes a peninsula of unincorporated territory; (3) public access to the tract exists by city streets, and it has schools, a fire station, and utilities; (4) the largest part of the tract constitutes platted residential development; (5) a small part of the tract contains a quarry, with the balance of the quarry already being in the City; and (6) the tract is adjacent to the Little Rock Port Authority, and further industrial development is predicted. The tract may be annexed as lands platted and held for sale as municipal lots. A part of a quarry exists upon a segment of the tract, but that quarry is only a small part of an area which is already developed for residential, commercial, and industrial uses. The facts of this case are clearly distinguishable from those in *Saunders* v. *City of Little Rock,* 262 Ark. 256, 556 S.W.2d 874 (1977), where the City sought to annex lands which contained 5,000 to 10,000 acres of mining lands.

With regard to tracts C and G, the trial court found:

> The acreages in tracts "C" and "G" are in part situated within the floodplain and floodway of Fourche Creek. There are low areas in tracts "C" and "G" which will probably never be developed. The City plans to acquire some lowlands and simply leave these lands as they are now and turn them into parks and green belts. The City does have "proposed plans" for draining some of the lands within these areas. Without question, there are lands within these areas which are now developed, and now being used for municipal purposes. Likewise, some of the undeveloped lands within these areas are presently and will continue to be placed to municipal uses within the immediate future. Access is in place, along with the typical municipal utilities.

Witnesses testified that: (1) 8,000 people reside in tract C in 1,956 single-family units and 395 multi-family units; (2) the tract has 82 commercial uses and 19 industrial uses; (3) rapid development of the tract has caused land-use

problems; (4) the area has city water and sewer services as well as municipal utilities; (5) a small part of the tract lies in the floodplain; and one of the city's reasons for annexation of the area is to control development of the floodplain; and (6) the City would establish a "green finger" belt along a major stream in the tract to enhance proper drainage as well as open space and a park.

The testimony about tract G established: (1) there are 2,030 people in 630 single-family units and 31 multi-family units in the 2,615 acre tract; (2) there are 20 commercial uses and 9 industrial uses of the tract; (3) it represents the growth of the City beyond its boundaries; (4) it has sewer and water districts developing without benefit of municipal controls; (5) the City has already purchased 80 acres and plans to acquire 100 to 160 more for the development of parks and for drainage purposes; and (6) the Master Parks Plan includes an impoundment for the control of flood waters. Tract C meets the criteria of furnishing an abode for a densely settled area, and tract G represents the growth of the City beyond its boundaries.

Appellant argues that, since parts of section C and G are in the floodplain and floodway, they are not proper lands for annexation. For authority, he relies on *Saunders* v. *City of Little Rock,* 262 Ark. 256, 556 S.W.2d 874 (1977), and *City of Little Rock* v. *Findley,* 224 Ark. 305, 272 S.W.2d 823 (1954). His reliance on those cases is misplaced as the facts of those cases are distinguishable from the case at bar. Here, only a small part of the tracts lies in the floodplain, and a large part is already developed. In *Saunders,* twelve square miles of floodlands were proposed to be annexed. In addition, the City had no plan for using or draining the floodlands, while the evidence here is that the City has developed an extensive flood control program. In *Findley,* we held that there was substantial evidence to uphold the trial court's finding that lands were inappropriate for annexation. However, we commented that the evidence preponderated in the City's favor.

The trial court's finding of fact described tract K as follows:

> In Tract "K" is a region to the west of the present city limits. It is without residential structures of significance. It is in the path of natural expansion of the City's westward development. There is only one small platted area which is in the northwest corner of the tract. There are no water or sewer improvement districts extending into the tract; however, those utilities districts have expanded the eastern boundary of this property.

There was testimony that section K was: (1) under intense development pressure because it is adjacent to Pleasant Valley, a prestigious subdivision; (2) the Pleasant Valley Country Club extends into the tract for approximately one mile; (3) there are condominium developments and estate size lots along Hinson Road in the lower portion of the tract; (4) there are large single-family lots and subdivision developments off Ridgehaven Road in the north part of the tract; (5) it has electricity, sewer, and water services; and (6) it is in need of the City's police powers for zoning and land use controls. The above constitutes evidence that tract K is held for urban development.

The cases cited by appellant as barring annexation are inappropriate. In *Parrish* v. *City of Russellville,* 253 Ark. 1000, 490 S.W.2d 126 (1973), the land was more remote from the City and its services, and only 785 acres of the 6,398 annexed were anything other than farms and forest. In *Vestal* v. *Little Rock,* 54 Ark. 321, 16 S.W. 291 (1891), that part of the land which was located on the north side of the Arkansas River would be taxed but would not receive any benefit from annexation.

The trial court found that:

> Tract "O" consists of a very thin strip of totally wild and undeveloped land. Tract "O" is situated between Walton Heights, an area of fine homes, and the Little Maumelle River. The land in Tract "O" is not platted. The terrain is cliff-like upward from the river. The existing access to this 188.3 acres which comprises Tract "O" is presently limited to the extreme

> northwest corner of the tract. There exists no streets or roads traversing this property; however, the City is interested in the property as it extends its utilities westwardly; by reason of the Little Maumelle River this area has an attraction as a park site or green belt. The annexation of this tract would extend the city limits to a natural boundary, Little Maumelle River. This area is of significance to the City in its obligation to afford police and fire protection to the residents of Walton Heights and other of its citizens that reside in the area.

Witnesses testified that most of tract O is: (1) a narrow strip of land situated between the Walton Heights subdivision and the Little Maumelle River, with a steep downgrade to the river; (2) it has, in part, a development potential similar to the Walton Heights and Robinwood subdivisions as there is great interest in lots with scenic river views; (3) the riverbank property has a boat ramp which can be developed into a marina; (4) the City has started River Mountain Park, a big metropolitan park which would extend from Murray Park westerly, and it has already purchased 685 acres in the area, including the land on the opposite side of the Little Maumelle River which lies south of the Arkansas River; (5) part of the tract is ideal for the "green finger" concept of open space park land, while another part will serve as a corridor for major water and wastewater utility lines.

It is proper for a city to annex property if it is needed for the purpose of making improvements and if value of the land is derived from actual and prospective use for city purposes. *Brown* v. *Peach Orchard,* 162 Ark. 175, 257 S.W. 732 (1924), and *Kalb* v. *City of West Helena,* 249 Ark. 1123, 463 S.W.2d 368 (1971). Annexation is not prohibited simply because a tract is "rather rugged" and "heavily wooded" with sparse population. *Kalb, supra.*

The order of the circuit court in annexation cases will be upheld unless it is clearly erroneous. ARCP Rule 52. We cannot say the findings by the trial court in this case are clearly erroneous.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I must again respectfully dissent. The majority set out the correct law concerning annexations of adjacent territory by cities then promptly forgot what it said and wrote a nice sounding piece of social legislation. The law establishes five criteria, one of which must be met before land is annexed. These five classifications provide that land may be annexed if: (1) it is platted or held for sale or use as municipal lots; (2) whether platted or not, the land is held to be sold as suburban property; (3) the land furnishes the abode for a densely settled community, or represents the actual growth of the municipality beyond its legal boundary; (4) the land is needed for any proper municipal purpose such as for the extension of needed police regulation; or (5) it is valuable by reason of its adaptability for prospective municipal uses. Fifteen tracts of land were included by a single vote. The City of Little Rock provides the residences for about 160,000 people and the area to be annexed contains the residences for about 10,000. When the spokesmen for the city stated they expected to take in $2.00 in taxes from the annexed area for each $1.00 expended they revealed the true purpose of the election. Another reason given was to square up the city boundaries. The record belies this statement because after the new areas are annexed one could stand on the Coleman Dairy property near Asher and University and throw a rock into the unincorporated area. The dairy, the adjacent Worth James property and the Big Rock property extend from near Asher and University across the Fourche bottoms and Arch Street Pike and join other property crossing the old and new Pine Bluff highways into and including College Station. This property was not included in the annexed territory. Certainly College Station meets several of the criteria, yet it was not included. Obviously College Station would not bring in a lot of tax dollars yet it is platted for use as municipal lots and furnishes the abode for a densely settled community. Certainly the first three criteria are met by the property known as College Station. On the other hand tract "O" consists of about 190 acres of rugged rough un-

inhabitable terrain with no roads, houses, utilities or other improvements. There is one abode on the extreme northwest corner which is the only possible building site except the railroad right of way. The city thought it might be able to lend its experience if there were ever a train wreck on the railroad. How this could be done is not shown since the only access, besides the railroad, is by boat or helicopter. One can look down from Walton Heights and see the tract which mostly consists of a hillside with slopes of 45° to 50°. The city does not have money appropriated or even plans for the use of tract "O". There is not one bit of evidence in the record that tract "O" meets any of the five criteria for annexation. This tract is not needed for any municipal purpose according to the testimony of the city's own witnesses. The remonstrants' testimony tended to reveal that this land is not adaptable to any municipal use now known to exist and cannot ever be developed as business or residential property. It is too rugged even for hiking trails. By no stretch of the imagination can tract "O" ever be adapted for proper city uses. The city says it could be used as a green belt — that is what it is and all it ever will be. The city already owns land for parks and recreation at two sites in sight of this tract. These tracts are so large they will not be developed in the foreseeable future.

If one or more of the tracts included in the same annexation election is found to be improperly included then all must fail. *Herrod* v. *City of North Little Rock,* 260 Ark. 890, 545 S.W.2d 620 (1977). Tract "O" would clearly void this election if the law and precedent were followed.

Much of the land included is used exclusively for agricultural and horticultural purposes and, according to the testimony, this is presently the highest and best use for such property. Such lands are unsuitable for annexation in accordance with Ark. Stat. Ann. § 19-307.1 (Repl. 1980) and *Saunders* v. *City of Little Rock,* 262 Ark. 256, 556 S.W.2d 874 (1977) (*Saunders II*).

Without so stating the majority opinion has wiped out the law and precedent and part of the Constitution of Arkansas in upholding this annexation. Article 2, Sections

22 and 23 prevent annexation for the purposes of taxation only. It has long been held by this court that owners of land taken into the cities must derive some benefits or the annexation violates Article 2, Section 22 of the Constitution of Arkansas. *Saunders II,* supra; *Parrish* v. *City of Russellville,* 253 Ark. 1000, 490 S.W.2d 126 (1973); *Town of Ouita* v. *Heidgen,* 247 Ark. 943, 448 S.W.2d 631 (1970).

Some of the land included in this annexation has been involved in annexation attempts at least since *City of Little Rock* v. *Findley,* 224 Ark. 305, 272 S.W.2d 823 (1954). Some of this same land was the object of the annexation attempts in the cases of *Saunders* v. *City of Little Rock,* 257 Ark. 195, 515 S.W.2d 633 (1974) (*Saunders I*) and *Saunders II.* Those attempts were declared void by this court. The law has not been changed and some of the land has not changed and probably never will. Admittedly one of the tracts being annexed contains a large productive pecan orchard and is being put to its highest and best use even though the city hopes to condemn part of it for an airport runway and therefore believes the highest and best use may be for other purposes. The annexation statute specifically prohibits annexation of such land. The majority actually relies on *Fowler* v. *Ratterree,* 110 Ark. 8, 160 S.W. 893 (1913) in approving this tract as meeting one of the five criteria for classes of property subject to annexation. We have decided many many cases since *Fowler* and none of them are cited. The current law on annexation is not even mentioned in regard to tract "A", the land containing the pecan orchard. I think it is not mentioned because it unequivocally prohibits annexation of this tract and would, standing alone, void the annexation of all these tracts.

The most astonishing statement in the majority opinion is this: "The facts of this case are clearly distinguishable from those in *Saunders* v. *City of Little Rock,* 262 Ark. 256, 556 S.W.2d 874 (1977), where the City sought to annex lands which contained 5,000 to 10,000 acres of mining lands." Much of the same mining land is included in the present case. The facts in *Saunders* and the present case are exactly the same except that the present annexation territory has excluded a part of the mines and some of the flood plains

land. Otherwise, only the names have changed. How can it be that these same lands were unsuitable for annexation in *Findley, Saunders I* and *Saunders II,* but are suitable now without change of law or the nature and use of the lands? Tract "B" contains a mining pit for which no use is planned by the city other than that it might make a good landfill (garbage dump). The pit being adjacent to the Airport Holiday Inn, such use is unlikely. The line on this tract was drawn down the middle of a street. Therefore, the sheriff will patrol one side of the street and the city the other. It is most interesting to note that this line is carefully drawn to take in only the improved parts of College Station while excluding 95% of the residential area which undisputedly is the abode for a densely settled community and is all either held for sale or platted in lots. More police protection is needed in the small excluded area than any spot in the county. Naturally this area would produce very little revenue and would demand the use of much resources. The only difference in the flood plains land here and in previous annexation attempts is that the land mass differs. Flood land included in the present case occupies hundreds of acres of land mass. The majority erroneously holds that the city has extensive plans for flood control. These so-called plans started with the United States Corps of Engineers back in the 1920's. The city has contributed to the problems of flooding rather than helping to solve them. In any event controlling floods is not one of the reasons cities are allowed to annex.

Cities are creatures of the legislature. They have neither existence nor power apart from the creator except such as may be given by the Constitution. *City of Piggott* v. *Eblen,* 236 Ark. 390, 366 S.W.2d 192 (1963). The creator has given cities the power to annex lands provided certain conditions are met. These conditions are expressly stated in Ark. Stat. Ann. § 19-307.1. Although the majority attempts to justify the propriety of the annexation of each tract, it does not even point out how the tracts meet the criteria. The present law is merely a codification of the law as expressed in the landmark case of *Vestal* v. *Little Rock,* 54 Ark. 321, 16 S.W. 291 (1891). For almost one hundred years the *Vestal* principle has controlled our decisions and the Acts of the General Assembly. Now the majority has with one fell swoop

obliterated all that has gone before in matters relating to municipal annexations. The opinion would be more useful and straightforward if it announced it was overruling all prior cases and declaring the annexation statute unconstitutional as well as small portions of the Constitution.

It would serve no useful purpose for me to continue. To convince this court of the error of its ways would be no less a problem than trying to convince cities not to annex but to develop from within. I will conclude by saying the City of Little Rock will not need to acquire outside property for garbage dumps for many years to come.

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CENTRAL FLYING SERVICE, INC.
*v.* Larry CAIN

84-275 686 S.W.2d 432

Supreme Court of Arkansas
Opinion delivered March 25, 1985
[Rehearing denied April 29, 1985.]

*Wright, Lindsey & Jennings,* for appellant.

*Wright & Chaney, P.A.,* by: *Travis R. Berry,* for appellee.

STEELE HAYS, Justice. This case comes to us on appeal on the issue of whether the interest charged on a matured debt was usurious.

In July, 1981, Larry Cain, appellee, established an open account with Central Flying Service, Inc., appellant, and began receiving flight training. All services had been performed by the end of October, 1981 and the balance on the account as $4,771.11. Nothing was paid on the account and after several months Central began charging interest on the amount due at a rate of 10% per annum[1]. In December, 1982, when Amendment 60 of the Arkansas Constitution became effective, Central began charging interest at the rate of 17% per annum. Cain refused to pay the account and Central filed suit. The case was submitted on the merits to the Circuit Court of Clark County, Arkansas, on a joint stipulation of fact and the pleadings.

Both parties agreed that the law at the time of the making of the contract determines whether a contract is usurious. *General Contract Corporation* v. *Duke,* 223 Ark. 938, 270 S.W.2d 918 (1954); *Sloan* v. *Sears Roebuck & Co.,* 228 Ark. 464, 308 S.W.2d 802 (1958), but disagreed as to when the contract was made. Appellee argued below that the contract was formed in July, 1981, and was controlled by

[1]The amounts of interest allowable under Amendment 60 are not argued.

Article 19, Section 13 of the Constitution, providing for maximum interest rate of 10%. Appellant, citing *Bank of Evening Shade* v. *Lindsey,* 278 Ark. 132, 644 S.W.2d 920 (1983) argued that because it was not obligated to renew the debt, any renewal or extension was in essence a new contract. The statement sent for the month of December, 1982, was a new contract and therefore Amendment 60, allowing a higher interest rate, would control. The trial court rejected appellant's argument and found the contract was controlled by the 10% interest rate of Article 19, Section 13.

On appeal appellant renews the argument made below and we find the argument persuasive.

It is a general rule of contracts that payment is due within a reasonable time upon completion of the services contracted for, and there is no objection raised by appellee that the account was not so due. Once a debt has matured and become due, the creditor may begin to charge interest, even if no interest has before been charged or agreed to. *State of Tennessee* v. *Barton,* 210 Ark. 816, 198 S.W.2d 512 (1947); *Temple* v. *Hamilton,* 178 Ark. 355, 11 S.W. 465 (1928). Under the circumstances of this case then, the appellant was justified in charging the appellee interest on the debt owing. The only question that remains is whether appellant was justified in charging the higher rate allowed by Amendment 60 when it sent out its charges to appellee in the December, 1982 statement. In *Bank of Evening Shade, supra,* the bank renewed a loan and charged a rate of interest allowable by law at the date of the renewal but which was higher than that allowed when the contract had originally been entered into. We found inasmuch as there was no obligation or commitment to renew the loan, a new contract could be made and the existing interest rate was applicable. While that decision was made within the context of the Monetary Control Act and federal regulatory guidelines issued pursuant to the Act, the underlying rationale applies with equal force to this situation which presents essentially the same considerations.

Here, the appellee's debt was due and the appellant was under no obligation or commitment to renew the loan or

extend time for payment. Appellant was free to file suit to recover its debt, or defer that action in the hope that payment would occur. At the end of each monthly billing period a new loan or agreement was implied, extending the appellee's indebtedness for an additional month. In the month of December another contract was formed, this time however, the appellant had available to it, the higher rate of interest allowed by Amendment 60. Based on our decision in *Bank of Evening Shade,* we find that under such a contractual arrangement the appellant was justified in charging the higher interest rate. See also, Barrier, Usury in Arkansas: The 17% Solution, 37 Ark. L. Rev. 572 at 578-82.

Appellee points out that Amendment 60 did not become effective until December 3, 1982, whereas the stipulation between the parties recites that interest at the rate of 17% began on December 1, 1982. Thus, appellee contends the charge of 17% would be usurious even if Amendment 60 were found to be applicable to this indebtedness.

But it is clear from the arguments made both here and below that the intent of the stipulation was to simplify the factual basis by which the real issue was presented, that is, whether an indebtedness which originated prior to the effective date of Amendment 60 was subject to the higher interest allowed by the amendment. Whether Amendment 60 took effect on December 1 or December 3, is irrelevant in the context of this case and we note the trial court did not rely on that fine distinction.

Even if the stipulation is taken literally, as appellee urges, it also recites that an itemized statement of account attached to the complaint is an *accurate* recapitulation of the account. That account shows the interest charge for December, 1982, to have been $60.51, whereas 17% would have been $65.76. That leaves a difference of $5.25, and thus the appellant could not have calculated interest on December 1 at 17%.

The order is reversed and remanded to the trial court for the entry of a judgment consistent with this opinion.

Bessie W. COFFELT *v.*
ARKANSAS STATE HIGHWAY COMMISSION

84-268 686 S.W.2d 786

Supreme Court of Arkansas
Opinion delivered March 25, 1985
[Rehearing denied April 29, 1985.*]

*HICKMAN, J., not participating.

*Kenneth C. Coffelt,* for appellant.

*Thomas B. Keys, Philip N. Gowen,* and *Charles Johnson,* for appellee.

DAVID NEWBERN, Justice. This appeal and cross appeal are from a condemnation judgment which, after a jury trial, awarded $40,000 to the appellant. It is the second appeal in the case, and as the first appeal was decided in this court, we have jurisdiction. Arkansas Supreme Court and Court of Appeals Rule 29. 1. j.

In July, 1955, Mr. and Mrs. D'Angelo conveyed to Pulaski County an easement for the right of way for State and U.S. Highway 67. The easement disected a parcel of land owned by the D'Angelos. The deed contained this language:

> This conveyance is made for the purpose of a freeway and adjacent frontage road and the grantor hereby releases and relinquishes to the grantee any and all other abutter's rights including rights appurtenant to grantor's remaining property in and to said freeway, provided, however, that such remaining property shall abut upon and have access to said frontage road which will be connected to the freeway only at such points as may be established by public authority.

On September 8, 1955, the D'Angelos conveyed their remaining interest in the parcel by warranty deed to Kenneth and Bessie W. Coffelt. Mr. Coffelt subsequently conveyed his interest in the parcel to Mrs. Coffelt.

As the north-south highway was constructed, entrance and exit ramps existed permitting entrance and exit to and from the highway upon a road known as Coffelt Road which runs east and west contiguous to the southern boundary of the Coffelt property on both sides of the highway. For a time, one could, by numerous stops and starts, cross from west to east, and vice versa, directly from the Coffelt land on one side

of the highway to the Coffelt land on the other side. It required stopping at each of the frontage roads and stopping prior to crossing each of the two double lanes of Highway 67.

Pulaski County transferred its right in the easement to the Arkansas State Highway Commission, and in 1972 Mrs. Coffelt sued the Commission to enjoin it from interfering with the Coffelt Road crossing, alleging the Commission was planning to close Coffelt Road and thus deny her direct access from her property on one side of the highway to her property on the other side.

In her complaint Mrs. Coffelt alleged the Commission had promised to construct an overpass. While that point was apparently not pursued, it is mentioned here as an aid to understanding what is at stake in this case. Had an overpass or underpass been constructed permitting Coffelt Road to remain passable across the highway, Mrs. Coffelt would have had no claim against the Commission.

This court ultimately affirmed injunctive relief awarded to Mrs. Coffelt. We held the initial entry of the Commission on the land to construct the highway was consistent with its easement. Thus the initial construction was not notice that the Commission was taking the fee and therefore Mrs. Coffelt was not barred by a statute of limitations from asserting her right in the fee underlying the easement. The taking of Mrs. Coffelt's interest remaining in the fee under the easement will permit closing Coffelt Road where it crosses the highway. We said whether Mrs. Coffelt would be entitled to damages from taking the fee was a matter yet to be determined. *Arkansas State Highway Commission* v. *Coffelt,* 257 Ark. 770, 520 S.W.2d 294 (1975).

That very matter was sought to be determined in the case before us now. The Commission sued to condemn the fee. In her appeal of the damages judgment in her favor, Mrs. Coffelt alleges she was erroneously prevented from giving her testimony as to the value of her land before and after the interruption of Coffelt Road. In the cross appeal the Commission contends the court erred in not granting a

motion in limine, in refusing to strike expert testimony offered by Mrs. Coffelt's witness and in allowing Mrs. Coffelt to state that the court was taking judicial notice of the earlier chancery decree.

*1. Mrs. Coffelt's Testimony*

Mrs. Coffelt's attorney began his questioning of her by asking her generally about her land. She responded that her land on the east side of the highway was 2.9 acres and gave figures on its length, width and depth. She gave similar testimony about the approximately 20 acres on the other side where she and Mr. Coffelt had resided nearly thirty years. She discussed the topography of the land and its usefulness as commercial property, noting that at one corner she had an antique shop. She spoke of the lack of drainage problems and of the accessibility to city water and utilities. She also testified about the nearest access points to the highway from the frontage road and about the nature of nearby commercial uses.

When Mrs. Coffelt's lawyer then asked her the value of her land before taking, the Commission objected on the basis that Mrs. Coffelt was not shown to be an expert or to be qualified as a landowner to testify as to the value of her land. Her lawyer then asked her if she was "familiar with land values in that area generally, particularly commercial properties," to which she responded in the negative. She was then asked if she were familiar "with the fair market value of these properties." The Commission again objected. Her lawyer then asked:

> Based upon the information you have, Mrs. Coffelt, do you have an opinion as to the fair market value of your property immediately prior to the taking?

Whereupon the judge said:

> Well, now I've got to sustain the objection, Mr. Worsham. I thought you were going to ask her some more questions about what she based her evaluation on.

More questions followed, but Mrs. Coffelt was not permitted to testify as to value, except to proffer her testimony out of the jury's presence.

While we can understand some of the confusion caused by questions asked of Mrs. Coffelt by her attorney which would more properly have been asked of an expert witness, it is clear that Mrs. Coffelt had shown sufficient knowledge of her own property to qualify her to state its value in her capacity as owner of the land.

On this point the Commission cites only *Arkansas State Highway Commission* v. *Darr,* 246 Ark. 204, 437 S.W.2d 463 (1969), in which a landowner's testimony as to the value of land was held to have been properly stricken. But there was no showing in that case that the witness had ever lived on the land. Nor was she asked about the fair market value of her land. Instead, she was asked how much the land was "worth" with no definition of "worth." She had also given statements about the land which were contradicted by other witnesses, and the evaluation reached in the judgment was entirely dependent on her testimony, as it was too high to have been based on the testimony of other witnesses.

In the case before us, it is clear that although there were other questions Mrs. Coffelt could not answer, the ones to which she quite adequately responded were sufficient to show she had a thorough knowledge of her land. In *Arkansas State Highway Commission* v. *Taylor,* 269 Ark. 458, 602 S.W.2d 657 (1980), we held that as long as a landowner demonstrates an intimate knowledge of his own property he may give his opinion as to its value, and he need not know the value of other, comparable properties. A demonstrated familiarity with his land is sufficient. *Arkansas State Highway Commission* v. *Duff,* 246 Ark. 922, 440 S.W.2d 563 (1969). Thus it was error for the court not to allow Mrs. Coffelt to testify with respect to the value of her land before and after the taking.

*2. Motion in Limine*

The Commission moved at the outset to prevent testi-

mony having to do with diminution of the value of Mrs. Coffelt's land due to inability to enter the highway at its intersection with Coffelt Road. The motion was based on the deed from the D'Angelos to the county which had so clearly given up that right and to which their deed to the Coffelts made reference. We have no doubt the motion should have been granted.

Had there been a correct ruling on the motion in limine, the Commission's next point would have been obviated. Mr. Larrison testified for Mrs. Coffelt as an expert. The evaluation he gave was clearly based on failure to understand that the D'Angelos, and thus their successor Mrs. Coffelt, had conveyed away their right of access at the Coffelt Road intersection to Highway 67. Mr. Larrison said specifically his evaluation had been done on the basis of loss of such access and not just loss of the right to cross the highway from one side of the Coffelt land to the other. He was given an opportunity to separate the right to cross the highway from the right of direct access to the highway, and he was unable to do it, thus it was error to permit Mr. Larrison's estimate to go to the jury. *Arkansas State Highway Department* v. *Wallace,* 247 Ark. 157, 444 S.W.2d 685 (1969).

*3. Judicial Notice*

This point need only be discussed because it may come up upon retrial. As stated earlier, the only question in the first appeal in this case was whether a statute of limitations had run, preventing Mrs. Coffelt from seeking damages for condemnation of the fee underlying the easement across her land so as to permit closing Coffelt Road where it crossed the highway. We held the statute had not run. We said:

> We do not pass upon the effect of the various deeds on damages claimed in this case, but we are of the opinion the chancellor's finding that the appellee owns the fee title to at least twenty feet of Coffelt Road is not against the preponderance of the evidence. We conclude, therefore, that the chancellor did not err in granting the injunction until the question of damages, if any, is fully determined. [257 Ark. at 780, 520 S.W.2d at 300]

Our decision was thus a very narrow one; so was the chancellor's and yet the following exchange appears in the record in the case before us now:

> Your Honor, the defendants are preparing to rest. But before we do, I believe before the recess I had tendered a decree. Your Honor, at this time we are proposing to withdraw the decree because it's my understanding the Court is taking judicial notice that a decree was entered on April 17, 1974, giving the defendants the right to the free use of Coffelt crossing and to the right of ingress and egress on said Coffelt crossing and to the free flow of traffic thereon. Is that correct, Your Honor?
>
> THE COURT: I'm so taking judicial notice.

This characterization of the earlier decree was thus at least possibly misleading. Two paragraphs of the chancellor's decree are set out in our earlier opinion 257 Ark. at 778, 520 S.W.2d at 299. The chancellor made it clear that Mrs. Coffelt had no right of access to the highway from Coffelt Road but that the right to cross over had not been compensated and thus the Commission was enjoined from closing Coffelt Road without condemning the remaining interest of Mrs. Coffelt.

The judicial notice taken could easily have been interpreted by jurors as being in excess of that justified by the decree, and certainly in excess of this court's interpretation of that decree in the first appeal. We need not decide whether the judicial notice thus taken and possibly misleading was error; however, we caution that upon retrial if there is another attempt at condensing the first decree and our opinion affirming it, more care should be taken to see that it is accurately limited.

Reversed on appeal; reversed on cross appeal, and remanded.

Justice Hickman not participating.

Joe MOORE *v.* STATE of Arkansas

686 S.W.2d 790

Supreme Court of Arkansas
Opinion delivered March 25, 1985
[Supplemental Opinion on Denial of Reconsideration
April 29, 1985.]

Pro Se Motion for Belated Appeal; denied.

Appellant, *pro se.*

No response.

PER CURIAM. In an order signed August 31, 1984, the Circuit Court of Crawford County denied petitioner Joe Moore's petition for postconviction relief. On September 4, 1984, the day the order was filed by the circuit court, the court received a letter from petitioner which the court treated as a motion to set aside the order. The court responded with a second order entered September 11, 1984, declining to disturb the first order.

Petitioner now asks for permission to proceed with a belated appeal of the orders on the ground that he did not

know that his Rule 37 petition had been denied until he was informed of the denial in a letter from the trial judge dated November 28, 1984. He alleges further that the circuit clerk did not forward a copy of the orders to him until January 14, 1985.

Rule 37.3(d) provides that when an order is rendered, a copy will be mailed promptly to the petitioner. *See Scott* v. *State,* 281 Ark. 436, 664 S.W.2d 475 (1984). The record in this case indicates that the circuit court complied with this provision. Letters to the petitioner dated September 4 and September 11, 1984, inform petitioner that a copy of an order is enclosed, and both orders have a notation under the trial judge's signature directing that a copy be delivered to the petitioner. There is a presumption that a letter mailed was received by the person to whom it was addressed. *American Fidelity Fire Insurance Company* v. *Winfield,* 225 Ark. 139, 279 S.W.2d 836 (1955). Petitioner has offered nothing to rebut that presumption beyond the unsubstantiated assertion that the letters did not arrive.

In view of the proof contained in the record that petitioner was provided a copy of both the September 4 and September 11 order, we find that petitioner has not stated good cause for failing to perfect an appeal. Accordingly, his motion for belated appeal is denied.

Motion denied.

Supplemental Opinion on Denial of Reconsideration
delivered April 29, 1985

688 S.W.2d 733

Pro Se Motion for Reconsideration of Denial of Motion for Belated Appeal; denied.

Appellant, *pro se.*

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. On March 25, 1985, we denied petitioner's motion for belated appeal. In the motion he had alleged that he was unable to file a timely notice of appeal because he had not received notice from the circuit court that his Rule 37 petition had been denied until several months had passed. He now asks for reconsideration based on the ground that since a prisoner's mail is not delivered directly to him but rather to the prison officials, the prisoner has no knowledge of it until it is passed along to him. He suggests that because he has been transferred four times since being committed to prison, it is possible that his mail was not delivered to him. His statement is unconvincing.

As we said when the motion for belated appeal was denied, Rule 37.3(d) provides that when an order is rendered, a copy will be mailed promptly to the petitioner. The record in this case indicates that the circuit court complied with the rule. We also said that there is a presumption that a letter mailed was received by the person to whom it was addressed. The fact that mail is delivered to the prison mailroom and not directly into the hands of the inmate is not in itself enough to overcome the presumption that it reached him. If petitioner had provided some proof that it is the practice of prison officials to withhold mail or to delay delivering it for an extended period when there has been a transfer, there might be grounds for reconsideration of the denial of his motion for belated appeal. (We note that he states that our opinion denying his motion for belated appeal was postmarked March 25, 1985 and delivered March 27, 1985.) There can be no argument with petitioner's assertion that mail

between the courts and litigants deserves prompt delivery, but petitioner has not demonstrated that there was any undue delay in his case.

Motion for reconsideration denied.

Patricia Ann SIDES *v.*
STATE of Arkansas

CR 85-6 686 S.W.2d 434

Supreme Court of Arkansas
Opinion delivered March 25, 1985

John W. Settle, by: *J. Randolph Shock,* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

PER CURIAM. Patricia Sides was convicted in the Ft. Smith Municipal Court of violating the Omnibus DWI Act, Act 549 of 1983. On appeal to the Circuit Court she was tried before a jury and again convicted. She was fined $800 and costs and her license was suspended for ninety days.

On appeal it is argued that Act 549 violates the separation of powers clause in Article 4, Section 1 of the Arkansas Constitution in that 1) the discretion given to prosecuting attorneys to bring criminal charges is transferred to police officers under the Act, and 2) the judicial function of judges or juries as fact finders is usurped by the provision of the Act which presumes guilt if the defendant's blood alcohol level equals or exceeds .10% by weight.

Those same arguments have been considered and rejected in other cases. See *Sparrow* v. *State,* 284 Ark. 396, 683 S.W.2d 218 (1985) and *Lovell* v. *State,* 283 Ark. 425, 678 S.W.2d 318 (1984).

Affirmed.

Leamon STYLES *v.* STATE of Arkansas

685 S.W.2d 813

Supreme Court of Arkansas
Opinion delivered March 25, 1985

*Reuben "Jay" Pickens* and *Wilson, Engstrom & Corum,* by: *William R. Wilson,* for appellant.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant, Leamon Styles, by his attorney, William R. Wilson, Jr., has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and it was no fault of the appellant. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases.

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

Thomas A. & Gerene L. DILDINE *v.*
CLARK EQUIPMENT CO., A Foreign Corp.,
TOWN & COUNTRY INTERNAT'L, INC. and
U.S. FIDELITY & GUARANTY CO.

84-283 686 S.W.2d 791

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Larry J. Steele,* for appellant.

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

JACK HOLT, JR., Chief Justice. This case presents questions concerning the use of expert testimony and photographic evidence in a products liability matter. Our jurisdiction is under Sup. Ct. R. 29(1)(m).

The appellant, Thomas Dildine, was injured while operating a front-end loader for his employer, Tenco, Inc., a feed and grain company. He and his wife filed suit for his injuries against the appellee, Clark Equipment Co., the manufacturer of the machinery, and against appellee, Town & Country International, Inc., the distributor. United States Fidelity & Guaranty Co., intervened for subrogation rights for worker's compensation benefits paid to the appellant.

The case was tried to a judge who granted both appellees' motions for directed verdicts. That decision was appealed to this court which affirmed as to Town & Country but reversed and remanded as to Clark. *Dildine* v. *Clark Equipment Co.,* 282 Ark. 130, 666 S.W.2d 692 (1984).

On remand, the case was tried to a jury which returned a verdict finding neither the appellant, Dildine, nor the appellee, Clark, guilty of negligence and that the product was not sold in a defective condition. It is from the jury's verdict that this appeal is brought.

The accident occurred in March, 1982, when Dildine was thrown from a front-end loader called a 632 Bobcat. According to Dildine, he had a load of feed in the bucket of the Bobcat and was driving toward the mixer with the bucket in a lowered position. As he approached the mixer, he began elevating the bucket and the Bobcat tipped forward, throwing him from the machine and causing him certain physical injuries. The evidence showed that his employer, Tenco, had modified the Bobcat by welding a metal piece to the bucket to permit a larger load and adding compensating weight to the rear of the machine. Conflicting testimony was presented as to the effects of this modification.

Dildine's initial allegation of error concerns the testimony of Dennis Combs, the appellee's witness. Dildine contends that the trial court erred in allowing Combs to testify as an expert witness in that Combs was not properly qualified. The following colloquy with Combs occurred in connection with this question:

> Q. Now, did you have occasion to see this particular 632 Bobcat after it had had an extension welded on the bucket?
>
> A. Yes, I have seen it.
>
> Q. Was that at your suggestion?
>
> A. No.
>
> Q. Would you recommend that such a thing be done?
>
> A. I would not recommend it, no, sir.
>
> Q. Tell the jury just what we had there.

> BY MR. STEELE: Your Honor, I'm going to object at this time. I don't think the proper foundation has been laid for Mr. Combs to testify as any kind of an expert witness.
>
> BY MR. SMITH: *All right. Let's put it this way.* Did you see it in your shop when it had this extension? [emphasis added].

This exchange demonstrates that, although Dildine objected to Combs' testimony, he never obtained a ruling from the judge on the objection. The burden of obtaining a ruling is upon the movant, and the failure to secure one constitutes a waiver, precluding its consideration on appeal. *Collier* v. *Hot Springs S & L Ass'n,* 272 Ark. 162, 612 S.W.2d 730 (1981). Furthermore, in response to the objection, the mode of questioning was altered by the appellee's attorney. Dildine therefore has not demonstrated where the trial court erred. "It is the responsibility of the appellant to demonstrate error." *Bostic* v. *Bostic Estate,* 281 Ark. 167, 662 S.W.2d 815 (1984).

In reaching the substance of Dildine's allegation, however, we find that under the circumstances, Combs was qualified to testify either as an expert or a lay witness. Whether a witness may give expert testimony rests within the sound discretion of the trial court and will not be reversed by this court absent an abuse of discretion. *Dildine, supra.*

In the first appeal of this case, this court stated, "[o]bviously this case required expert testimony. There is no suggestion that the dynamics of this accident were explainable in lay terms." Uniform R. Evid. 702 provides that a witness qualified "by knowledge, skill, experience, training, or education" may testify in the form of opinion or otherwise. Combs was qualified under this rule in that he has worked for Town & Country for six years; has been service manager for the equipment, including Bobcats, for three years; performed the pre-delivery inspection on this Bobcat; shows rental customers how to operate a Bobcat; has driven, maintained and serviced this Bobcat; and has

operated all Bobcat models. He has the knowledge, skill, experience and training and was qualified to testify under Rule 702.

His testimony was also admissible as that of a lay witness. Uniform R. Evid. 701 provides that testimony by a lay witness in the form of opinions or inferences is permitted which is rationally based on the witness' perception and "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue." Combs' testimony meets this test and was admissible.

Dildine's second objection to Combs' testimony goes to its relevance. Decisions about relevancy are within the discretion of the trial court, and he is not reversed unless that discretion is abused. *Daniels* v. *State,* 277 Ark. 23, 638 S.W.2d 676 (1982).

The appellant maintains that Combs was allowed to testify to irrelevant, prejudicial testimony while his expert witness, Dr. Albert Mink, was prohibited from testifying on similar subject matter. The testimony concerned the feed in the bucket when the accident occurred. Dildine testified that he did not remember what type of feed he was carrying. The pertinent testimony by the two witnesses was as follows:

*TESTIMONY OF DR. MINK:*

Q. . . . Did I provide you with a sample of the material that had supposedly been moved or transported at the time . . . the material that was being moved in the bucket?

BY MR. McNEILL: Your Honor, we're going to object to this question. I believe the plaintiff himself testified he didn't know what he was using or — There's been no testimony in the record as to what material was being loaded at the time. [objection sustained]

*TESTIMONY BY DENNIS COMBS:*

Q. At that time, did you go over and get a load in the bucket?

A. Yes.

Q. Was it a full load?

A. What we done, we loaded the bucket just to the capacity of the bucket, without using the extension. There was no material after the level of the extension and the bucket weighed 1,060 pounds.

BY MR. STEELE: Your Honor, I'm going to object. We don't know what type of material that was loaded. There's been no evidence of the kind of material that Mr. Dildine was carrying.

BY THE COURT: Mr. Steele, you will be given an opportunity to explore both of those items on cross-examination.

The appellant argues that the court allowed Combs to testify about an experiment he did concerning the accident but disallowed Mink's testimony about a similar experiment. This contention is without merit. Dr. Mink did testify about his experiment and gave his opinion on the Bobcat's defectiveness and the effect of Tenco's modification. He simply was not allowed to state that, in his experiment, he filled the bucket with the same kind of feed used by Dildine, since the type of feed was unknown. In Combs' testimony, no attempt was made to state what type of material filled the bucket, he merely said that the bucket was filled. The credibility of the two witnesses and the weight to be accorded their testimony is solely within the province of the jury. *Caldwell* v. *State,* 267 Ark. 1053, 594 S.W.2d 24 (1980). The trial judge did not abuse his discretion in allowing the testimony.

Dildine's final allegation of error is that the court erred in allowing two pictures into evidence, defendant's (appellee here) exhibits 6 and 7. Dildine argues that since the pictures were taken after the Bobcat was washed off they were not a true representation of the Bobcat as it looked when the accident occurred.

Exhibit 6 is a photograph of the warning sticker inside the cage of the Bobcat. It was admitted into evidence in conjunction with testimony that the sticker was in the cage on the day of the accident and has been in the Bobcat the whole time Tenco has owned it. Exhibit 7 is a picture of the inside of the Bobcat where the driver sits. It shows a manual and instructions hanging on a cable inside. There was testimony that the sticker and manual in the Bobcat had been cleaned up since the accident. "The law is settled that the introduction of photographs rests largely within the discretion of the trial judge." *Smith* v. *State,* 10 Ark. App. 390, 664 S.W.2d 505 (1984). In *Horne* v. *State,* 12 Ark. App. 301, 677 S.W.2d 856 (1984) the Court of Appeals upheld the admission of a shirt into evidence which had been washed since the crime was committed. The court said, "[t]he possibility that certain stains on the shirt had been washed away simply goes to the weight the jury was to accord the evidence." The same is true here. There was ample testimony to let the jury know that the Bobcat was much dirtier when the accident occurred than it was in these pictures. The pictures were not introduced as depicting the Bobcat at the time the accident occurred in any respect but to demonstrate the presence of the warning sticker, manual and instructions. The judge did not abuse his discretion.

Affirmed.

Laverne E. FRENCH *v.*
DILLARD DEPARTMENT STORES, INC.

84-288 686 S.W.2d 435

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Mary Ann Gunn* of *Williams & Gunn,* for appellant.

*William Robert Still, Jr.,* of *Barrett Law Firm,* for appellee.

GEORGE ROSE SMITH, Justice. From 1972 until September, 1982, the appellant was employed by the appellee in the cosmetics department of its Fayetteville store. After her employment was terminated, she brought this action for slander and for her assertedly wrongful discharge. Upon the appellee's motion for a partial summary judgment the trial

judge granted such a judgment as to the discharge. The Court of Appeals transferred the case to us as possibly involving an issue that was touched upon but not decided in two recent cases. *Jackson* v. *Kinark Corporation,* 282 Ark. 548, 669 S.W.2d 898 (1984); *Griffin* v. *Erickson,* 277 Ark. 433, 642 S.W.2d 308 (1982).

In *Griffin* we followed our long-standing rule that when the term of employment is left to the discretion of either party, or is indefinite, or is terminable by either party, then either may end the relationship at will and without cause. The possible change mentioned in the two cases would be brought about, as we said in *Jackson,* "by finding an express or implied agreement for a specified period of employment or by imposing on the employer a duty not to discharge the employee arbitrarily or in bad faith."

The appellant presents her arguments as four points for reversal, but there is actually only one essential issue: Does the proof submitted for and against summary judgment present any material disputed question of fact that might bring the case within the *Jackson* exceptions? We find none.

The appellant testified that when she was orally employed in 1972, she was told that she could work as long as she desired. No definite term was specified. She signed a written application that included this statement: "I understand and agree that Dillard's may terminate my employment at any time, without prior notice or liability of any kind, except for wages earned and unpaid at the time of such termination." Thus the original agreement was terminable at will by either party, under the common-law rule we have always followed.

As to later modifications of the agreement, only three are suggested. First, Dillard's initiated a profit-sharing plan to which it contributes. After five years an employee's interest is vested in the sense that she receives the balance in her account at her retirement or a percentage of it if she is terminated before retirement. The plan, however, is not shown to involve any assurance of continued employment. Second, there is a stock-purchase plan. After one year's

employment an employee may contribute up to 3% of her pay, which Dillard's will match and use for the purchase of stock in the company. The employee then simply owns the stock; it has nothing to do with her continued employment. Third, in a proffered affidavit which we have taken into consideration, the appellant stated that from the time she accepted the employment she was required to give two-weeks notice of any decision on her part to terminate the employment and would lose certain benefits if she failed to do so. Such a provision is not uncommon, but it does not assure the employee of a job for any specified length of time. Rather to the contrary, it confirms the employee's right to quit.

In sum, we find nothing in the proof to present an issue of fact with respect to the possible exceptions discussed in the *Jackson* and *Griffin* opinions.

Affirmed.

Cullen LIVINGSTON, et al
*v.* J. Bruce STREETT, et al

84-297 686 S.W.2d 794

Supreme Court of Arkansas
Opinion delivered April 1, 1985
[Rehearing denied May 6, 1985.]

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

*David F. Gillison, Jr.* and *Alex G. Streett,* for appellees.

JOHN I. PURTLE, Justice. This is the second time we have reviewed this case. In *Cannco Contractors, Inc.* v. *Livingston,* 282 Ark. 438, 669 S.W.2d 457 (1984), we remanded the matter to the trial court for redetermination of ownership of certain lands. This is an appeal from the trial court's second decision. The appellants argue that the chancellor did not comply with our first decision in the case and that the trial court should have granted summary judgment. The chancellor applied the law in accordance with our mandate and correctly refused to grant summary judgment.

We reversed in part and affirmed in part on the first appeal. The reversal related only to abandonment and damages. We held that the railroad had abandoned the property and that nothing in the record supported an award

for $300 damages. These two things were all that we reversed. All other holdings were affirmed and are binding upon the parties and the courts.

When the case was returned the parties submitted the same briefs and arguments which were used in this court to the trial court. Each party moved for a summary judgment and the court denied both motions. No additional testimony or evidence was offered before the trial court. In accordance with his interpretation of our opinion and mandate the trial judge considered the facts and evidence and awarded ownership of the abandoned railroad property to different parties.

This appeal relates to lands designated on Exhibit 17 as tracts "A" and "C." Both tracts were parts of a grant to the railroad made in 1902. The Streetts deeded the property to the railroad with the restriction of "so long as it shall be used for railroad purposes." Other lands were deeded to the railroad in fee and these lands are not here in question. We held on the first appeal that the railroad abandoned this right of way when it sold the land to the Livingstons in 1980. When the grantee abandoned the property the title reverted to the Streetts or their assigns. Cannco purchased tract "A" from the Streetts after the railroad deeded it to the Livingstons. Tract "C" was not deeded to anyone except Mopac and it was proper for the court to confirm title in tract "C" in the heirs of Streett and tract "A" in Cannco as it derived its title from the Streett heirs. Since Cannco was given title to tract "A" it was proper for the court to disallow the $300 it had found Cannco owed the Livingstons.

The decree of the trial court is affirmed in all matters.

Affirmed.

Rudolph LANE and James Matthew LANE by
Rudolph LANE, His Grandfather and Next Friend
*v.* ARKANSAS BLUE CROSS AND BLUE SHIELD, INC.

84-296 686 S.W.2d 438

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Michael Everett,* for appellant.

*Jim Patton,* for appellee.

ROBERT H. DUDLEY, Justice. Appellant, Rudolph Lane, and his family were insured by appellee, Blue Cross-Blue Shield, under his employer's group medical insurance policy. He filed suit against appellee for expenses incurred in the medical treatment of his newborn grandson who suffers from congenital heart problems. The grandson was born to appellant's unmarried sixteen year old daughter. Appellant tacitly admits that his grandson is not within coverage of the insurance contract but contends that Ark. Stat. Ann. § 66-3248 should be interpreted to require coverage. The trial court held that the statute did not mandate coverage. We affirm. Jurisdiction to construe an

Act of the General Assembly is in this court. Rule 29(1)(c).

Ark. Stat. Ann. § 66-3248, in its pertinent part provides, "Every . . . medical service insurance . . . contract . . . which covers *the insured* and members of the insured's family, shall include coverage for *newborn infant children by the insured* from the moment of birth."

The term "insured" is not one of fixed meaning, and often its meaning may be ascertained only from the policy or statute in which it appears. See 44 C.J.S. Insurance § 49. As the term is used in this statute it is clear that appellant, Rudolph Lane, is the insured and that his unmarried daughter is a member of his family. The statute then covers his newborn infant *children.* This conclusion is bolstered by Emergency Clause language which states: "Many . . . hospital and medical service contracts . . . do not cover *newborn infants of an insured* until the infant reaches a certain age. . . ." From this clause it would appear that the legislature contemplated coverage for Rudolph Lane's newborn child but did not intend to extend coverage to cover his grandchild since they did not specifically include newborn infant grandchildren. We are precluded from construing "children" to include "grandchildren" since we previously held that where the word "children" is used in a statute it must be construed to mean only descendants of the first degree unless it is apparent from the context that a broader meaning was intended. *Starrett* v. *McKim,* 90 Ark. 521, 119 S.W. 824 (1909).

Affirmed.

John Edward SPENCER *v.* STATE of Arkansas

CR 85-31 686 S.W.2d 436

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Jim Lyons,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint E. Miller,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was convicted of first degree carnal abuse of a person who was less than fourteen years old. There is no need to review the facts since the sufficiency of the evidence is not questioned. We affirm the judgment.

Appellant first contends that the trial court erred in denying his motion to take the discovery deposition of three prosecution witnesses. He argues that the Due Process Clause gives the accused a right to discovery, and, as

authority, cites *Wardius* v. *Oregon,* 412 U.S. 470 (1973). The argument is without merit. The *Wardius* opinion makes it clear that the Due Process Clause does not, by itself, require discovery procedures in criminal cases. Rather, it mandates that when a state imposes discovery against a defendant, due process requires that equivalent rights be given against the state. Arkansas statutes do not provide for discovery against a defendant, as does the Oregon notice-of-alibi rule, at issue in *Wardius,* which requires that when a criminal defendant intends to rely on an alibi defense, he must notify the State of the place where he claims to have been at the time in question and of the names and addresses of witnesses he intends to call in support of the alibi. *Wardius* does not mandate discovery under the Arkansas procedure. *Hoggard* v. *State,* 277 Ark. 117, 640 S.W.2d 102 (1982). Instead, it is discretionary with the trial judge. *Sanders* v. *State,* 276 Ark. 342, 635 S.W.2d 222 (1982). Since appellant has not included any trial testimony in the record we cannot determine whether the trial judge abused his discretion. We do not reverse for failure to grant discovery in a criminal case without showing an abuse of discretion. *Sanders* v. *State, supra.*

Appellant next contends that the trial court erred in refusing to quash the information or in suppressing their testimony because the prosecutor took three witnesses to the courtroom and went over their testimony. Again, we find the argument to be without merit. The appellant moved to quash the information, or alternatively to suppress the testimony, or alternatively for a continuance. The court granted the requested alternative motion for a continuance. A party cannot complain of a ruling that was made at the insistence of his own attorneys, *Sheppard* v. *State,* 239 Ark. 785, 394 S.W.2d 624 (1965).

Affirmed.

Ray BASS *v.* STATE of Arkansas

CR 84-203 686 S.W.2d 441

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*House, Wallace & Jewell, P.A.,* by: *William Dean Overstreet,* for appellant.

*Steve Clark,* Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant was charged with operating a tractor-trailer in excess of the weight limits prescribed by Act 7 of the 1983 Acts of Arkansas[1], known as the "Bridge Formula Restriction." Appellant's vehicle, loaded with coal, weighed 78,200 lbs. and exceeded the allowed weight by 4,920. A fine of $92 was imposed.

The circuit court rejected appellant's argument that coal is a form of rock and therefore he was exempt under § 74-817(i) of the Act which provides that vehicles hauling, "sand, gravel, rock or crushed stone," are not subject to the Act. Appellant renews the argument on appeal and we affirm.

[1]Ark. Stat. Ann. § 75-817 (1983 Supp.).

Appellant called two geologists as expert witnesses who gave an opinion that coal is a kind of rock. Rock, they said, was a very general term for materials occupying a significant portion of the earth's crust, and includes sandstone, granite, limestone, shale and coal, as examples. Several texts they regarded as authoritative were cited which supported their view.

But the issue is not whether coal is a type of rock in a geological sense, but whether the legislature intended to include coal when it exempted "sand, gravel, rock and crushed stone" from the bridge formula. We think not. The basic rule of construction is that words of a statute are to be given their commonly accepted meaning. *Phillips Petroleum Co.* v. *Heath,* 254 Ark. 847, 497 S.W.2d 30 (1973); *Black* v. *Cockrill, Judge,* 239 Ark. 367, 389 S.W.2d 881 (1965).

Sand, gravel, rock and crushed stone are generally regarded as building materials, whereas coal is not. Coal is a fuel, the others are not. Nor do the dictionary definitions suggest that coal is a type of rock. Webster's New International Dictionary of the English Language, Second Edition, defines coal as:

> A black or brownish-black, solid, combustible mineral substance formed by the partial decomposition of vegetable matter without free access of air, under the influence of moisture and, in many cases, of increased pressure and temperature.

Random House College Dictionary, Revised Edition, defines coal as a dark combustible mineral substance consisting of carbonized vegetable matter, used as a fuel.

Finally, it is conceded that gravel, sand and crushed stone are also rocks, which detracts from the theory the legislature intentionally used the word "rock" in a generic sense. Had the legislature intended coal to be exempt, we believe it would have added it to sand, gravel and crushed stone, and not have thought it to be included within the meaning of rock.

Affirmed.

James Calvin CAGE, Jr. *v.* STATE of Arkansas

CR 84-139 686 S.W.2d 439

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Ken Cook,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint E. Miller,* Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The question in this case is whether the confession of the appellant, Cage, should have been suppressed because it was induced by a promise made by police officers. After hearing evidence from Cage and from the police officers who arrested and interrogated Cage,

the judge admitted the confession into evidence. A jury returned a verdict of guilty, and Cage was sentenced to serve forty years in prison for rape. Our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29. 1. b.

At a hearing on his motion to suppress, Cage testified that Officer Presley had promised him "mental help" if he would sign a confession; that if he did so he could probably be out of a mental institution in three or four years and otherwise they could put him away for fifty to one hundred years and he would never see West Memphis again.

At the same hearing, Presley testified that Cage had initiated discussions of his needing help because he, Cage, did not know why he had committed the crime. Presley testified he agreed with Cage, that he needed help, but Presley clearly testified that no promises were made. Similar testimony was given by Officer Sudburry who also said no promise was made to Cage.

When involuntariness of a confession is alleged, we make an independent review of all the circumstances surrounding the confession. *Davis* v. *State,* 275 Ark. 264, 630 S.W.2d 1 (1982). We determine whether the record shows the will of the accused was somehow overcome at the time he confessed. *Dewein* v. *State,* 114 Ark. 472, 170 S.W. 582 (1914).

The factors we consider are set out in *Cessor* v. *State,* 282 Ark. 330, 668 S.W.2d 525 (1984); *Perkins* v. *State,* 258 Ark. 201, 523 S.W.2d 191 (1975). See also *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973). The appellant here was thirty-four years old. He was literate and had gone through the twelfth grade in school. He was advised of his rights before confessing and before the conversation about "mental help" occurred, and he acknowledged his understanding of his rights. Before confessing, the appellant was detained about one and a half hours, during which time he was questioned intermittently and he was allowed to phone his father twice.

Cage's testimony conflicted with that of Presley and Sudburry as to whether or not there was a promise and as to

his allegation that Presley used profanity toward him. His allegation of the latter did not amount to what we might call undue mental pressure. No physical abuse was alleged. With respect to the conflict in testimony as to whether a promise was made, the trial court obviously resolved it against the appellant, and we have been given no substantial reason to say the trial court was wrong. *Fleming* v. *State,* 284 Ark. 307, 681 S.W.2d 390 (1984); *Fuller* v. *State,* 278 Ark. 450, 646 S.W.2d 700 (1983).

Affirmed.

James Calvin HARRIS
*v.* STATE of Arkansas

CR 84-190 686 S.W.2d 440

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*John F. Gibson, Jr.,* for appellant.

*Steve Clark,* Att'y Gen., by: *Sandra Tucker Partridge,* Asst. Att'y Gen., for appellee.

PER CURIAM. The appellant was convicted of DWI, first offense. He asked the court to suspend his sentence or put him on probation so he would not have to attend an alcohol

treatment or education program required by Ark. Stat. Ann. § 75-2509 (Supp. 1983). The court refused his request, finding it was without authority to grant it in view of the mandatory nature of the statute. Our jurisdiction arises from Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

The appellant recognizes that our decision in *Lovell* v. *State of Arkansas,* 283 Ark. 425, 678 S.W.2d 318 (1984), makes it clear that the word "shall" as used in Act 549 of 1983 makes its provisions mandatory and that we held in the *Lovell* case that trial courts have no discretion to use alternatives of probation or suspension pursuant to Chapter 12 of Title 41 of Arkansas Statutes Annotated as they may with respect to many other offenses. The appellant asks us to reconsider our ruling in the *Lovell* case, but he gives us no reason to do so other than the tradition in our courts of granting probation and suspension and the fact that Act 549 does not specifically say that the sentencing alternatives of Ark. Stat. Ann. § 41-1201 (Repl. 1977) may not be used.

In view of the specificity of the Act, cited in the *Lovell* case and re-emphasized in the opinion denying rehearing in that case, we decline to overrule our previous decision.

Affirmed.

J. C. "Buddy" JOHNSON *v.* STATE of Arkansas; and Cecil A. TEDDER, White County Circuit Judge

CR 85-53 686 S.W.2d 443

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Paul Petty,* for petitioner.

No response filed for respondents.

PURTLE and NEWBERN, JJ., would grant.

JOHN I. PURTLE, Justice, dissenting. I would grant the writ because I think all parties are entitled to know whether they are trying a misdemeanor or a felony. The time and money saved is great if we hold that the offense is a misdemeanor. On the other hand, if we hold it is a felony no one is injured because all trial courts have plenty of cases to try without these. Needless to say an accused will not suffer harm unless he is being held in custody awaiting trial.

NEWBERN, J., joins in this dissent.

Robert Steven OSGOOD and
Anthony Gerald TEMPLE *v.* STATE of Arkansas

CR 85-45 and CR 85-46 686 S.W.2d 442

Supreme Court of Arkansas
Opinion delivered April 1, 1985

*Hani W. Hashem,* for petitioner Robert Steven Osgood.

*R. Byrum Gibson, Jr.,* for petitioner Anthony Gerald Temple.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for respondent.

PER CURIAM. Respondent's motion to reconsider issuance of temporary Writ of Prohibition is granted.

PURTLE and NEWBERN, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I dissent from the action taken by the majority in granting the motion to reconsider. We did not grant a writ of prohibition but granted a stay until we could decide the issue of whether the present law declares possession of marijuana with intent to deliver to be a misdemeanor or a felony. In this dissent I will argue that a writ of prohibition is proper in this case. In reenacting Ark. Stat. Ann. § 82-2617(a)(1)(iv), the 1983 General Assembly apparently, or at least arguably, downgraded possession of marijuana to a misdemeanor. There is at least sound argument that the offense as stated is a misdemeanor. Temple and Osgood, as well as perhaps hundreds of others, contend the offense is a misdemeanor. They are charged with felonies.

I think we wisely granted the stay or prohibition pending briefing by the parties. In fact, the State more or less agreed to the continuance because the matter was of "great

public interest and importance." It was, and is indeed, a matter of great importance. In the event we finally hold the offense to be a misdemeanor we could, by staying prosecutions temporarily, save the state and counties large sums of money. Certainly a defendant is entitled to know whether he is charged with a misdemeanor or a felony. An accused facing a possible penalty of one year is certainly not in the position of one facing ten years. In all fairness one ought to know, before he is tried, the maximum sentence he could receive upon conviction. By granting a stay we would harm no one but by refusing to do so we are doing irreparable harm, if we decide the offense is a misdemeanor.

The writ of prohibition is truly an extraordinary writ and should not be issued without considerable thought and then only in unusual circumstances. In granting prohibition in *Curtis* v. *Partain, Judge,* 272 Ark. 400, 614 S.W.2d 671 (1981), we stated: "We grant the writ only because we deem the matter to be of first impression and of general interest to all trial courts." In *Curtis* we granted the writ to keep the trial judge from enforcing his own pre-trial order. Certainly a pre-trial order is one which may be appealed with the case in chief.

NEWBERN, J., joins in this dissent.

F. M. & Lyda M. BRIXEY, Husband and Wife, and Frank N. & Martha Marie BRIXEY, Husband and Wife, *v.* CITY OF BOONEVILLE, ARKANSAS

84-305 687 S.W.2d 126

Supreme Court of Arkansas
Opinion delivered April 8, 1985
[Rehearing denied May 13, 1985.]

*Martin, Vater & Karr,* by: *Charles Karr,* for appellant.

*Paul X. Williams, Jr.,* and *Paul Danielson,* by: *Paul Danielson,* for appellee.

JACK HOLT, JR., Chief Justice. This case raises questions about the right of a city to condemn land. We find that the appellants are precluded from raising these issues. Jurisdiction is pursuant to Sup. Ct. R. 29(1)(n) because the case involves oil and gas rights.

On June 4, 1975, the city of Booneville filed suit in

Sebastian County Circuit Court to condemn flowage easements over lands owned by the appellants. The purpose of the taking was to provide for impounding water and rights of way for water lines and other facilities necessary for a water distribution system which the city was developing. On the day before the trial of the case, the city filed an amendment to its complaint, seeking a fee simple interest in the lands rather than flowage easements. No objection was made to the amendment and the jury issued verdicts upon the complaint as amended. The verdicts awarded compensation for the lands taken to the defendants, who are the appellants in this proceeding, with judgment entered on the verdicts on October 30, 1975.

In 1984 appellants filed this chancery action seeking a declaratory judgment reserving to them the oil, gas and other mineral rights underlying the lands acquired by Booneville in the 1975 judgment.

The trial court found that the city did condemn the lands in question in fee simple, and the same was done properly. We agree.

Appellants argue that the Sebastian County Circuit Court, which entered the 1975 judgment of condemnation did not have jurisdiction to award the fee simple estate because of the general rule of eminent domain that no more property of a private individual, and no greater interest therein, can be condemned and set apart for public use than is absolutely necessary to satisfy the public purpose. This general rule still applies, however, it is also a rule that when the property owners, in this instance the appellants, thought that the lands were about to be condemned, and an interest greater than necessary was about to be taken, an answer should have been filed at that time contesting the taking, with a motion to transfer to equity. *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S.W.2d 58 (1944). This was not done. Thus, the right of the appelants to litigate these questions is deemed to have been waived and the appellants are precluded from raising this issue at this late date. *Selle* v. *City of Fayetteville,* supra.

The city of Booneville had the authority to take a fee simple interest under Ark. Stat. Ann. § 35-902 (Repl. 1962). The amended complaint of the city clearly declares a fee simple taking and the amounts awarded, which were accepted by the appellants, fully support the taking of a fee.

Accordingly, the chancellor was correct in finding that the city did in fact acquire the lands in question in fee simple absolute and that the appellants were not entitled to claim any oil, gas or mineral rights underlying the lands.

Affirmed.

## HARTFORD ACCIDENT & INDEMNITY COMPANY *v.* STEWART BROTHERS HARDWARE COMPANY

84-313 687 S.W.2d 128

Supreme Court of Arkansas
Opinion delivered April 8, 1985

*Saxton & Ayers,* for appellant.

*W. Frank Moreledge, P.A.*, for appellee.

GEORGE ROSE SMITH, Justice. The appellant Hartford was the corporate surety on a contractor's bond given to secure the payment of bills for labor and material furnished to the contractor on a private construction job. The contractor ceased work on the contract on March 26, 1976. Some two years later, on May 31, 1978, the appellee Stewart Brothers brought this action against Hartford to recover an amount owed for materials furnished to the contractor, plus the statutory penalty and attorney's fee. Hartford pleaded as its defense a one-year limitation period contained in the bond sued upon. The trial court rejected the plea of limitations and entered judgment for the plaintiff upon undisputed facts. Our jurisdiction of the appeal is pursuant to Rule 29(1)(c).

The principal question is that of limitations. The governing statute provides that no action upon such a bond shall be brought against the corporate surety after six months from the date final payment is made on the contract. Ark. Stat. Ann. § 51-636 (Repl. 1971). It is stipulated that the last payment was made on October 2, 1978. Since this suit was brought four months before that date, it was apparently timely.

The bond, however, provides in substance that no action on the bond shall be commenced after the expiration of one year following the date on which the contractor ceased work on the contract, "it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof," then the limitation shall be the minimum permitted by the law. This action having been filed more than two years after the contractor ceased work, Hartford argues that the one-year contractual limitation is a bar to the suit.

Hartford relies on our holding in *City of Hot Springs* v. *National Surety Co.*, 258 Ark. 1009, 531 S.W.2d 8 (1975), but that reliance is misplaced. There the common-law bond in question had a two-year limitation from the due date of the final payment on the contract. We held that the parties were

free to contract for a limitation shorter than the general five-year statute applicable to written instruments if the stipulated time was not unreasonably short "and the agreement did not contravene some statutory requirement." Upon the facts in that case the plaintiff had, under the terms of the bond, more than a year and eight months for bringing suit. We considered that to be ample time and upheld the contractual limitation.

By contrast, here the specific statute, *supra,* allows the suit to be filed up to six months from the date of final payment on the contract. That is a reasonable point of beginning, for the materialman may not know the exact amount of his claim, if any, until that final payment has been made. The one-year contractual limitation, however, began to run from the date the contractor ceased work and would have actually barred this suit even before the statutory limitation had been set in motion by the final payment. We hold, therefore, that the contractual limitation was prohibited by the controlling statute, so that the alternative minimum period recognized by the bond became controlling. The action was brought within that period and so is not barred.

Hartford argues secondarily that an attorney's fee allowance cannot be sustained in the absence of proof of the nature and extent of the attorney's services. That is not the law. When the trial judge is familiar with the case and the service done by the attorneys, the fixing of a fee is within the discretion of the court. *Tech-Neeks, Inc.* v. *Francis,* 241 Ark. 390, 407 S.W.2d 938 (1966). Here the allowance of a $3,000 fee was based upon the recovery of an $11,571.11 judgment. We do not regard the amount as excessive.

Affirmed.

COMPUTE-A-CALL, INC., a Missouri Corp.,
COMPUTE-A-CALL, INC., an Arkansas Corp.,
Cecil WHITE and Bob BOEHM *v.*
Ralph TOLLESON and Lewis JONES

84-302 687 S.W.2d 129

Supreme Court of Arkansas
Opinion delivered April 8, 1985

*Gary D. Corum* and *Timothy O. Dudley,* for appellants.

*Brazil, Clawson & Adlong,* for appellees.

ROBERT H. DUDLEY, Justice. The appellees filed a complaint in chancery court stating that they had suffered irreparable damage because the appellant did not pay money due under the terms of a contract. They asked for a temporary injunction directing that the appellants pay the money already due, and also pay the money which would become due under the terms of the contract. The chancellor refused to transfer the case to circuit court and granted the temporary injunction ordering that appellants pay $40,760.13 into the registry of the court and to make future payments under the terms of the contract. We reverse and remand. Jurisdiction to hear this interlocutory appeal is vested in the Court under Rule 29(1)(k).

The prospect of irreparable harm or lack of an otherwise adequate remedy is at the foundation of the power to issue injunctive relief. Harm is normally only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Kreutzer* v. *Clark,* 271 Ark. 243, 607 S.W.2d 670 (1980). Money damages are the only damages asked in this case. The remedy at law is adequate. The chancellor erred in refusing to transfer the case to circuit court and erred in granting an injunction for money damages.

The complaint does state that appellees suffered irreparable damage. However, such a conclusory allegation, with no statement of fact, is not sufficient to give equity jurisdiction. *Duncan* v. *Baxter,* 222 Ark. 955, 264 S.W.2d 395 (1954).

This case is reversed and remanded with directions to dissolve the injunction, to return the money which appellants have paid into the registry of the court, and to transfer the case to circuit court.

Reversed and remanded.

George HUFSMITH *v.* Charles T. WEAVER,
Individually and in his capacity as
President of L & S Concrete Company, et al.

84-263 687 S.W.2d 130

Supreme Court of Arkansas
Opinion delivered April 8, 1985

*Perroni & Rauls, P.A.*, for appellant.

*Davidson Law Firm, Ltd.*, by: *Stephen L. Gershner,* for appellees Weaver; L&S Concrete Co.; Webco, Inc.; Case; and Case Concrete Co.

*Stephen Napper,* for appellees Gilliam and Gilliam Brothers, Inc.

DAVID NEWBERN, Justice. In this action for tortious interference with a contract, a summary judgment was entered in favor of the defendants who are now the appellees. The appellant, Hufsmith, was not a party to the contract which was allegedly subverted by the appellees. Rather, he based his standing to sue on his position as a third party

creditor beneficiary. The trial judge held the allegations of the complaint were insufficient to sustain the contention that the appellant was a third party creditor beneficiary. To that we add that there was no remaining genuine issue of material fact, as shown by the record, when the summary judgment motion was made, thus summary judgment was proper. Ark. R. Civ. P. 56(c). As this was a tort action, our jurisdiction arises under Arkansas Supreme Court and Court of Appeals Rule 29. 1. o.

The allegations of Mr. Hufsmith were that he, as president and majority shareholder of Razorback Ready Mix Concrete Company, Inc. (Ready Mix), entered into a contract to sell the assets of that company to Razorback Quality Concrete Company. He further alleged that the sale was dependent upon the issuance of industrial revenue bonds pursuant to Ark. Stat. Ann. §§ 13-1601 through 13-1616 (Repl. 1979 and Supp. 1983), popularly known as Act 9 bonds. Finally, Hufsmith alleged that the bond issue failed because of a "false and fraudulent" lawsuit filed by the appelles to block the issuance of the bonds, and that the appellees, who were competitors of Ready Mix, knew that failure of the bond issue, and thus of the sale, would cause the financial ruin of Ready Mix.

In an affidavit in support of his opposition to the appellees' motion for summary judgment, Mr. Hufsmith stated that because of the failure of the sale he was forced to use his own assets to pay off obligations of Ready Mix which he had personally guaranteed. It is this posture as guarantor of the obligations of Ready Mix, which was known to the appellees, which Hufsmith contends makes him a third party beneficiary to the contract of sale and thus gives him standing in this lawsuit.

Neither the allegations nor the affidavit was sufficient to show a remaining factual issue on the matter of Mr. Hufsmith's standing. With respect to the relationship of pleadings and summary judgment see *Joey Brown Interest* v. *The Merchants National Bank of Fort Smith,* 284 Ark. 418, 683 S.W.2d 601 (1985). Hufsmith cites no case showing that a third party beneficiary may bring an action

for tortious contract interference. More importantly, the cases he cites to demonstrate his third party beneficiary status are woefully inadequate.

Hufsmith cites *Wilson* v. *General Mortgage Co.,* 638 S.W.2d 821 (Mo. App. 1982), for this language: "one upon whom the promisee intends to confer the benefit of performance of the contract and thereby discharge an obligation or duty the promisee owes the beneficiary" is a third party creditor beneficiary (638 S.W.2d at 823). While the quoted language sounds good and is correct in the abstract, it is not helpful to Hufsmith's argument. In the *Wilson* case the plaintiff was a mortgagor who alleged the mortgagee had promised the Federal Housing Commissioner to make diligent efforts to acquire fire insurance to replace that which had been cancelled on plaintiff's mortgaged home. The plaintiff's home burned, and she sued the mortgagee claiming to be a third party beneficiary of the mortgagee's promise to the Commissioner. After citing with approval ALI, Restatement, Contracts § 133(1)(b) (1932), and discussing the standard fare on creditor and donee beneficiaries, the court held the plaintiff had not stated a cause of action because she alleged no facts showing the Commissioner owed her a duty which would have been discharged had the contract been performed by the mortgagor.

The same is true here. Accepting Mr. Hufsmith's statement that he was the guarantor of obligations owed by Ready Mix, there is no allegation or evidence that Ready Mix owed Hufsmith anything when the contract was entered.

The contract was entered on February 26, 1982. According to Hufsmith's affidavit, it was not until May 29, 1982, that he received a demand letter requesting that he, personally, pay the notes he had guaranteed for Ready Mix. No duty of Ready Mix to Hufsmith would have been discharged had the sale been consummated, because, as Hufsmith contends, there would have been no default by Ready Mix, and no duty on the part of Ready Mix to reimburse Hufsmith would have arisen. For a very similar situation in which status as a third party beneficiary was

denied, see *Shamburger* v. *Moody,* 322 F. Supp. 196 (E.D. Ark. 1970).

The duty or obligation of the promisee to the purported third party creditor beneficiary and the prospect of satisfaction of that duty by performance are integral elements of the description of a third party creditor beneficiary according to the Restatement. ALI, Restatement of Contracts, Second, § 302(1)(a) (1981). For an article analyzing the Arkansas cases in light of the first Restatement, cited earlier, see Comment, Enforceability of Third-Party Beneficiary Contracts in Arkansas, 5 Ark. L. Rev. 66 (1950). A more recent review is contained in *Ozark Milling Co., Inc.* v. *Allied Mills, Inc.,* 349 F. Supp. 553 (W.D. Ark. 1972).

The other case cited by Hufsmith on this point is *Southern Farm Bureau Casualty Co.* v. *U. S.,* 395 F.2d 176 (8th Cir. 1968), which involved an insurance contract in which the promise in the contract was to indemnify accident victims. It was properly conceded by Mr. Hufsmith's counsel in oral argument that such a case is not applicable here.

The appellees have argued that Hufsmith could not bring this action as a shareholder on behalf of Ready Mix. We find that argument inapposite, as Hufsmith sued as a third party beneficiary, not as a shareholder representing Ready Mix. They also argued the Noerr-Pennington privilege. See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965). We need not consider whether their lawsuits against Hufsmith were privileged in view of our agreement with the trial court that Hufsmith lacked standing to bring this action.

We hold summary judgment in favor of the appellees was correctly entered because there was no remaining genuine issue of material fact as to whether Hufsmith was a third party creditor beneficiary, and thus Hufsmith lacked standing to bring this action.

Affirmed.

HAYS, J., not participating.

OVERTON CONST. CO., INC.,
Michael J. OVERTON & Vickie L. OVERTON
*v.* FIRST STATE BANK, Springdale, Ark.

84-238 688 S.W.2d 268

Supreme Court of Arkansas
Opinion delivered April 15, 1985

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

*Herdlinger, Jacoway & Stanley, P.A.,* by: *Roy Stanley,* for appellee.

JACK HOLT, JR., Chief Justice. This is the second appeal of a case involving a default judgment on a promissory note. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(j).

The appellants executed a promissory note to the appellee which was secured by a mortgage on real property. When the appellants defaulted, the appellee filed a complaint to foreclose on the property. The appellants asserted usury as a defense in their answer to the complaint.

The trial court found the note was not usurious under the governing federal law. That ruling was appealed to this court and we affirmed in part, reversed in part, and

remanded in part on December 12, 1983. *Overton Const., Inc.* v. *First State Bank, Springdale,* 281 Ark. 69, 662 S.W.2d 470 (1983), *rehearing denied,* Janaury 16, 1984.

On remand, the appellants filed an amended answer in which they alleged that the real property securing the promissory note was not "residential" real property within the meaning of the applicable federal legislation. The trial court struck the amended answer. It is from that order that this second appeal is brought. We affirm.

This court has consistently held that when a cause is broadly remanded for a new trial all of the issues are opened anew as if there had been no trial, and the parties have a right to amend their pleadings as necessary. *Sanders* v. *Walden,* 214 Ark. 523, 217 S.W.2d 357 (1949); *American Nat'l Ins. Co.* v. *Laird,* 228 Ark. 812, 311 S.W.2d 313 (1958); and *Ford Motor Credit Co.* v. *Herring,* 267 Ark. 201, 589 S.W.2d 584 (1979). Here there was no such broad remand. Instead, this court in *Overton,* supra, decided all of the issues except for the question of whether or not the parties proceeded to trial "with the knowledge that First State Bank was a member of the Federal Deposit Insurance Corporation." *Overton,* 281 Ark. at 71. It was for the narrow purpose of resolving that question that this case was remanded. It is a general rule that a party is not allowed on remand to amend his pleadings so as to open up matters that were adjudicated by the appellate court. 5B CJS *Appeal & Error* § 1969 (8) (1958).

In fact, this appeal marks the appellants' third attempt to litigate the question of whether or not the property securing the mortgage was residential property. This same issue was raised in the first appeal and in the petition for rehearing. Clearly this court has already answered the appellants' contention.

In *Harper* v. *Nash Implement Co. Inc., et al,* 281 Ark. 161, 662 S.W.2d 811 (1984), we found the trial court had correctly applied the doctrine of "law of the case" by refusing to permit additional pleadings on remand. We said:

The principles of law determined and announced

in the former appeal are binding and must stand as the law of the case . . . The decision of the trial court . . . was approved by this Court in the first appeal. On retrial the trial court correctly applied the doctrine of "law of the case" in applying the law set out in this Court's opinion in the original appeal. Accordingly, we conclude the trial court was correct in refusing to grant a trial de novo on all of the issues.

We reach the same conclusion in this case.

Affirmed.

Norma FOSTER *v.* STATE of Arkansas

CR 84-188 687 S.W.2d 829

Supreme Court of Arkansas
Opinion delivered April 15, 1985

[redacted]

*James C. Cole,* for appellant.

*Steve Clark,* Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, Norma Foster, was convicted of first degree murder and sentenced to life imprisonment. This appeal from that conviction is before us under Sup. Ct. R. 29(1)(b). We reverse and remand.

The appellant's conviction stemmed from her alleged participation in the contract killing of Orin Hendrickson of Arkadelphia. At the time of the murder, the appellant was a housemother at Ouachita Baptist University in Arkadelphia. Mrs. Foster was accused of having conspired with Hendrickson's wife, Pat, and Mark Yarbrough, a student at OBU, to hire Howard Vagi, another OBU student, to kill Hendrickson in return for money. Vagi did in fact kill Hendrickson and is serving a life sentence in prison for that crime. Yarbrough was granted immunity from prosecution in return for his testimony at Mrs. Foster's trial.

The appellant raises numerous issues on appeal, and we find merit in her contention that the trial judge erred by refusing to suppress her taped statement. The facts surrounding the taping of the statement were as follows: Four officers went to the appellant's home at about 2:30 a.m. They knocked on the door, and, when Mrs. Foster answered, told her that the prosecuting attorney, W. H. "Dub" Arnold, would like to see her and for her to come with them to his office. The officers testified that they went to pick Mrs. Foster up at the prosecuting attorney's request. Once she arrived at Arnold's office, the appellant was questioned by two of the officers. The prosecuting attorney did not participate in the questioning although he was in the building. He entered the room where Mrs. Foster was being questioned once to bring a tape recorder into the room and play part of a taped statement by Mark Yarbrough. Arnold told the appellant, "We know whatever the truth is. You might as well tell them." He then left the room. Before taping Mrs. Foster's statement, one of the officers informed her of her rights and she signed a waiver form.

The appellant contends that she was unlawfully brought to the prosecutor's office for questioning and she is right. When we review a ruling on a motion to suppress evidence, "we make an independent determination based

upon the totality of the circumstances." *Grant* v. *State,* 267 Ark. 50, 589 S.W.2d 11 (1979). We do not set aside the trial judge's finding unless it is clearly against the preponderance of the evidence. *Ibid.*

There are several legal mechanisms by which an individual can lawfully be picked up for questioning, but none of them were used in this case.

Arkansas R. Crim. P. 2.2 provides that a law enforcement officer may request a person to furnish information or to otherwise cooperate in the investigation of a crime. Rule 2.3 provides that if, pursuant to this rule, the officer asks any person to come to or remain at a prosecuting attorney's office, the officer shall take steps to make it clear that there is no legal obligation to comply with the request. To the contrary, no such steps were taken here. In fact, one of the officers agreed during his testimony that Mrs. Foster did not volunteer for questioning but only went to the prosecutor's office "because four officers came out to her house and picked her up and carried her down there." The fact that Mrs. Foster accompanied the officers without being arrested or forced to comply does not demonstrate acquiescence. "[C]onsent to an invasion of privacy must be proved by clear and positive testimony — a burden that is not met by showing only acquiescence to a claim of lawful authority." *Meadows* v. *State,* 269 Ark. 380, 602 S.W.2d 636 (1980). Such acquiescence is all the state has been able to demonstrate here.

Ark. Stat. Ann. § 43-801 (Repl. 1977) authorizes a prosecutor to issue subpoenas in all criminal matters under investigation. These written subpoenas must substantially follow a form provided in the statute. Here there was no subpoena used, the officers merely acted at the prosecutor's direction.

It is illegal to use a prosecutor's subpoena power "to obtain the presence of a witness for questioning by a police officer, absent the prosecutor." *Duckett* v. *State,* 268 Ark. 687, 600 S.W.2d 18 (Ark. App. 1980). It is unquestionably illegal therefore to use the office of the prosecutor, absent

even a subpoena, to obtain the presence of a witness for the same purpose. The officers picked Mrs. Foster up in the middle of the night ostensibly because the prosecutor wished to see her. The prosecutor however did not participate in the subsequent questioning except for one brief appearance to play a portion of a tape. The entire procedure whereby Mrs. Foster's presence at the prosecutor's office was obtained was merely a guise to let the officers detain her and interrogate her. Based on the totality of the circumstances, the illegality of this procedure has impermissibly tainted Mrs. Foster's subsequent statement and it should have been suppressed.

Since the case will be remanded, we will address the other issues raised by the appellant which are likely to arise on retrial.

The jury in this case was sequestered. The appellant argues that it was error for the trial judge not to administer the mandatory oath to the persons he placed in charge of the sequestered jury. We agree.

The oath is provided for in Ark. Stat. Ann. § 43-2121 (Repl. 1977):

> The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate, or be kept together in the charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves.

The appellant's attorney objected twice to the trial judge's failure to swear the officers pursuant to the statute. His first objection was lodged when the officers were placed in charge of the jury at the beginning of the trial. He objected again the next day before the first witness was called. The judge obviously erred by not administering the oath as required by statute.

The appellant also contends that the trial judge erred by refusing to sequester a witness, W. H. "Dub" Arnold, the

prosecutor, with the other witnesses. The appellant asked the trial court to sequester the prosecutor because he expected to call him as a witness for the defense. The court did not err. Uniform R. Evid. 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of . . . (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Here, Arnold stated and the court found, that he was essential to the case because he was the attorney trying it for the state. In *McCoy Farms, Inc.* v. *J & M McKee,* 263 Ark. 20, 563 S.W.2d 409 (1978), this court found that neither the statutes on sequestration nor the Code of Professional Conduct requires the exclusion of a party's attorney when the attorney is called as a witness by the adverse party. We said in *McCoy* that a party's only lawyer falls within the category of Rule 615(3) essential persons. "The rule against the attorney who becomes a witness continuing as an advocate was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him." *Ibid.* However, had Arnold played a greater role in the interrogation of Mrs. Foster he might have been properly subject to sequestration. Instead the questioning was done by the officers and Arnold entered the room only once to play part of a tape and speak briefly to the appellant.

The appellant also assigned as error the trial judge's refusal to allow the appellant to introduce the results of Pat Hendrickson's polygraph test. The admission of the results was sought to bolster Mrs. Foster's testimony that her suspicions about Mrs. Hendrickson's involvement in the murder were dispelled when she heard that Mrs. Hendrickson had taken and passed a polygraph examination.

Ark. Stat. Ann. § 42-903 (Repl. 1977) provides that the results of polygraph tests "shall be inadmissible in all courts in this State." We have held that the results are only admissible if both parties enter into a written stipulation

agreeing on their admissibility. *Wilson* v. *State,* 277 Ark. 43, 639 S.W.2d 45 (1982). There was no stipulation between the parties and the results were therefore inadmissible. The mere mention of the test, under the circumstances, makes obvious its results, which is inadmissible hearsay.

The court erred however, when it permitted the prosecutor to call Pat Hendrickson, the wife of the deceased, who was charged with capital felony murder, as a witness even though both the court and the prosecutor knew that Mrs. Hendrickson would be advised to plead her fifth amendment privilege against self-incrimination. At the appellant's bail bond hearing, Mrs. Hendrickson's attorney informed the prosecutor, the appellant's attorney and the court that he would advise his client to invoke the fifth amendment if she was called to testify at Mrs. Foster's trial. The appellant argued that calling her in light of her attorney's statement was a "grandstand play" and sought a mistrial.

When she was called to the stand, Mrs. Hendrickson recited her name, address, the relation of the victim to her, his age at his death, and their child's name and age. She was then asked, "Mrs. Hendrickson, I will call to your attention the time immediately prior to March 10, 1983 and ask you if you knew Norma Foster?" At that point, the witness invoked her fifth amendment right.

The Court of Appeals dealt with this same question in great detail in *Sims* v. *State,* 4 Ark. App. 303, 631 S.W.2d 14 (1982). The court quoted the state's brief as follows:

> The evil in the non-testimony of such a witness is not the mere calling of the witness, but the obvious inferences drawn by a jury to a series of questions, to all of which the witness refuses to answer on Fifth Amendment grounds. In that case the questions themselves "may well have been the equivalent in the jury's mind of testimony." *Douglas* v. *Alabama,* 380 U.S. 415, 419, 85 S. Ct. 1074, 13 L. Ed. 2d 934, 937 (1965). Such improper questioning, not technically being testimony at all, deprives an accused of his right to cross-examine the witnesses against him as guaranteed by the

> Confrontation Clause of the Sixth Amendment to the federal constitution [made obligatory on the states by the Fourteenth Amendment.] *Dutton* v. *Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Frazier* v. *Cupp,* 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969); *Douglas* v. *Alabama, supra.*

The court also cited a Wisconsin decision, *Price* v. *State,* 37 Wis. 2d 117, 154 N.W.2d 222 (1967) which held: "no error is committed by the mere fact of calling a witness who will claim the privilege." Instead the court said *Namet* v. *United States,* 373 U.S. 179 (1963) "makes it clear that the forbidden conduct is the 'conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.'"

Applying this rule to the instant case, there was an attempt by the prosecutor to build the state's case out of inferences arising from Mrs. Hendrickson's assertion of her fifth amendment privilege. "[T]he granting of a mistrial is a drastic remedy which should be resorted to only when the prejudice is so great that it cannot be removed." *Gross* v. *State,* 8 Ark. App. 241, 650 S.W.2d 603 (1983); *Gammel & Spann* v. *State,* 259 Ark. 96, 531 S.W.2d 474 (1976). Here the prejudice is great.

Reversed and Remanded.

# FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF MORRILTON *v.* Captain Raimund STACHA et al

84-256 688 S.W.2d 269

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Joe Cambiano; Hardin, Jesson & Dawson;* and *Steve Kirk,* for appellant.

*Tim D. Williams; Clark & Adkisson,* by: *William M. Clark;* and *Henry & Henry,* by: *Robert W. Henry,* for appellees.

GEORGE ROSE SMITH, Justice. This is another case involving a due-on-sale clause — a provision in a mortgage entitling the mortgagee to accelerate the maturity of the entire debt if the debtor sells the property without the mortgagee's consent. Several similar foreclosure suits were consolidated for trial. The chancellor entered a summary

judgment dismissing all the suits, on the ground that the due-on-sale clauses are not enforceable. The appeal comes to us under Rule 29(1)(c). The issue is whether under the controlling federal statute the clauses can be enforced.

The various cases are similar. All the mortgages were made to the appellant, a federal savings and loan association, and were secured by liens on real property. All the mortgages were executed during the "window period" between July 31, 1976, and October 15, 1982. (For an explanation of the window period, see *Abrego* v. *United Peoples Sav. & Loan,* 281 Ark. 308, 664 S.W.2d 858 [1984].) All the debtors sold their property without the Association's consent. Presumably the purchasers refused to refinance the loans at a higher interest rate; so the Association declared the debts immediately due and filed these foreclosure suits upon default. The chancellor, considering the federal statutes not to be applicable, refused to allow the acceleration of maturities, in accord with our holding in *Tucker* v. *Pulaski Fed. Sav. & Loan,* 252 Ark. 849, 664 S.W.2d 858 (1972).

The due-on-sale innovation has had its ups and downs. Arkansas was one of several jurisdictions that by statute or court decision refused to allow a lender to exercise such an option without some equitable reason for the acceleration. Congress, however, was concerned that such restrictions might impair the stability of the national real estate financing market and therefore passed the Garn-St. Germain Depository Institutions Act, effective October 15, 1982. *See* Geier, Due-On-Sale Clauses, 17 San Francisco L. Rev. 355 (1983). The issue here is whether that federal act permits the acceleration of maturities in this case.

The statutory language pertinent to this case is set forth in Section 341 of the Garn-St. Germain Act. 12 U.S.C.A. § 1701j-3. (West Supp. 1984). Subsection (b)(1) provides that notwithstanding any state law or decision to the contrary, a lender may enforce due-on-sale clauses with respect to real property loans. Subsection (c)(1) establishes the window period during which state laws are permitted to remain in force for a limited time. Next, however, is subsection (c)(2), which contains the two subparagraphs on which this case hinges.

(B) A lender may not exercise its option pursuant to a due-on-sale clause in the case of a transfer of a real property loan which is subject to this subsection where the transfer occurred prior to October 15, 1982.

(C) This subsection does not apply to a loan which was originated by a Federal savings and loan association or Federal savings bank.

The appellees contend that subparagraph (B) is applicable, because the transfers to them were prior to October 15, 1982. They, in effect, disregard subparagraph (C) by saying that it does not apply to these mortgages. The appellant, on the other hand, argues that subparagraph (C) confirms the enforceability of due-on-sale clauses, as declared in subsection (b)(1), with respect to all loans originated by a federal savings and loan association such as this appellant.

We think the appellant's position is clearly right. As Geier, *supra,* points out, the reference in subparagraph (C) to "[t]his subsection" was sloppy draftsmanship, because of its lack of precision. Even so, we think the reference is necessarily to all of subdivision (c), for several reasons. First, no other workable meaning can be ascribed to the reference to "this subsection." Second, throughout the section all cross references are to *lettered subsections,* as to *subsection (b), subsection (c),* and *subsection (d).* Hence the reference to "this subsection" evidently follows the same pattern and means all of subsection (c).

Finally, the pertinent Senate committee report pretty well puts the question at rest. That report reads in part:

The United States Supreme Court, in *Fidelity Federal Savings and Loan Association* v. *De La Cuesta,* [458 U.S. 141] (1982), recently upheld the right of federally chartered savings and loan associations and federal savings banks to include and enforce due-on-sale clauses pursuant to a 1976 regulation issued by the Federal Home Loan Bank Board. Hence, the due-on-sale practices for federally chartered thrifts, for loans

> originated by those thrifts, will continue to be subject to the Federal Home Loan Bank Board's exclusive regulatory authority. The identity of the lender at the time the loan was originated determines whether or not a loan is subject to window period restrictions.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 24, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 3054, 3078.

We have no hesitancy in agreeing with Geier's conclusion that the window period exception applies only to non-federal loans, so that the due-on-sale clause in loans originated by a federal savings and loan association such as the appellant continues to be enforceable regardless of state law.

Reversed and remanded for further proceedings.

# Alice H. MILLDRUM *v.* TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND

85-5 688 S.W.2d 271

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Evans & Evans,* by: *James E. Evans, Jr.,* for appellant.

*Jones, Gilbreath & Jones,* by: *Robert L. Jones, III,* for appellee.

GEORGE ROSE SMITH, Justice. By stipulation the only question in this case is one of law: Did Act 900 of 1975 prohibit the appellee, Travelers Indemnity, from inserting

in a group disability insurance policy a clause providing that total disability benefits under the policy would be reduced by the amount of Social Security benefits received by the disabled employee? Ark. Stat. Ann. § 66-3709 (Repl. 1980). Our jurisdiction is under Rule 29(1)(c).

The unambiguous language of the statute itself unmistakably dictates a negative answer to the question at issue. Act 900 provides that no contract of group disability insurance shall contain any provision for the reduction of benefits because of the existence of "other like insurance." That phrase is then specifically defined:

> The term "other like insurance" may include group or blanket disability insurance or group coverage provided by Hospital and Medical Service Corporations, government insurance plans, union welfare plans, employer or employee benefit organizations, or Workmen's Compensation Insurance or no-fault automobile coverage provided for or required by any statute.

The enumeration of various private insurance plans as constituting "other like insurance" by implication excludes from the prohibition governmental social programs such as Social Security benefits. In fact, the General Assembly itself later so construed Act 900, for a later statute not applicable to this case amended the original act by including Social Security benefits in the prohibition. Even then, however, Social Security benefits were not classified as "other like insurance." Instead, those benefits were placed within a new exclusion of "other such coverage." Act 702 of 1981; Ark. Stat. Ann. § 66-3709 (Supp. 1983).

The appellant argues that Social Security benefits should be included as other like insurance because the emergency clause in Act 900 recites a legislative purpose to prohibit "denial or reduction of benefits under any contract of group disability insurance." That statement in itself is too sweeping to have any practical force if treated as an enactment, which it is not. In cases of ambiguity we may refer to the language of the emergency clause to clarify the

legislative intent. *City of Fort Smith* v. *Brewer,* 255 Ark. 813, 817, 502 S.W.2d 643 (1973). Here, however, there is no ambiguity, for the act itself defined the term "other like insurance." We do not find in the all-inclusive language of the emergency clause any intent to nullify that definition. The trial judge's interpretation of the statute was right. The appellant is not entitled to recover additional amounts under the policy in view of the exclusion of Social Security benefits.

Affirmed.

James Ray CANADY *v.* Connie A. CANADY

84-292 687 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Stripling & Morgan,* by: *Dan Stripling,* for appellant.

*Mark Cambiano,* for appellee.

DARRELL HICKMAN, Justice. The primary question on appeal in this divorce case is the division of property which James Canady, the appellant, owned before the marriage. After hearing extensive testimony, the chancellor concluded that "the parties mixed their assets and obligations as well as

their joint efforts to the extent that it becomes clear to this court that the parties are each equitable and joint owners of the other's property." Consequently, the chancellor ordered all real and personal property sold and the proceeds divided equally. We must reverse the decree as to the property division for reasons we explain.

One of the tracts of land ordered sold was 123 acres of land which James Canady received pursuant to his divorce from his first wife. The decree awarded the land to him and his two daughters as joint tenants with right of survivorship. The chancellor found, however, that Mr. and Mrs. Canady purchased that land. That was clearly wrong. Since his daughters were not parties to the divorce proceedings, their interests could not be ordered sold. See *Cole* v. *Cole,* 168 Ark. 381, 270 S.W.2d 593 (1925). Without the daughters' consent, the only way to affect their interests would be by partition. See Ark. Stat. Ann. § 34-1801 (Supp. 1984). The ownership that Mr. Canady shared with his daughters was not only of the land but also that of a dairy operation, the buildings, equipment and cattle, all of which was ordered sold. Although it is sometimes possible in such cases to determine the party's interest in jointly owned property and take that into consideration in dividing the property as was suggested in *Riegler* v. *Riegler,* 243 Ark. 113, 419 S.W.2d 311 (1967), there was no substantial evidence in this case from which the chancellor could make such a finding. The chancellor will have to determine the scope of the entire dairy operation and land and its value at the time of the marriage of the Canadys as well as its worth at the time of the divorce. We cannot make that determination from the record before us.

Another question concerns the ownership of a 101 acre tract. In 1973 James Canady inherited a one-sixth interest in the land with his brothers and sisters. He bought their interests in November, 1975, before he married Mrs. Canady. Mrs. Canady claims they used her money to make the purchase. The divorce decree recites that this land was purchased by both parties in Mr. Canady's name. The chancellor's findings ignore the fact that Mr. Canady had a prior interest in the land.

It is our judgment that the chancellor did not give due deference to the statutory requirements pertaining to property acquired by parties prior to marriage in dividing the real property. Ark. Stat. Ann. § 34-1214(A)(1) and (2) (Supp. 1984) provides:

> All marital property shall be distributed one-half [½] to each party unless the court finds such a division to be inequitable, in which event the court shall make some other division that the court deems equitable taking into consideration (1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital property, including services as homemaker; and (9) the federal income tax consequences of the Court's division of the property. When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties and such basis and reasons should be recited in the order entered in said matter.
>
> All other property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subparagraph (A) above, in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

While the chancellor's findings touched on some reasons for his decision and while the record may contain enough evidence to justify his order and equal division, except for the 123 acres and dairy, the statute is explicit regarding specific findings if there is any deviation from returning non-marital property to the original owner. The reasons given must be sufficiently specific. See eg. *Davis* v.

*Davis,* 270 Ark. 180, 603 S.W.2d 900 (Ark. App. 1980); *Glover* v. *Glover,* 4 Ark. App. 27, 627 S.W.2d 30 (1982).

Both parties were previously married. James Canady and Connie Canady began living together in the spring of 1974 and were married December, 1976. James Canady was not divorced from his first wife until October of 1974. James Canady took some part in operating the dairy and was a long haul truck driver until 1979. Connie had considerable sums of money which she had inherited from her first husband and received from other sources. She operated the dairy and contributed substantially to their living expenses and the obtaining, maintenance, and development of the marital property. The chancellor found that Mrs. Canady contributed a total of $161,000. Our total of her contribution from the record is approximately $150,000. Her contribution to the *marital property* will have to be determined exactly or nearly so. *Potter* v. *Potter,* 280 Ark. 38, 655, S.W.2d 382 (1983).

We reverse and remand for a retrial of that part of the decree relating to the division of property.

Normally, we decide chancery cases *de novo* and do not remand them for retrial. However, on the record before us, we cannot fairly determine the interests of the parties. That division can only be made on the basis of specific findings as directed by Ark. Stat. Ann. § 34-1214. Sometimes where a case is extremely complicated and an accounting would consume an inordinate amount of the court's time, a special master is appointed. See *Petty* v. *Lewis,* 285 Ark 3, 684 S.W.2d 250 (1985).

James Canady also argues that the introduction of various documents relating to Connie Canady's income was error since in some instances they could not be traced to James. We find that introduction of these documents was not an abuse of the court's discretion since they were relevant to the issue of what funds Connie Canady had available to her to contribute to the marriage.

We agree with James Canady that the court erred in

excluding testimony by H. C. Wallace that he deposited $12,000 in Canady's account. The chancellor refused to admit the proffered testimony without physical documentation of the deposit. That is a misconception of the best evidence rule. Unif. R. Evid. 1002. When a transaction occurs where a written record is made, it is not necessary to produce the record where there is testimony to prove the transaction. It is only where the writing itself must be proved that the writing must be produced. 5 Weinstein's Evidence Par. 1002 [03] (1984).

Reversed and remanded.

Jack ELLIOTTE *v.* Guy JOHNSON

84-308 687 S.W.2d 523

Supreme Court of Arkansas
Opinion delivered April 15, 1985
[Rehearing denied May 20, 1985.]

*Paul D. Groce,* for appellant.

*Wallace & Hamner,* by: *Ralph Hamner,* for appellee.

DARRELL HICKMAN, Justice. Our decision in this case is controlled by *Okla Homer Smith Mfg. Co.* v. *Larson & Wear, Inc.,* 278 Ark. 467, 646 S.W.2d 696 (1983), where we interpreted Ark. Stat. Ann. § 37-237 (Supp. 1983), which provides generally that suits based on property damage resulting from design or construction deficiency cannot be brought more than five years after the work is substantially completed.

Admittedly this case was brought eight years after Johnson Plaza Shopping Center was completed. The appellant rented space for a hobby shop in the center in 1973. The center was destroyed by fire in 1982. The appellant sued Guy Johnson, one of the partners in the shopping center who had contracted for the construction of the center and supervised the work. The complaint alleged that Johnson was negligent in installing an inferior quality of electrical wiring and in failing to construct fire walls. Appellant complained that as a result of appellee's negligence, the fire, which started at one end of the center, spread to the appellant's shop at the other end.

The appellant raises two arguments. The first is that this is a tort action rather than a contract action, and the statute of limitations imposed by Ark. Stat. Ann. § 37-237 does not apply. We expressly held in *Okla Homer Smith Mfg. Co.,* v. *Larson & Wear, Inc., supra,* that this statute does apply when the allegation is one of negligence in construction or design. That is precisely the negligence alleged in this case. The other argument is that the statute does not apply to the owner of a building but only to the construction firm. The statute makes no such distinction, providing that "No action in contract . . . shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction. . . ."

Affirmed.

# T. R. ELLIS *v.* William Scott FEEMSTER

85-6 687 S.W.2d 835

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Kathryn E. Laws,* for appellant.

*Peter R. Darling,* for appellee.

DARRELL HICKMAN, Justice. This is a conversion suit. William Scott Feemster, a farmer from Howard County, sued T. R. Ellis, a Muskogee, Oklahoma, resident, for stealing 800 gallons of diesel fuel from his farm fuel tanks which are located south of Nashville, Arkansas.[1] All the evidence was circumstantial; Ellis chose to put on no evidence. The trial judge, sitting as a jury, found that agents of Ellis had intentionally converted the 800 gallons of fuel and entered judgment for Feemster for the cost of the fuel and trebled damages for punishment. The only real issue on

[1]This suit arose when T. R. Ellis and Sheriff Dick Wakefield for return of his pickup which was impounded after the conversion. Feemster intervened and cross-complained against Ellis for conversion. Upon agreement of the parties, Wakefield was dismissed as a party and the truck was released to Ellis in exchange for a replevin bond.

appeal is the sufficiency of the evidence, and we agree with the trial court that Feemster made a sufficient case.

The circumstances of the case are unusual. About 10 p.m. on the evening of April 9, 1980, Feemster and a companion were passing one of Feemster's fields, where he had a fuel storage tank, when they noticed a pickup truck backed up to his fuel tank. They saw someone, perhaps two people, flee as they approached. They got out and found a 1979 GMC truck with the motor running. It was equipped with two fuel tanks, one rectangular and the other a saddle type tank like those used on semi-trailer trucks, various valves and hoses connecting the tanks, and an electric pump. A fuel line was running from one of the tanks into Feemster's tank. A camper shell covered the equipment. Feemster turned the truck motor off, got the license number and called the sheriff.

The sheriff put out an alert in the neighborhood about the incident, but Feemster was unable to provide any substantial description of the person or persons who fled. The sheriff impounded the truck, ran a check on the vehicle, and found it to be registered to T. R. Ellis of Muskogee, Oklahoma. He also found an invoice in the vehicle issued to T. R. Ellis of Muskogee, Oklahoma. An Arkansas road map, marked in three places, was in the pickup. An area was circled which included the storage tanks of Feemster. Two other places were marked which turned out to be road intersections where large farming operations were conducted and where fuel storage tanks were located. The sheriff, a farmer himself, said he had never seen a farm truck with such equipment before. He said that ordinarily a farm truck in that locality had to have lug tires, not smooth tires, which this one had.

The sheriff testified that he checked and did not find that such a vehicle had been reported stolen. Ellis called him within a few days asking whether the sheriff had his pickup truck. The sheriff said he did have it, and he could come get it. In fact, he asked Ellis to come get it, but Ellis never came. Ellis told the sheriff that Frank Fields, an employee of Ellis, had reported the truck stolen at Texarkana from a truck stop

on April 9. Fields drove for Ellis, who had several trucks used for hauling grain. The sheriff told Ellis he would like to talk to Fields, but Ellis said he did not know where he was. The sheriff called the Texarkana police and obtained a report made by one Frank Fields at 1:25 p.m. on the afternoon of April 9 that a GMC pickup had been stolen from a truck stop. Fields had reported that the pickup was left at the truck stop two days earlier with the keys in the ashtray. When he returned, it was gone.

Close in time to the incident, Joe Harding, a resident of Nashville, picked up a hitchhiker, who said he had been fishing. However, it was peculiar to Harding that he had scratches all over him. The man said he was going to Oklahoma. The sheriff testified that the description of this man matched the description of Frank Fields who had reported the vehicle stolen in Texarkana.

The judge specifically found that he did not believe the report of the stolen vehicle to be true. Further, he found that the pickup truck was specially rigged to convert fuel. Both findings of fact were conclusions which the judge could have made from the evidence presented.

After Feemster presented his proof, Ellis moved to dismiss. He argues that a verdict should have been directed in his favor at that point. On appeal from a denial of such a motion, we look at the evidence in the light most favorable to the non-moving party, and, if there is any substantial evidence, a question of fact was presented and the motion should have been denied. *Nichols* v. *International Paper Co.*, 278 Ark. 226, 644 S.W.2d 583 (1983). We find that there was sufficient evidence to present a question for the trier of fact of whether Ellis' agent had converted the fuel.

Once the judge concluded that the vehicle was indeed being used to convert fuel (it is undisputed that the pickup belonged to Ellis), and that Fields worked for Ellis, then the only missing link was whether Fields or an agent of Ellis used the vehicle that night. The judge chose not to believe Fields' report to the police that the truck had been stolen. In view of all the circumstances of the case, we cannot say that

the judge was wrong to draw the conclusion. Therefore, he could have believed that Fields had possession of the truck on April 9 and converted the fuel.

Ellis also argues that even if there was sufficient evidence that his agent stole the fuel, there was insufficient evidence that the agent was acting within the scope of his agency. Once the trial court determined that Ellis or his agent was responsible for the theft, it would only take a small step to find that in view of the truck's equipment the agent was acting at Ellis' direction.

It is argued that the finding that 800 gallons of fuel were stolen is error because that amount is beyond the capacity of the two tanks in the back of the pickup. The sheriff did testify that Feemster could not be sure of the capacity of the tanks. Feemster's testimony was unrefuted, however, that he had filled the tank with 1000 gallons only a few weeks before, had used none, and that when he measured the tanks, he only found 200 gallons left. Once the judge determined the pickup's mission, demonstrated by the roadmap and the equipment, he could have easily concluded that the missing fuel was taken by Ellis' agent, perhaps in two different trips.

When a judge sits without a jury, we will not reverse his findings unless they are clearly erroneous. ARCP Rule 52. We find no such error.

Affirmed.

Robert BREWINGTON *v.*
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY and L.T. GATES, M.D.

84-312 687 S.W.2d 838

Supreme Court of Arkansas
Opinion delivered April 15, 1985
[Rehearing denied May 20, 1985.]

*Fletcher Long, Jr., P.A.,* by: *Fletcher Long, Jr.,* for appellant.

*Rieves, Shelton & Mayton,* by: *Elton A. Rieves, III;* and *Friday, Eldredge & Clark,* by: *Laura A. Hensley,* for appellees.

JOHN I. PURTLE, Justice. This is an appeal from a summary judgment rendered by the trial court against the appellant on his complaint for damages allegedly resulting from medical malpractice by appellee L. T. Gates, M.D. The judgment was granted upon the submission of affidavits and a counteraffidavit. We agree with the appellant that summary judgment should not have been granted under the circumstances of this case.

The appellant was involved in an airplane crash on July 6, 1980. He did not consult a physician until July 13, 1980. On that date he went to the Crittenden Memorial Hospital in West Memphis, Arkansas, for the purpose of obtaining medical attention and treatment. Dr. L. T. Gates was the physician who examined the appellant and took a statement of appellant's medical history. Some family members were present at the time of this examination. Dr. Gates determined that appellant had been drinking alcohol and decided that he was drunk. In his affidavit in support of the motion for summary judgment, Dr. Gates stated that in this case he could not differentiate between symptoms related to appellant's head injury and symptoms related to alcohol. He recommended that appellant be admitted and observed. The family, according to Dr. Gates, prevailed upon him to transfer the appellant to another hospital. Appellant's affidavit states that Dr. Gates decided he was drunk and refused treatment for that reason. Appellant then entered Forrest Memorial Hospital where his problem was at least partially diagnosed. He was later sent by ambulance to the Veterans Hospital in Memphis, Tennessee. The Veterans Hospital diagnosed his problem as a subarachnoid hemorrhage and an anterior cerebral aneurysm. He subsequently underwent surgery as part of the treatment for his

injuries. A second affidavit in support of the motion for summary judgment was executed by Dr. McPhail. The appellant's affidavit also denied the truthfulness of the affidavits executed by Drs. Gates and McPhail.

Although appellant enumerates several points for reversal all of them essentially challenge the sufficiency of the affidavits or allege that appellant's affidavit was sufficient to overcome the affidavits in support of the motion for summary judgment.

The matter to be decided by this court is whether the appellees' affidavits entitled them to summary judgment in spite of the counteraffidavit submitted by the appellant. It is a well established rule of law that a summary judgment, being an extreme remedy, is only proper when the pleadings and proof show that no genuine issue of a material fact exists and the moving party is as a matter of law entitled to judgment. *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). In medical malpractiace suits it is necessary in some cases to have expert medical testimony. In other cases it is not necessary because the results of the treatment, or failure to treat, are of such character as to warrant inferences of negligence from the testimony of laymen, or such knowledge that is within the experience of the jurors themselves. *Lanier* v. *Trammell,* 207 Ark. 372, 180 S.W.2d 818 (1944). It was the duty of the appellees to show that no genuine issue of fact could possibly be made without expert testimony. *Graham* v. *Sisco,* 248 Ark. 6, 449 S.W.2d 949 (1970). In *Lanier* we held that when the applicable standard of care is not a matter of common knowledge the jury must have the assistance of expert witnesses in coming to a conclusion of the issue of negligence.

Each affidavit on behalf of the appellees stated that medical and scientific matters relating to this case are not commonly known and must be proved by medical experts. Each affiant stated that he was a specialist in general medicine. Neither physician stated the nature and extent of appellant's complaints at the time he was examined by them. Neither affidavit contains any specifics of what would be a proper diagnostic procedure in cases such as this. The

affidavits also contained allegations generally denying that Dr. Gates was negligent. Conclusory allegations are insufficient to support the motion for summary judgment in this case. Neither physician made diagnostic findings or gave the standard of care, skill, and learning ordinarily used by physicians in such practice in West Memphis, Arkansas.

The appellant's affidavit is generally hearsay. Although other witnesses may have been able to execute an affidavit reciting these facts, as to the appellant they were hearsay. We disregard appellant's affidavit in reaching the decision in this case.

In summary judgment matters we look to ARCP Rule 56(e), which requires that proof offered to meet a properly supported motion for summary judgment must set forth specific facts showing that there is a genuine issue for trial. The facts stated in the affidavit must be admissible in evidence. Affidavits of general denial are insufficient to support a motion for summary judgment. *Stevens* v. *Barnard,* 512 F.2d 876 (10th Cir. 1975).

We are of the opinion that the affidavits by the two physicians in this case amount to general denials of negligence and are therefore not sufficient to sustain the motion for summary judgment.

Reversed.

Bill CLINTON, Governor, et al. *v.*
REHAB HOSPITAL SERVICES CORP., et al.

84-321 688 S.W.2d 272

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*George Harper,* Asst. Att'y Gen., and *Pickens, McLarty & Watson,* by *James A. McLarty,* for appellants.

*Hilburn, Calhoon, Forster, Harper & Pruniski, Ltd.,* by: *Sam Hilburn* and *Janet James Robb,* for appellee.

JOHN I. PURTLE, Justice. The Pulaski County Chancery Court issued an injunction against the appellants on the grounds that they had not timely sought a review of an agency ruling. On appeal it is successfully argued that the trial court erred in granting appellees injunctive relief.

Rehab Hospital Service Corporation filed an application for the issuance of a certificate of need (CON) with the State Health Planning and Development Agency (Agency) for the purpose of constructing a rehabilitation hospital in Jonesboro, Arkansas. Arkansas law requires CON approval from the Agency prior to construction of a new facility such as the one appellees desired to build. The administrative process requires that an application for a CON first be reviewed by one of four Health Systems Agencies. In this case the review was made by Delta-Hills Health Systems Agency (Delta) and the CON was denied. The recommendation was overruled by Joel North, Director of the Agency. Delta's request for reconsideration was denied on May 2, 1984. North informed Delta that a request for review of the Agency's decision could be filed no later than June 4, 1984. A request for review was filed by Delta on June 4, 1984. Rehab then filed its petition for injunction alleging that the request for review was not timely filed. The chancellor granted the injunction. This case reaches us from the issuance of an injunction, but it is more in the nature of an appeal from the decision of an administrative agency. Although chancery courts are not proper courts to review the decisions of administrative agencies, we accept this case because of the need for an immediate appellate review and because we have before us an appeal from the circuit court on the same application for a CON.

The Agency rule at issue reads in part: "Any decision of the State Agency to issue, deny, or withdraw a certificate of need . . . will, upon request . . . be reviewed by an agency of

the state . . . designated by the Governor . . . To be effective, the request [for review] must be received . . . within thirty days of the State Agency decision. . . ."

An attorney with the Agency computed the deadline for filing the request for review and caused the date to be sent to Delta by letter dated May 2, 1984. Thirty days from the date of the decision would have been June 1, 1984, which was a Friday. In computing the deadline, the Agency allowed one day for delivery of the letter, which would have caused the deadline to fall on Saturday, June 2, 1984. The next working day would have been Monday, June 4, 1984, the date the request was filed.

The only question presented for our consideration is whether the Agency properly extended the time within which to file for review. Testimony of Agency employees indicated it was the custom to allow mail delivery time in addition to the 30 day limit stated in the Agency rules and ARCP Rule 6. An agency or department interpretation of its own rules and regulations is not binding upon the courts but it is highly persuasive. *Brawley School District No. 38* v. *Kight,* 206 Ark. 87, 173 S.W.2d 125 (1943). In *Mohawk Rubber Co.* v. *Buford,* 259 Ark. 614, 535 S.W.2d 819 (1976) we said that "where the decision is based upon the application of the commission's own rules, we must also view it in deference to the commission's treatment of these rules. . . . Any reasonable construction or interpretation given such rules is certainly entitled to great weight upon judicial review. . . ." An administrative agency's interpretation of its own rule is controlling unless plainly erroneous or inconsistent. *Arkansas Savings and Loan Association Board* v. *Grand Prairie Savings and Loan Association,* 261 Ark. 247, 547 S.W.2d 109 (1977). "We must accept the agency's interpretation, if it is reasonable in terms of the words of the regulation and the purposes of the statute, even though, as an original matter, we might have reached a different conclusion." *Baker* v. *Heckler,* 730 F.2d 1147 (8th Cir. 1984). It is basic that administrative procedure requires that an agency be given the opportunity to address a question before resorting to the courts. *Truck Transport, Inc.* v. *Miller Transporters, Inc.,* 285 Ark. 172, 685 S.W.2d 798 (1985).

When we give due deference to the Agency's interpretation of its own rules and consider the purpose of the review, we do not find that the slight variance of one day was detrimental to the purposes of the law or the rights of the parties. Therefore, we hold that Delta was not in error in relying on the deadline as computed and communicated to the parties a month before the date fixed by the Agency.

The injunction is dissolved and the case remanded with directions to allow a hearing on Delta's request for review.

Reversed.

GEORGE ROSE SMITH, J., concurs in the results.

GEORGE ROSE SMITH, Justice, concurring. Under our law a court of equity has no jurisdiction in a case of this kind. The Constitution of 1874, Art. 7, § 14, vests in the circuit court superintending control and appellate jurisdiction over inferior courts. Chancery courts have the power to grant injunctive relief in cases within their jurisdiction, but every request for an injunction is not necessarily proper. "That injunctive relief of a court of equity cannot be invoked when there is an adequate remedy at law is so well settled that the mere statement of the rule is sufficient." *Special Sch. Dist. No. 50* v. *Deason,* 183 Ark. 102, 34 S.W.2d 1084 (1931).

In truth, the chancery court's injunction in the case at hand was really a writ of prohibition, regardless of its form. One legislative attempt was made to confer on chancery courts the power to issue writs of prohibition, but that part of the statute was unconstitutional because the 1874 jurisdiction of courts of equity cannot be enlarged. Ark. Stat. Ann. § 33-101 (Repl. 1962); *Jeffery* v. *Jackson County Court,* 251 Ark. 1071, 476 S.W.2d 805 (1972). The application for an injunction should, under our law, have been dismissed by the trial court in the present case.

REHAB HOSPITAL SERVICES CORP. *v.*
DELTA-HILLS HEALTH SYSTEMS AGENCY, INC.;
and Frances FLENER, Individually and as Executive
Director of Delta-Hills Health Systems Agency, Inc.

85-2 687 S.W.2d 840

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Hilburn, Calhoon, Forster, Harper & Pruniski, Ltd.*, by: *Sam Hilburn* and *Janet James Robb*, for appellant.

*Pickens, McLarty & Watson*, by: *James A. McLarty*, for appellee.

ROBERT H. DUDLEY, Justice. The Arkansas State Health Planning and Development Agency granted a certificate of need to appellant, Rehab Hospital Services Corporation, to construct a hospital in Jonesboro. Frances Flener, the Executive Director of appellee, Delta-Hills Health Systems Agency, the regional health planning agency for the Jonesboro area, filed a motion for reconsideration after conducting a telephone poll of most of the Executive Committee of the appellee's board. Appellant filed suit for a declaratory judgment, and argued that the motion for

reconsideration should be voided because the appellee, in conducting a telephone poll, had not abided by the Freedom of Information Act. Ark. Stat. Ann. §§ 12-2801 through 2807. The trial court refused to void the motion for reconsideration. We affirm. Jurisdiction to interpret the Freedom of Information Act is in this Court. S.Ct. Rule 29(1)(c).

Declaratory judgment actions are intended to supplement rather than replace ordinary causes of action. *Mid-State Const. Co.* v. *Means,* 245 Ark. 691, 434 S.W.2d 292 (1968). As such, the parties are required to exhaust administrative remedies prior to seeking a declartory judgment.

> It seems to be now a recognized doctrine that requires administrative relief to be sought before resorting to declaratory procedure, wherever administrative relief is afforded and this requirement is not one merely requiring the initiation of administrative procedure, *but the administrative procedure must be pursued to its final conclusion before resort may be had to the court for declaratory relief.*

W. Anderson, *Actions for Declaratory Judgments,* § 204, at 433 (1951). This court likewise requires exhaustion of administrative remedies before resorting to an action for declaratory judgment. See *Ragon* v. *Great American Indemnity Co.,* 224 Ark. 387, 273 S.W.2d 524 (1954).

A basic rule of administrative procedure requires that the agency be given the opportunity to address a question before resorting to the courts. *Truck Transport, Inc.* v. *Miller Transporters, Inc.,* 285 Ark. 172, 685 S.W.2d 798 (1985). Furthermore, the procedure of the agency before us provides for further administrative review of the agency's decision. S.H.P.D.A. Rule 11(13). By filing the declaratory judgment action, the appellant circumvented the established agency appeals procedure. Under most circumstances we would dismiss the appeal without reaching the merits of the case. However, we choose to decide the case on its merits because it involves the interpretation of the Freedom of Information Act, a matter of significant public interest.

The trial court was in error in holding that appellee, Delta-Hills, was not subject to the Freedom of Information Act. Appellee is incorporated as a non-profit regional health planning corporation under the requirements of federal law. 42 U.S.C. § 3001-1(b). Its function is to assist the Arkansas Health Planning and Development Agency in the regional review of proposed state health systems' changes. An indication of the public purpose served by appellee is demonstrated by a section of the act which mandates the creation of appellee and provides that adequate public notice must be given and that business must be conducted in public meetings. 42 U.S.C. § 3001-1(b)(3)(B)(viii). The primary source of funding for the appellee is the federal government. The Freedom of Information Act applies to all organizations of the State supported wholly or in part by public funds, except as otherwise specifically provided by law. Delta-Hills is not excepted by law, so it is subject to the requirements of the act. Since there was no emergency exception involved, and no emergency notice to the press, the appellee violated the terms of § 12-2805 of the Freedom of Information Act.

The most significant issue in this case is what remedies, if any, are appropriate, other than the express statutory remedies, when a violation of the act occurs. The act expressly establishes criminal penalties for willful violations of the statute, Ark. Stat. Ann. § 12-2807, and a mechanism by which one denied rights under the act may challenge that denial. Ark. Stat. Ann. § 12-2806. However, appellant chose not to bring the matter to the attention of appellee and does not seek an injunction against future similar telephone polls by appellee. Appellant seeks only judicial invalidation of the motion for reconsideration. Thus, it seeks to use the Freedom of Information Act solely to mandate the result of a meeting.

The last paragraph of § 12-2805 provides that when a public entity fails to reconvene in public session and ratify the matter, after arriving at a decision in executive session, it shall not be legal. However, that section is not applicable to the facts of this case. Here, there was no meeting in executive session. Instead, there was a telephone poll of those members

of the executive committee who could be reached over a three day period. Unlike an executive meeting, without later public ratification, this telephone poll, if conducted with proper notice, and if conducted with telephones available to the public and press, could have been an acceptable type of open meeting. Therefore, the act does not expressly provide that the meeting "shall not be legal."

Some states hold that when the "public meeting" statute sets out specific remedies, the courts are limited to those remedies set out. For a listing of those jurisdictions see *Annotation - Statutes - Proceedings Open to Public,* 38 A.L.R.3d 1070, § 7. We decline to take such a limited approach but instead, in order to effectuate the laudable public purposes of the act, hold that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis.

While we consider voidability a valid option to enforcement of the Freedom of Information Act, we decline to invoke it in this case for the reasons set out below.

First, there has been no showing that appellee's board members knowingly violated the law by participating in the telephone poll and the appellant did not bring it to their attention. The agency was never given the opportunity to address the issue. Instead, appellant circumvented the agency and directly filed suit asking for invalidation. If we allowed invalidation on that basis, the potential for harm would be great. It would mean that any person who did not like a resolution, ordinance, rule, or regulation passed since the inception of the act could have it invalidated, under the subterfuge of freedom of information, because of some unintentional past violation which had never been brought to the attention of the governmental entity. Such an interpretation would create a substantial amount of undesirable uncertainty. See *Elmer* v. *Board of Zoning Adjustment of Boston,* 343 Mass. 24, 176 N.E.2d 16 (1961); *Open Meeting Statutes: The Press Fights for the "Right to Know",* 75 Harv. L. Rev. 1199, at 1214 (1962). It is only in the event invalidation is sought that we require that the board or

agency be given the opportunity to address the issue. The opportunity to address the issue does not necessarily have to be given to the agency when the public or the press seeks only those remedies expressly set out in the act. See *Arkansas Gazette* v. *Pickens,* 258 Ark. 69, 522 S.W.2d 350 (1975); *Mayor, etc. of El Dorado* v. *El Dorado Broadcasting,* 260 Ark. 821, 544 S.W.2d 206 (1976).

Second, the telephone poll was not necessary to authorize the motion for reconsideration. The full board had already met in an open meeting and voted to contest the granting of the certificate of need. After that, there was no need for the board, or any committee, to meet and vote on each step of the adjudication. It would be unrealistic and intolerable to hold that every step taken on behalf of a board in a lawsuit or adjudication must be approved at a public meeting. If such were required, counsel could not even perform those routine tasks such as preserving an appeal by timely filing the jurisdictional notice of appeal without a public meeting of the board. We decline to take such an unreasonable approach. Accord: *Florida Parole and Probation Comm.* v. *Thomas,* 364 So.2d 480 (Fla. App. 1978).

Third, the appellant does not seek to protect the public's right to information, it seeks invalidation solely to build a hospital.

Affirmed.

Bob DAVIS, II *v.*
Debra Diane Wheaton DAVIS

84-299 687 S.W.2d 843

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Wright & Chaney, P.A.*, by: *Donald P. Chaney, Jr.*, for appellant.

*B. W. Sanders, P.A.*, for appellee.

STEELE HAYS, Justice. Bob Davis appeals from an order of the Chancellor of Hot Spring County finding that Arkansas has no jurisdiction to decide a custody dispute

between Davis and his former wife, Debra, involving their son, Bradley. We agree with the appellant that under the Uniform Child Custody Jurisdiction Act[1] the Chancellor should have heard the case on its merits. Accordingly, we reverse and remand.

Bob and Debra Davis are longtime residents of Arkansas, with ties to Clark and Hot Spring Counties. They married in Clark County and Bradley was born there on July 5, 1977. They seem to have lived at times in Clark County and in the neighboring county of Hot Spring, where Debra Davis owned a mobile home on lands belonging to her parents.

In September of 1980 Bob Davis went to Texas to work as a welder. Debra joined him later, leaving Bradley in Hot Spring County with her parents. Bradley came still later and lived there just over a year. In March of 1982 a decree of divorce was entered in the District Court of Harris County, Texas, awarding a divorce and custody of Bradley to Debra Davis.

Some months after the divorce Debra came back to Arkansas with Bradley and resumed habitation in Hot Spring County. Bob Davis also returned to Arkansas and neither party has had any further residence in Texas. After Bob's return he lived in Arkadelphia and, by agreement between the parties, Bradley spent weekends and summers with his father on a regular basis.

Debra began selling real estate and in April, 1983, she went to Florida, where opportunities seemed brighter, again leaving Bradley in Arkansas with her parents. In the fall Debra was back in Arkansas hoping to find work. Bob told her he would oppose any effort to remove Bradley to Florida, if that was her aim. Evidently this conversation, which occurred on October 8, 1983, alarmed Debra and she suddenly removed Bradley from school and left for Florida "within the hour."[2]

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[1]Ark. Stat. Ann. §§ 34-2701 et seq. (1983 Supp.).

[2]Affidavit of Debra Davis's father, R., p. 94.

Bob Davis immediately petitioned the Chancery Court of Clark County for a change of custody and the Chancellor issued a temporary order for Bradley's return to Arkansas, which a Florida court honored. Bradley was returned to Arkansas where he remained until December 6, 1983, when the Clark Chancery Court held a hearing in the matter. There is some indication from the record that Debra Davis, while objecting generally to jurisdiction in Arkansas, argued that as between Clark and Hot Spring County, venue lay in Hot Spring County. At any rate, the Chancellor determined that Hot Spring County had more significant connections with the family and ordered the proceedings transferred.

When the case came before the Chancellor of Hot Spring County in January, 1984, he held there was no jurisdiction in Hot Spring County and attempted to transfer the case back to Clark County. With the entry of that order, Bob Davis moved the Clark Chancellor to reconsider his original order of transfer, which was refused. Davis then filed a new petition in Hot Spring County on March 12, 1984 and it, too, was dismissed by the Chancellor for lack of jurisdiction in Arkansas. On appeal, that order is reversed.

The basic purposes of the Uniform Child Custody Jurisdiction Act are to provide a forum with the closest connection to the child and his family, to deter the abduction and shifting of children from state to state, and to promote interstate cooperation in adjudicating custody matters[3]. Other purposes stated in the act are to "discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child," and to discourage the "unilateral removal of children undertaken to obtain custody awards." Ark. Stat. Ann. § 34-2701 (Supp. 1983). The frustration of most of the goals of the act is demonstrated to a significant degree by this record. The parties have litigated in Arkansas and Florida over the past eighteen months without ever getting beyond the threshold issue of jurisdiction to the merits. Bradley has been shuttled between

[3]Shively, Survey of Family Law, 3 UALR L.J. 223 (1980).

Arkansas and Florida, away from family, school and friends, substituting instability for a relatively stable environment[4]. Bob Davis has been shunted back and forth between the courts of Clark and Hot Spring Counties, Arkansas, as well as Florida, in a futile effort to obtain a custody ruling on the merits of the case.

The Uniform Child Custody Jurisdiction Act recognizes that circumstances can occur after an initial custody award which affect jurisdiction for purposes of modifying custody. A second state, in order to modify the custody award of another state, must first have jurisdiction under one or more of those provisions listed in § 3 (Ark. Stat. Ann. § 34-2703), which include being the "home state," defined in § 2 as: "The state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months. . ." Plainly, Arkansas was the home state in this case. It is undisputed that Bradley had been back in Arkansas for considerably longer than six months when his father filed the original petition in October, 1983. And while appellee suggests that Florida had become the "home state" by March, 1984, when the "new" petition was filed in Hot Spring County, we cannot sustain that contention.

Debra Davis argues that Texas has retained jurisdiction over Bradley's custody. She cites *Blosser* v. *Blosser,* 2 Ark. App. 37, 616 S.W.2d 29 (1981), as being "almost exactly" the situation before us, and *Rodriguez* v. *Saucedo,* 3 Ark. App. 43, 621 S.W.2d 874 (1981) and *Caskey* v. *Pickett,* 274 Ark. 383, 625 S.W.2d 473 (1981). None of these cases govern. In *Caskey* v. *Pickett, supra,* we reversed the trial court's preemption of jurisdiction over the jurisdiction of Texas, where the parties had lived at the time of the divorce and custody award, and where the custodial parent and child still lived. The non-custodial parent had moved to Arkansas and refused to return the child to the Texas parent at the end of a visitation period, claiming an emergency existed pursuant to § 3 [Ark.

[4]The National Conference of Commissioners on Uniform State Laws, which approved the Act, has aptly noted that the harmful consequences of such experiences on children cannot be over emphasized. See Uniform Laws Annotated, Master Edition, Vol. 9, p. 112.

Stat. Ann. § 34-2703(a)(3)]. The Chancellor upheld the claim but the finding was not sustained on appeal to this court. We determined that Texas had continuing jurisdiction because of its status as the "home state" of the custodial parent and the child.

In *Blosser,* the Court of Appeals affirmed an Arkansas Chancellor's refusal to assume jurisdiction under the act on the petition of a father who had wrongfully removed the child from Oklahoma for almost a year to prevent the enforcement of an Oklahoma custody order. A similar wrongful removal of the child occurred in *Rodriguez, supra.* Thus, in *Blosser* and *Rodriguez,* one parent, in contravention of § 34-2708(b)[5] attempted to defeat jurisdiction by the wrongful removal of the child and urged Arkansas to assert jurisdiction adverse to the jurisdictional rights of the original states. In both cases the child was wrongfully removed in violation of § 34-2708(b), but in *Rodriguez,* Texas remained the home state under § 34-2703(a)(1) and (2), and in *Blosser,* Oklahoma would have also been the home state but for the wrongful removal by the non-custodial parent.

The factual differences between *Blosser* and *Rodriguez,* and the case before us need little elaboration. There were no circumstances in this case requiring deference to the jurisdiction of any other state. Arkansas was clearly the home state and there was no improper conduct by one parent in removing the child to this state.

*Blosser* and *Rodriguez* were correctly decided, jurisdiction in the foreign states resting firmly on § 34-2708(b) and home state considerations, but reference in both decisions to "continuing jurisdiction" in the state which grants a divorce and awards custody, could lead to confusion. *Blosser* and *Rodriguez* referred to § 34-2706(a), which provides that one state will not exercise jurisdiction under

[5]§ 34-2708(b). Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. . . .

the act if at the time of filing the petition a custody proceeding is pending in another state exercising jurisdiction substantially in conformity with this act unless the first state recognizes that this state is the more appropriate forum. In the setting of those cases, we would be reluctant to label such "continuing jurisdiction" as constituting a "pending proceeding" as contemplated in § 34-2706. If that were so, the court of a state granting custody in the first instance would always retain "pending" jurisdiction for later modification of custody, irrespective of subsequent developments, and even if the parties and children were, as here, living in another state. Hence, the "home sate" provision of § 2(5) of the act [Ark. Stat. Ann. § 34-2702(5)] would have little meaning. See *In Re Marriage of Steiner,* 89 Cal. App. 3d 363, 152 Cal. Rptr. 612 (1979); *Wheeler* v. *District Court of Denver,* 186 Colo. 218, 526 P.2d 658 (1974); *Williams* v. *Zacker,* 35 Or. App. 129, 581 P.2d 91 (1978); 96 A.L.R.3d 959; "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand. L. Rev. 1207, at page 1236. Therefore, while Texas in this case had jurisdiction initially over these parties when granting the divorce there is no "pending proceeding" there to qualify that state for jurisdiction over this cause under § 34-2706(b).

For the foregoing reasons we reverse the order of the Hot Spring Chancery Court and remand for further proceedings.

NEWBERN, J., concurs.

DAVID NEWBERN, Justice, concurring. This case is before us because there is no venue statute for child custody cases when the defendant neither resides nor is summoned in Arkansas. Until our General Assembly enacts such a statute, these cases will suffer from an uncertainty resulting in delays which can only be detrimental to the stability and other best interests of the child in question. A venue statute for child custody cases is badly needed.

Charles D. RAGLAND, Commissioner of Revenues
*v.* ALLIED TELEPHONE CO. OF ARKANSAS, INC., et al

84-325 687 S.W.2d 847

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*Timothy J. Leathers, Joseph V. Svoboda, Kelly S. Jennings, John H. Theis, Ann Kell, Joe Morphew, and Michael D. Munns,* by: *Wayne Zakrzewski,* for appellant.

*Lawrence E. Chisenhall,* for appellee Yelcot Telephone Co.

*Prince & Ivster,* for appellees Allied Telephone Co. of Ark., and Allied Utilities Corp.

*Timothy D. Brewer, D. D. Dupre, Gary S. Wann, Ronald D. Young,* and *Patricia J. Nobles,* for Southwestern Bell Telephone Co.

DAVID NEWBERN, Justice. The trial court entered a declaratory judgment to the effect that no sales tax need be collected by the appellees on charges levied for installation of telephones. The applicable statute, Ark. Stat. Ann. § 84-1903(c)(1) (Repl. 1980), says the tax will be levied on "all service and rental charges having any connection with transmission of any message." The court held the statute was unambiguous but that it should not be interpreted as including the installation charge as taxable because the appellant had acquiesced in the contrary interpretation from the time the statute came into effect, July 1, 1941, until 1982. In 1982 the appellant issued a "revenue policy statement" requiring collection of the tax on telephone installations. The statement's operation was prospective only. As this is a case involving statutory interpretation, our jurisdiction rests upon Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

The arguments of the appellees are essentially (1) that the trial court should be sustained in its finding that the statute is unambiguous because it has been unambiguously construed for over forty years, and (2) that even if the language of the statute requires the tax to be levied it may be varied by a principle of statutory construction giving weight to the manner in which the statute has been construed by the state official or agency responsible for its implementation.

*1. Unambiguity of construction*

The appellees contend the trial court's ruling was that the statute in question here was unambiguous regardless of its language, because it had been construed for over forty years as not requiring the tax. If indeed that was the holding we cannot sustain it. To determine ambiguity or lack of it we must look to statutory language rather than to unambiguous "construction." The appellees have cited no authority, and we have found none, in which a decision is premised on unambiguity of construction as opposed to unambiguity of statutory language.

*2. Construction absent ambiguity*

We agree with the trial court that the statute is

unambiguous. Its language leaves no doubt the General Assembly intended that all charges levied in rendering telephone service be subject to the tax. Thus, there was no reason to resort to principles of construction. *Vault* v. *Adkisson,* 254 Ark. 75, 491 S.W.2d 609 (1973).

The appellees have cited *Prewitt* v. *Warfield,* 203 Ark. 137, 156 S.W.2d 238 (1941), for the proposition that principles of statutory construction apply even when a statute is unambiguous. In that case language of no particular statute was found to be ambiguous, but the question was whether a previously enacted statute had been impliedly repealed by a later statute. It thus involved an ambiguity created by conflicting language of two statutes.

The two principal cases relied on by the appellees as permitting construction of statutory language by considering the consistent and long-standing interpretation by the state agency responsible for its implementation are *Arkansas Public Service Commission* v. *Allied Telephone Company,* 274 Ark. 478, 625 S.W.2d 515 (1981), and *Walnut Grove School District* v. *County Board of Education,* 204 Ark. 354, 162 S.W.2d 64 (1943). It is enough to say of those cases that each properly applied the construction principle urged here because each involved interpretation of ambiguous statutory language.

Reversed.

Terry CAMP *v.* STATE of Arkansas

687 S.W.2d 133

Supreme Court of Arkansas
Opinion delivered April 15, 1985

*John W. Unger, Jr.,* for appellant.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant has filed a motion for a rule on the clerk.

His attorney, John W. Unger, Jr., has admitted that the record was tendered late as a result of negligence on his part.

Such negligence made in a criminal case is good cause to grant the rule on the clerk. See Per Curiam, In Re: Belated Appeals In Criminal Cases, February 5, 1979, 265 Ark. 964.

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

# SOUTHWESTERN BELL TELEPHONE COMPANY *v.* MID-STATE CONSTRUCTION COMPANY, INC.

84-300 688 S.W.2d 278

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*Stephany Ann Slagle,* for appellant.

*Tom Lienhart,* for appellee.

GEORGE ROSE SMITH, Justice. This action was brought by the appellant, Southwestern Bell, to recover for damage to its underground cables caused by the appellee, Mid-State Construction Company. Mid-State counterclaimed for the amount of needless expenses incurred as a result of Southwestern Bell's misrepresentation of the location of the cables and negligent failure to relocate them as promised. The jury awarded Southwestern Bell $216.34 on its complaint and Mid-State $4,110.40 on its counterclaim. Southwestern Bell appeals on the single ground that the verdict against it is not supported by sufficient evidence. Rule 29(1)(o) brings the case to us.

We cannot reach the merits of the appeal, because the issue was not properly raised below. Counsel did not file a motion for a directed verdict on the counterclaim and

instead sought to question the sufficiency of the evidence by a motion for a new trial. That procedure was formerly permissible, but more than a year before the trial we amended Civil Procedure Rule 50(e) to eliminate that method of questioning the opposing party's proof. The change was desirable, for if a party cannot produce substantial evidence to support his claim, a new trial would be useless.

The controlling Rule, since the 1983 revision, has read as follows:

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

The Reporter's Notes were amended to call attention to the deletion:

> Rule 50(e) is amended to omit the reference to the motion for new trial as a means of challenging the sufficiency of the evidence. Motions for directed verdict and judgment notwithstanding the verdict are used to challenge the sufficiency of the evidence.

*In Re: Amendments to the Rules of Civil Procedure,* 279 Ark. 470, 651 S.W.2d 63 (1983). The issue that Southwestern Bell seeks to present to this Court has been waived.

Affirmed.

Douglas TOLAND *v.* STATE of Arkansas

CR 84-213 688 S.W.2d 718

Supreme Court of Arkansas
Opinion delivered April 22, 1985
[Rehearing denied May 28, 1985.]

*John W. Achor* and *Jeff Rosenzweig,* for appellant.

*Steve Clark,* Att'y Gen., by: *Clint Miller,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The appellant was convicted of possession of marijuana with intent to deliver [Ark. Stat. Ann. § 81-2617(a)(1)(iv) (Supp. 1983)] and of aggravated assault [Ark. Stat. Ann. § 41-1604 (Repl. 1977)]. He was sentenced to 10 years for possession and four years for

aggravated assault. Sentences were ordered to run consecutively. On appeal appellant argues: (1) that the court erred in refusing to suppress evidence; (2) that the trial court erred in refusing to order the state to identify the confidential informant; and (3) that the conviction for possession is a misdemeanor rather than a felony. We do not find that the court committed prejudicial error for the reasons set out in the opinion.

The appellant and his wife, Lisa Toland, were arrested and charged with possession of a controlled substance with intent to deliver. They were also charged with aggravated assault as a result of placing a shotgun "booby-trap" in a field near their marijuana patch. A motion to suppress contested the validity of the descriptions and directions on the search warrant and the identity of a confidential informant. During the omnibus hearing the court ordered the confidential informant's identity be disclosed to appellant's wife. Thereupon, the state dismissed the charges against Mrs. Toland.

Officer Jenkins received a tip from a confidential informant that the appellant was involved in the marijuana business. He obtained the use of an airplane and flew over appellant's property. He stated he saw marijuana growing in an open field about 100 feet behind appellant's house. The officer and the unidentified informant drove to the vicinity of appellant's property. They did not stop or go onto the property but the informant pointed out the house and land to the officer. So far as the record shows, this was the first and last information obtained from this informant. Officer Jenkins appeared before a magistrate and swore to an affidavit to obtain a warrant. Without setting out the facts in detail, it suffices to state that the directions on the warrant were impossible to follow and the information obtained from the unidentified informant was not even alleged to be reliable. For reasons to be stated below this improper procedure does not affect the result of this case.

I

THE COURT ERRED IN REFUSING TO SUP-

PRESS EVIDENCE.

For the purposes of this opinion it is stated that the directions given on the warrant in this case were absolutely defective. No person could have followed the directions and ended up at the site where the search was supposed to have been conducted. So far as the record is concerned the informant furnishing the original information to Officer Jenkins was not proven dependable. There is however no rule, statute, or other procedure which prevents officers from following through and investigating any information received by them whether by confidential informant or otherwise. In the present case Officer Jenkins did not rely solely on the informant's tip nor did he need the directions given on the warrant. He personally confirmed the information given by the informant and drove to appellant's property on the ground and flew over it in the air. Under the totality of the circumstances test stated in *Thompson* v. *State,* 280 Ark. 265, 658 S.W.2d 350 (1983), we have no hesitancy in affirming the trial judge's refusal to suppress the evidence received as a result of this search and seizure. This search could also be upheld under the "good faith" exception to defects in search warrants as stated in *United States* v. *Leon,* 104 S. Ct. 3405 (1984). Officer Jenkins was obviously acting in good faith although the warrant he used was defective. The "good faith" spoken of in *Leon* was an instance wherein the information supporting the warrant was on the wrong form. In the present case the officer executing the warrant knew exactly where he was going and what he was looking for. The results would have been the same had the information and directions in the affidavit and on the warrant been completely accurate. The appellant probably had no reasonable expectation of privacy concerning his outdoor marijuana farming operation. *Oliver* v. *United States,* 104 S.Ct. 1735 (1984); *Ford* v. *State,* 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied,* 441 U.S. 947 (1979). Had Officer Jenkins not personally had the necessary information then it could have been argued that he was not acting in "good faith."

II

THE TRIAL COURT ERRED IN REFUSING TO

ORDER THE STATE TO IDENTIFY THE CONFIDENTIAL INFORMANT.

We agree with the trial court that it was not necessary to reveal the identity of the confidential informant because appellant was charged merely with "possession." *Jackson* v. *State,* 283 Ark. 301, 675 S.W.2d 820 (1984).

III

THE CONVICTION FOR POSSESSION IS A MISDEMEANOR RATHER THAN A FELONY.

Appellant's third contention for reversal is that a violation of Ark. Stat. Ann. § 82-2617(a)(1)(iv) (Supp. 1983) is a misdemeanor. We do not find in the abstract or record that this argument was presented to the trial court. Therefore, it cannot be raised for the first time on appeal. *Wright* v. *State,* 270 Ark. 78, 603 S.W.2d 408 (1980). This argument will be decided very shortly in another case.

Affirmed.

Chester CATO and Verna CATO, His Wife
*v.* ARKANSAS MUNICIPAL LEAGUE MUNICIPAL
HEALTH BENEFIT FUND

84-315 688 S.W.2d 720

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*Wilson, Grider & Castleman,* for appellants.

*David H. White,* for appellee.

ROBERT H. DUDLEY, Justice. Appellants, Chester Cato and Verna Cato, were participants in the health insurance program of appellee, the Arkansas Municipal League. Verna Cato suffered a self-inflicted gunshot wound to the head which required that she be hospitalized. Her hospital charges were $26,206.89. Appellants both signed a standard form which authorized the Municipal League's insurance carrier to pay benefits directly to the hospital. Appellants later filed a claim for the hospital expenses which was denied on the basis that an intentional self-inflicted injury was excluded from coverage. Appellants then retained attorneys on a 40% contingent fee basis. The attorneys filed suit for appellants. After service of process and a denial of liability, appellee settled directly with the hospital for $13,103.45, or 50 cents on the dollar. Neither appellants nor their attorneys were notified of the settlement until after it had been completed. Appellants then amended their complaint to allege that appellee owed them an attorney's fee equal to 40% of the hospital bill, before settlement, under the attorney's fee lien statute, Ark. Stat. Ann. § 25-301 (Repl. 1962), and also the 12% penalty plus attorney's fees as set out in Ark. Stat. Ann. § 66-3238 (Repl. 1980). Additionally, appellants amended their complaint to allege that the refusal to pay hospital expenses directly to appellants constituted the tort of bad faith. Both parties filed motions for summary judgment. The trial court awarded to appellants an attorney's fee of $10,407.76, or 40% of the $26,206.89 originally billed by the hospital; denied appellants' claim for the 12% penalty and attorney's fees; and denied appellants' claim based upon the tort of bad faith. We reverse and remand on the amount of attorney's fees, but affirm on all other parts. Jurisdiction to interpret the statutes at issue is in this Court. Rule 29(1)(c).

Appellants first argue that the trial court erred in refusing to award the 12% penalty plus attorney's fee. Where an insured loss occurs and an insurance company fails to pay the loss within the time specified in the policy, the insurance company is required to pay, in addition to the loss, a 12% penalty plus a reasonable attorney's fee. Ark. Stat. Ann. § 66-3238 (Repl. 1980). Since this statute is penal in nature, it is to be strictly construed. *Callum* v. *Farmers Union Mutual Ins. Co.,* 256 Ark. 376, 508 S.W.2d 316 (1974). The plaintiff must recover the exact amount claimed in order to collect the penalty and attorney's fees. *Farm Bureau Ins. Co.* v. *Paladino,* 264 Ark. 311, 571 S.W.2d 86 (1978). In this case, appellants' complaint and amended complaint asked for a greater amount than was finally recovered. It was only after appellee confessed judgment and tendered $916.83 into the registry of the court that the appellants reduced their claim to the correct sum, the amount which had already been tendered. Even so, appellants argue that they are entitled to penalty and attorney's fee because they recovered the exact amount finally claimed. The argument is without merit because the insurance company confessed judgment for the correct amount before appellant filed claim for the correct amount. See *Broadway* v. *The Home Ins. Co.,* 203 Ark. 126, 155 S.W.2d 889 (1941).

Appellants next contend that the trial court erred in not awarding punitive damages based upon the first party tort of bad faith. In an unusual proceeding, the appellants filed a motion for summary judgment following a similar motion by appellee, but neither party contended below, nor contends on appeal, that there is any issue of material fact. The trial judge decided the question on the affidavits. We affirm as the decision is not clearly erroneous.

An insurance company may incur liability for the first party tort of bad faith when it affirmatively engages in dishonest, malicious, or oppressive conduct in order to avoid a just obligation to its insured. *Employers Equitable Life Ins. Co.* v. *Williams,* 282 Ark. 29, 665 S.W.2d 873 (1984). However, mere refusal to pay a claim does not constitute the first party tort of bad faith when a valid controversy exists with respect to liability on the policy. *Findley* v. *Time Ins.*

*Co.*, 264 Ark. 647, 573 S.W.2d 908 (1978).

The only provision in appellants' affidavit which can be construed as a fact showing affirmative conduct designed to avoid a just obligation is the statement that appellee settled the hospital claim directly with the hospital rather than with the appellants. However, in response the appellee, in its affidavit, stated:

> 5. It is undisputed that Mrs. Verna Cato, Plaintiff herein, suffered a gunshot wound to the head on or about March 12, 1982. From the claim forms, medical reports from doctors at the Corning hospital and the Baptist Memorial hospital, and two investigative reports from Equifax Services Inc., the claim was initially denied based on the exclusion contained in our benefits excluding coverage for self-inflicted wounds. Copy of the above mentioned documents have previously been filed herein.
>
> 6. The claim was ultimately appealed to the Municipal Health Benefit Fund's Board of Trustees who upheld the decision to deny the claim. This lawsuit followed.
>
> 7. After commencement of this suit, further investigation undertaken by trial counsel, and research of the applicable Arkansas law, trial counsel advised that the Municipal Health Benefit Fund faced a difficult burden of proof in maintaining that Mrs. Cato suffered an *intentional* self-inflicted wound. Whereupon a decision was reached to settle this claim.
>
> 8. A settlement has been arrived at with the Baptist Memorial hospital and a full release of claims obtained therefor. We have submitted sums in the registry of the court representing payment for claims received by us and for which we provide benefits, up to the limits of our policy. We continue to deny liability for any nursing home or disability income benefits since these claims are not covered by our benefits. In addition, we are due a setoff in the sum of $75.00 which

[redacted]

represents the remainder of the deductible provision under the terms of our benefit program.

Upon this evidence we cannot say the trial court's ruling was clearly erroneous.

The appellee has filed a cross-appeal. The trial court found that when the appellee settled the $26,206.89 debt directly with the hospital for $13,103.45 after suit had been commenced, the appellants' attorneys held a lien against appellee for 40% of $26,206.89, or a lien for an attorney's fee in the amount of $10,482.76. We modify and remand for further evidence on this point.

The cross-appellant insurer argues that the cross-appellees, the Catos, assigned their medical benefits to the hospital, and therefore, there is nothing to which the lien could attach. While the argument may have some theoretical merit, it is immaterial since the statute does not create a lien against the cross-appellant under the facts of this case.

After an attorney files suit, a party litigant may settle the cause of action without notice to the attorney, but if he does so, the attorney is entitled to a fee. Ark. Stat. Ann. § 25-301 (Repl. 1962); *Jarboe* v. *Hicks,* 281 Ark. 21, 660 S.W.2d 930 (1983). In order to collect the fee the attorney may proceed in either of three ways: he may proceed against his client, he may proceed against the other party, or he may proceed against both parties. If the proceeding is against the client the amount of the fee is governed by their agreement and, to insure payment of that fee, the attorney is entitled to a lien upon the client's cause of action which attaches to any settlement recovered by the client. Ark. Stat. Ann. § 25-301; *Baxter Land Co.* v. *Gibson,* 236 Ark. 664, 367 S.W.2d 741 (1963). However, when the attorney only proceeds against the other party litigant, as here, the statute contains no provision for a lien on the cause of action for the agreed fee, but provides that the attorney is entitled to a reasonable fee which shall not necessarily be limited to the amount of the settlement. Thus, the attorney is rewarded to the extent of services performed, even though he has no lien until judgment. *Jarboe* v. *Hicks,* 281 Ark. 21, 660 S.W.2d 930

(1983). In discussing a reasonable fee we have stated:

> The statute in question provides for a reasonable fee for the attorney against the parties to said action and that the amount of such fee shall not necessarily be limited to the amount of compromise or settlement between the parties litigant. We think this provision of the statute in question, in providing that the fee be reasonable and not limited to the amount of the compromise or settlement, in effect, provides for a fee on a *quantum meruit basis.* In determining what would be a reasonable fee we take into consideration the amount of time and labor involved, the skill and ability of the attorneys, and the nature and extent of the litigation.

*Jarboe* v. *Hicks, supra,* quoting from *St. Louis-San Francisco Ry. Co.* v. *Hurst,* 198 Ark. 546, 129 S.W.2d 970 (1939). See also *St. Louis S.W. Ry. Co.* v. *Poe,* 201 Ark. 93, 143 S.W.2d 879 (1940); *Slayton* v. *Russ,* 205 Ark. 474, 169 S.W.2d 571 (1943).

Because the reasonable fee is not necessarily limited by the amount of settlement, or the contract, we have authorized a $750.00 fee when the settlement was for $1,000.00 and the contingent fee contract called for 40% or a $400.00 fee contract. *Jarboe* v. *Hicks, supra.* We allowed a $1,500 fee when the contingent fee contract called for 50% of all sums collected and the authorized settlement was for $1,000.00. *St. Louis S.W. Ry. Co.* v. *Poe, supra.* Similarly, a fee of $318.54 was allowed when the case was settled for $50.00. *Slayton* v. *Russ, supra.* In the latter case we unequivocally held that proof of a settlement without the attorney's consent, after the suit is filed, constitutes the only prerequisite to the attorney having his fee fixed on a quantum meruit basis.

Here, the cross-appellee's attorneys filed suit, and the cross-appellant settled without the consent of the attorneys. Therefore, the attorneys were entitled to a judgment against cross-appellant for a reasonable fee based upon quantum meruit. Instead of basing the attorney's fee upon quantum meruit, the trial court based the fee upon the contingent fee

contract. Since this proceeding was not against the client, but only against the adverse party, the trial judge used the wrong standard to fix the fee, and the record does not contain sufficient evidence for us to set a reasonable fee. Therefore, we must modify and remand for the trial court to set a reasonable fee.

Affirmed on direct appeal.

Modified and remanded on cross-appeal.

Raymond MARSHALL *v.* Olene MARSHALL

84-320 688 S.W.2d 279

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*W. H. "Dub" Arnold,* for appellant.

*B. W. Sanders,* for appellee.

STEELE HAYS, Justice. These parties were granted a divorce and the only points raised on appeal by Mr. Marshall, appellant, concern two of the Chancellor's holdings on the property division. We address first a challenge to the division of appellant's retirement benefits.

Prior to his marriage to Mrs. Marshall, appellee, Mr. Marshall was employed by Reynolds Aluminum, and is now receiving retirement benefits of $1,050 per month. He was employed by Reynolds for thirty-five years and was married to appellee for the last ten of those thirty-five years. The Chancellor found the retirement benefits to be marital property and awarded one-half of those benefits to the wife pursuant to Ark. Stat. Ann. § 34-1214, Division of Property.

The appellant argues that appellee is only entitled to that portion of the benefits which accrued during the marriage or one-half of 2/7ths, approximately $150 per month. He maintains the remainder of the benefits were

acquired prior to the marriage and under § 34-1214 would constitute separate property. We agree with appellant.

The Chancellor's order came on December 30, 1983 before our decision in *Day* v. *Day,* 281 Ark. 261, 633 S.W.2d 719 (1984). In *Day* we overruled our previous decisions and held that pension plan benefits vested but not yet due and payable, constituted marital property and as such should be divided under § 34-1214 unless the court finds such a division to be inequitable. We relied on *Re Marriage of Brown,* 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976). In *Brown,* the California court overturned its previous rule of not recognizing nonvested property rights as marital property. The court in *Brown* did not address directly the question raised here but recognized implicitly that such a division as appellant suggests is correct. In stating the facts of the case the court said a substantial portion of the "points" the husband had accumulated for his company was "attributable to his work during the period when the parties were married and living together." A footnote to that sentence reads: "Since it concluded that nonvested pension rights are not divisible as a community asset, the trial court did not determine what portion of [the appellant's] pension rights is owned by the community." The case was remanded for proceedings consistent with the opinion.

*Brown* is annotated in 94 ALR3d 176 where we find in those jurisdictions recognizing retirement benefits as marital property, there appears to be no question that benefits based on contribution or services not made during the marriage constitute the separate property of the recipient. And in a more recent Arkansas case, *Gentry* v. *Gentry,* 282 Ark. 413, 668 S.W.2d 947 (1984), although not addressing the issue presented here, citing *Day, supra,* we found the retirement benefits of the husband to be marital property and as part of the basis of that decision we stated that the "required years of service and contribution *occurred during the marriage.*" (Our emphasis).

We agree that such a classification of previously acquired benefits as separate property is in keeping with the spirit and letter of our own property division statute. Our

statute (§ 34-1214) requires that all property owned prior to the marriage shall be returned to the owner and if separate property is not returned to one party, the court must state in writing its reasons for not returning it to the party who owned it at the time of the marriage. The Chancellor here made no finding of separate property, nor gave any reasons for not returning the separate property to the appellant.

Under the clear language of § 34-1214 and its logical application to *Day, supra,* we must find that the court erred in finding that all the retirement benefits constituted marital property. As twenty-five years of Mr. Marshall's contributions were made prior to the marriage to Mrs. Marshall, that portion acquired before marriage is his separate property. Accordingly, the award of retirement benefits should be modified to reflect the correct proportionate share due each party.

As his second point, appellant argues error in the Chancellor's finding that the home was marital property and should be divided equally.

At the time Mr. Marshall married appellee, he had a home in his name on a lot he owned, which he purchased for $5,000 and with improvements made by both parties the value was about $15,000. The house burned and the Marshalls collected $20,000 insurance — $15,000 for the home and $5,000 for the contents. It is not disputed that the $5,000 insurance proceeds for contents were for marital property. With the $20,000 insurance proceeds and a note of $5,000 signed by both parties, a mobile home was purchased and placed on the lot owned by the husband.

The court found it undisputed that both parties had contributed separately owned property to the improvement of the home, that at the time of the marriage the house was valued at $5,000 and that the home was personal property to be divided one-half to each, less the indebtedness.

The appellant makes two arguments. First he argues that the original house was his separate property and under § 34-1214(B) the increase in the value of separate property

acquired prior to the marriage is not considered marital property. Therefore, the mobile home is nothing more than property acquired in exchange for property acquired before the marriage. In the alternative, appellant argues that if it was correctly decided that the home was marital property, the Chancellor erred in not giving appellant credit for the original payment for the property.

As to appellant's first point there is no merit. There appears to be agreement from the testimony of both parties, that after the $5,000 investment of the husband, the remaining increase in value was a result of the efforts of both parties, the increase in value representing the greater portion of the value of the home. We find no error in the Chancellor's finding the new home replacing the burned home was marital property.

We find merit however in appellant's contention that he should receive credit for his original investment of $5,000. In a somewhat analogous situation in *Williford* v. *Williford,* 280 Ark. 71, 655 S.W.2d 398 (1983), we allowed the husband credit for salvage from a house he owned separately which had been destroyed by a tornado but had been rebuilt with joint funds with his wife. Although we did not deal with any question of his original investment other than the salvage, it was not questioned that a portion of the proceeds were paid to satisfy the husband's remaining mortgage. The only proceeds in issue were for the contents jointly owned and used toward the building of the new home. Under the facts and our decision in *Williford* and the separate property provision of § 34-1214, we find there should be an allowance for Mr. Marshall's original investment which constituted his separate property.

The court found that the husband had made an original $5,000 investment and that fact is undisputed. No credit was allowed for that amount, nor any reason given why that amount should not be returned to him as required by § 34-1214. We therefore find that the division of the proceeds of the mobile home should be modified to allow Mr. Marshall credit for his $5,000 investment.

The case is remanded for modification of the order consistent with this opinion.

ARKANSAS STATE HIGHWAY COMMISSION
*v.* Bessie COFFELT

84-328 688 S.W.2d 282
Supreme Court of Arkansas
Opinion delivered April 22, 1985
[Rehearing denied May 28, 1985.*]

*Thomas B. Keys* and *Chris O. Parker,* for appellant.

*Kenneth C. Coffelt,* for appellee.

STEELE HAYS, Justice. This is the third appeal of a long standing dispute between the Arkansas State Highway Commission and Mrs. Bessie W. Coffelt involving the intersection of Coffelt Road and U.S. Highway 67. The background of the litigation is stated in depth in our opinion in *Coffelt* v. *Arkansas State Highway Commission,* 285 Ark. 314, 686 S.W.2d 786 (1985).

*HICKMAN, J., not participating.

In 1955 the D'Angelos granted an easement for a freeway and frontage road across lands they owned in north Pulaski County where Highway 67 was to be constructed. The conveyance affected all rights of abutment from either side of the freeway, reserving only the right of access to the frontage road and, hence, to the freeway at such points as might be established by the highway department. The D'Angelos later sold their lands to the Coffelts, subject to the easement, and eventually title vested to Mrs. Coffelt alone.

In 1972, Mrs. Coffelt sued the highway department to enjoin a threatened interference with what by then was known as Coffelt Road, at its juncture with Highway 67 alleging in the complaint that an overpass at the Coffelt Road crossing had been promised. As noted in our opinion mentioned above, this contention seems to have been abandoned, though had an overpass been constructed, it would have resolved any conceivable dispute over the crossing.

In the 1972 phase of this litigation the Chancellor held that Mrs. Coffelt continued to own the fee in the lands involved and he permanently enjoined the commission from interfering with the free use of Coffelt crossing until her remaining interest was acquired by eminent domain or by purchase. That ruling was affirmed on appeal to this court in *Arkansas State Highway Commission* v. *Coffelt,* 257 Ark. 770, 520 S.W.2d 294 (1975).

The case remained in a dormant state until recently when the commission elected to condemn the outstanding interest and eliminate the crossing of Highway 67 at that point. A few days before condemnation proceedings were actually begun, "no turn" signs were erected at both sides of the freeway on Coffelt Road. Mrs. Coffelt petitioned the Chancery Court for citation for contempt of court against the commission members and director, as a result of which the respondents were held to be in contempt and fined $49 each. A later order awarded Mrs. Coffelt's attorney a fee of $700.

The commission has petitioned for certiorari, tradi-

tionally the method of reviewing contempt cases. However, since this petition was filed we noted that gradually the distinctions between review of contempt proceedings by certiorari and review by appeal as in other cases have disappeared in all but name — and henceforth review in contempt would be by appeal. *Frolic Footwear* v. *State,* 284 Ark. 487, 683 S.W.2d 611 (1985).

We might easily dispose of this appeal on the basis of a lack of jurisdiction by the trial court to punish for contempt, as there was no personal service on the respondents, nor was there any waiver of that requirement. *Hilltop, Inc.* v. *Riviere,* 268 Ark. 532, 597 S.W.2d 596 (1980); *Nooner* v. *Nooner,* 278 Ark. 360, 645 S.W.2d 671 (1983). But in view of the long history of the case and because the latest, presumably the final, phase is still pending, we prefer to deal with the merit of the substantive issue.

No violation of the restraining order occurred. The highway commission simply posted signs which prohibited vehicles on Coffelt Road from turning onto the freeway, which it had every right to do. There was no attempt to interfere with the right to *cross* the freeway at Coffelt Road, the only right not conveyed by the D'Angelos under their 1955 easement and, thus, the only right acquired by Mrs. Coffelt. See *Coffelt* v. *Arkansas State Highway Commission,* 285 Ark. 314, 686 S.W.2d 786 (1985). True, the wording of the permanent restraining order might have been clearer, as it enjoins the commission "from closing or interfering in any manner with the free use of Coffelt Road crossing or interfering with the flow of traffic on said crossing." But the order must be read in context. *Ferracuti* v. *Ferracuti,* 27 Ill. App. 3d 495, 326 N.E.2d 556 (1975), *Christiano* v. *Christiano,* 131 Conn. 589, 41 A.2d 779 (1945), and in that light the order only restrained the right of *crossing*. That was the only right Mrs. Coffelt had (or for that matter, the only right she even claimed to have when she filed her suit in 1972, in view of her allegation the commission had promised to build an overpass) and any scrutiny into the wording of the original easement, or the background of the case, would have rendered that fact quite clear. *Coffelt* v. *Arkansas State Highway Commission, supra.*

The orders appealed from are reversed and the petition is dismissed.

HICKMAN, J., not participating.

WARNER HOLDINGS, LTD., Ruth SINGER and Hymie SINGER *v.* Mary Ann ABREGO, Larry A. COTTEN, and Brenda S. COTTEN

84-295 688 S.W.2d 724

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*Gregory T. Karber,* for appellants.

*Harper, Young, Smith & Maurras,* by: *Robert Y. Cohen, II,* for appellee Mary Ann Abrego.

*Phillip J. Taylor,* for appellees Larry A. Cotten and Brenda S. Cotten.

DAVID NEWBERN, Justice. This is the second appeal arising from a mortgage foreclosure case. Our jurisdiction is based on Ark. Supreme Court and Court of Appeals Rule 29. 1. j. In the first appeal we held that, given the state of the law in 1974, when the mortgage was executed, the mortgagor, United Peoples Federal Savings and Loan Association, could not enforce a "due on sale" clause against its mortgagee, Mary Ann Abrego, and those who had purchased the mortgaged property from her. *Abrego* v. *United Peoples Federal Savings and Loan Association,* 281 Ark. 308, 664 S.W.2d 858 (1984). Larry and Brenda Cotten had purchased from Abrego, and ultimately Warner Holdings and Ruth Singer had purchased from the Cottens. Hymie Singer had co-signed Ruth's note to the Cottens. Peoples had sought enforcement against Abrego and had named the Cottens and Warner and the Singers as defendants.

In their purchase agreement with Abrego, the Cottens had promised to indemnify Abrego for any loss resulting from demands Peoples might make, and they specifically agreed to pay attorney's fees which might be incurred by

Abrego in protecting her interest in the property and in enforcement of the indemnity agreement against the Cottens. In their agreement with the Cottens, which incorporated the Abrego-Cotten agreement by reference, Warner and Singer promised to protect the Cottens in the same manner Abrego was protected in her agreement with the Cottens.

In her original decision the chancellor awarded eighty percent of the attorney's fees requested by attorneys for Abrego and the Cottens against Warner and Singer. In remanding the case we held the eighty percent award might have been arbitrary and directed the chancellor to award reasonable attorney's fees, costs and other reasonable expenses. In her reconsideration, the chancellor awarded substantially more in attorney's fees than she had originally allowed.

Warner and Singer argue that (1) no attorney's fees should have been awarded to the Cottens for enforcement of their indemnity agreement against Warner and Singer; (2) it was error to hold Warner and Singer ultimately liable for attorney's fees awarded to Abrego in enforcement of her indemnity agreement with the Cottens; and (3) the attorney's fees awarded were excessive. The Cottens have cross-appealed, saying that if Warner's and Singer's obligations to them are reduced, their obligations to Abrego should also be reduced. As we affirm on appeal, the cross-appeal becomes moot.

*1. Indemnity agreement enforcement*

For their contention that they should not have to pay attorney's fees incurred by the Cottens in enforcement of their agreement with Warner and Singer, Warner and Singer cite *U.S. Fidelity and Guaranty Company* v. *Love,* 260 Ark. 374, 538 S.W.2d 558 (1976), for the general proposition that when a party agrees to indemnify another against losses, attorney's fees incurred in enforcement of the indemnity agreement are not recoverable. We continue to observe that general proposition but need only note here that it was developed in cases in which the indemnity agreement

contained no specific promise that the indemnitor would pay the attorney's fees of the indemnitee incurred by the indemnitee in enforcing the indemnity agreement. *See, e.g., U.S. Fidelity and Guaranty Co.* v. *Love,* cited above. We have no doubt that there was an agreement to pay attorney's fees, as the contract between the Cottens and Warner and Singer said the Cottens were to be protected in the same manner Abrego was protected. The appellants do not challenge Abrego's right to an attorney's fee in enforcement of her indemnity contract against the Cottens. Because of its "same protection" language, the contract between the Cottens and Warner and Singer provided Warner and Singer were to pay the Cottens' attorney's fees incurred in enforcing their agreement.

*2. Fees passed on*

Warner and Singer argue that in her original decree the chancellor did not award the Cottens an amount to compensate them for attorney's fees the Cottens were required to pay Abrego under the Abrego-Cotten agreement. Their further contention is that, as this court did not reverse the chancellor's decision on that point, her first decision is law of the case, and she should not have made such an award on remand. While the chancellor was not specific in saying what the attorney's fee she awarded to the Cottens represented, we must agree it could not have included the larger sum awarded to Abrego. Nothing in the abstract or, as far as we can tell, the record, shows this law of the case argument was called to the chancellor's attention. It was not stated in a brief submitted to the chancellor by Warner and Singer in which they argued the effect of the hold harmless agreements. We will not consider an issue raised for the first time on appeal. *Green* v. *Ferguson,* 263 Ark. 601, 567 S.W.2d 89 (1978).

Even if we were to consider it, we would have to say the chancellor reached the right result in view of Warner's and Singer's agreement to protect the Cottens just as Abrego was protected in the Abrego-Cottens agreement. We affirm if the chancellor reached the correct result. *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979).

*3. Reasonableness of attorney's fees*

Warner and Singer argue that the fees awarded by the chancellor are excessive in comparison with her original awards. In view of the fact that an appeal and proceedings on remand have occurred since the original awards were made we think the comparison is not very useful.

When she made the final award of attorney's fees, the chancellor had before her briefs of the parties and a record of unrefuted expert testimony to the effect the fees sought by the attorneys for Abrego and the Cottens were reasonable, and, in the case of one attorney, less than a reasonable hourly rate had been charged. The record also included detailed time records of the attorneys. In her decision the chancellor cited our leading case on the manner of determining reasonableness of attorney's fees. *Love* v. *United States Fidelity and Guaranty Co.,* 263 Ark. 925, 568 S.W.2d 746 (1978).

There is no precise formula for the determination of reasonableness of attorney's fees. *Southall* v. *Farm Bureau Mutual Insurance Co. of Arkansas, Inc.,* 283 Ark. 335, 676 S.W.2d 228 (1984). The question of reasonablness of attorney's fees is to be addressed to the chancellor's discretion. *Troutt* v. *First Federal Savings and Loan Association of Hot Springs,* 280 Ark. 505, 659 S.W.2d 183 (1983); *New Hampshire Insurance* v. *Quilantan,* 269 Ark. 359, 601 S.W.2d 836 (1980). We find no abuse of discretion here.

We cannot end this opinion without noting we have not been asked to address instances in which attorney's fees may be allowed as a general proposition. The appellant has not argued that attorney's fees may not be awarded unless specifically authorized by statute, or that an agreement permitting recovery of such fees constitutes an unlawful penalty. *See Missouri Pacific Railroad Co.* v. *Winburn Tile Manufacturing Co.,* 461 F.2d 984 (1972); Note, 9 Ark. L. Rev. 70 (1954). We recognize that our decisions in this area are not clear, and, when presented with a case raising the issue properly, we will address squarely the question whether a clause permitting recovery of reasonable attorney's fees

incurred in enforcement of the agreement containing the clause is enforceable.

We also have before us motions to assess reasonable attorney's fees and costs in favor of the appellees on this appeal. The only response of the appellants is that this court previously found the attorney's fees not to be covered by the indemnity agreement and the fees requested are excessive. We made no such finding in our earlier decision.

The attorney for appellee Abrego seeks a fee of $976.00 and costs of $125.57, or $1,101.57. We find these amounts to be reasonable and assess them jointly and severally upon the Cottens, Warner and Ruth Singer.

The Cottens ask that the fees awarded to Abrego against them on this appeal be awarded in turn in their favor against the appellants. The motion is granted.

The Cottens ask further for an award of their attorney's fees against the appellant on this appeal. They ask the amount sought by their attorney which is $2,145.00 for fees and costs plus expenses advanced on behalf of Abrego in the amount of $76.88. We hold that $1,200 may be charged as a reasonable fee for the Cottens' attorney, and they are entitled to that amount from the appellants plus the above mentioned costs of $76.88 and printing costs of $113.56.

Affirmed.

Gary LOMAX *v.* STATE of Arkansas

CR 84-195 688 S.W.2d 283

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*Ricky Gill,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant Gary Lomax was found guilty by a jury of aggravated robbery and sentenced to a term of 20 years imprisonment in the Arkansas Department of Correction. He subsequently filed a petition pursuant to A.R.Cr.P. Rule 37 to vacate the sentence, alleging ineffective assistance of counsel. The petition was denied without a hearing and appellant brings this appeal.

Pursuant to *Anders* v. *California,* 386 U.S. 738 (1967), appellant's counsel has filed a motion to be relieved and a brief stating there is no merit to the appeal. Appellant was notified of his right to file a *pro se* brief within 30 days. *See* Rules of the Supreme Court, Rule 11(h), Ark. Stat. Ann. Vol. 3A (Supp. 1983). He did not file a brief. The State concurs that the appeal has no merit.

Petitioner alleged in his petition for postconviction relief that counsel was ineffective for urging him to accept a plea bargain, advising him not to testify and failing to perfect an appeal. Neither urging an accused to accept a negotiated plea nor merely advising him against taking the stand constitutes ineffective assistance of counsel. Both are matters of strategy and therefore outside the purview of Rule 37. *Smith* v. *State,* 283 Ark. 264, 675 S.W.2d 627 (1984).

The circuit court need not hold an evidentiary hearing where it can be conclusively shown on the record or the face of the petition itself, as it can be in this case, that the allegations have no merit. *See Rawls* v. *State,* 264 Ark. 954, 581 S.W.2d 311 (1979). On appeal, we affirm the trial court's denial of postconviction relief unless it is clearly against the preponderance of the evidence. *Knappenberger* v. *State,* 283 Ark. 210, 672 S.W.2d 54 (1984). The trial court's decision here was not clearly against the preponderance of the evidence.

With regard to petitioner's claim that his attorney failed to appeal when requested to do so, petitioner was entitled at most to a belated appeal, but he failed to request one in accordance with A.R.Cr.P. Rule 36.9 which governs motions for belated appeal. Appellant was committed in February, 1982, and therefore could have filed a motion for belated appeal in this Court at any time between that date and August, 1983, which was eighteen months after the date of commitment. Rule 36.9. He did not file such a motion. Instead, petitioner raised the question of whether counsel was ineffective for failure to appeal in his Rule 37 petition, filed April 11, 1984. Rule 37, however, is not a means of by-passing a motion for belated appeal. If it were construed to be so, an appellant could simply ignore the rule limiting

the time for filing a motion for belated appeal in favor of filing a Rule 37 petition which may be filed at any time up to three years from the date of commitment. *See* Rule 37.2(c).

From a review of the record and briefs before this Court, we find the appeal to be without merit. Accordingly, counsel's motion to be relieved is granted and the judgment is affirmed.

Affirmed.

Chester WARREN, et ux *v.*
Hon. Van B. TAYLOR, Chancellor

85-65 687 S.W.2d 848

Supreme Court of Arkansas
Opinion delivered April 22, 1985

*Susanne K. Roberts,* for petitioners.

*Bill Strait,* for respondent.

PER CURIAM. The petitioners were found in contempt of court on January 15, 1985 by Judge Van B. Taylor of the Yell County Chancery Court. A petition for writ of certiorari was filed asking this court to order the record of the proceedings below forwarded for the purpose of determining whether the evidence supports the verdict rendered.

The petition for writ of certiorari is no longer the remedy for review of a finding of contempt; appeal is the remedy. *Frolic Footwear, Inc.* v. *State,* 284 Ark. 487, 683 S.W.2d 611 (1985). Accordingly, this matter is remanded to the trial court to determine a proper bond pending an appeal, provided the petitioners desire to appeal.

Remanded.

Floyd WILLIAMS *v.* John LANGSTON, Judge,
Fourth Division,
Circuit Court of Pulaski County

CR 76-93 688 S.W.2d 285

Supreme Court of Arkansas
Opinion delivered April 22, 1985

Petitioner, *pro se.*

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. Petitioner was convicted by a jury of capital felony murder and sentenced to life imprisonment without parole. We affirmed. *Williams* v. *State,* 260 Ark. 457, 541 S.W.2d 300 (1976). In 1976, petitioner filed a petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37 which was denied. He was allowed to file a second Rule 37 petition in 1979 because his original petition presented only conclusory allegations. This petition was also denied. We denied a third petition for postconviction relief in 1981.

Petitioner has now filed a petition for writ of mandamus, asking this Court to direct the Circuit Court of Pulaski County to act on a petition for writ of error coram nobis which he filed in that court on September 20, 1984.

Once a conviction has been affirmed on appeal, error coram nobis is not available to secure a new trial on the basis of newly discovered evidence or to raise issues which are properly raised in a petition pursuant to Criminal Procedure Rule 37. *See Pickens* v. *State,* 284 Ark. 506, 683 S.W.2d 614 (1985); *see also Penn* v. *State,* 282 Ark. 571, 670 S.W.2d 426 (1984). If a petitioner discovers some ground for relief such as that claimed by the petitioner in *Pickens* after a judgment is affirmed, he may present that ground in a clemency proceeding. Allegations of constitutional error and ineffective assistance of counsel, such as those argued by petitioner in his error coram nobis petition, may be argued on direct appeal and under our postconviction rule. We expanded the writ of error coram nobis in *Penn* to fill a gap in the legal system. Petition for writ of error coram nobis is not available after we review a case. Petitioner's conviction was affirmed and three petitions for postconviction relief were considered and denied; therefore, it is not an appropriate remedy in this case. As the circuit court has no duty to grant relief to petitioner, the petition for writ of mandamus is dismissed.

Petition dismissed.

Helen REDDOCH, et al *v.*
Ora H. BLAIR, et al

84-173, 84-208 688 S.W.2d 286
Supreme Court of Arkansas
Opinion delivered April 29, 1985
[Rehearing denied June 3, 1985.]

*Guy H. "Mutt" Jones, Sr., Phil Stratton,* and *Casey Jones; Graham Sudbury;* and *Robert R. Wright,* by: *Robert R. Wright,* for appellant.

*Fendler, Gibson & Bearden,* for appellee.

JACK HOLT, JR., Chief Justice. The issues in this appeal concern the contest of a will executed by Elizabeth H. Bowden. Two cases involving the same parties have been consolidated. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(p).

Elizabeth H. Bowden, of Osceola, Ark., died January 30, 1982, at the age of 81. She was survived by five sisters: Helen Reddoch, Geneva Rauenhorst, Ora Blair, Rosamond Banks and Irene Wilson; and two half-brothers and one half-sister. A will executed by Mrs. Bowden on December 7, 1981, was admitted to probate. The will favored Helen Reddoch and her descendants and did not provide for the decedent's other relatives. Mrs. Reddoch, who is now deceased, had lived with Mrs. Bowden since the 1940s when Mrs. Bowden's husband died. She was living with her at her death, as was Mrs. Reddoch's daughter, Rose Mahan, also now deceased.

Two of Mrs. Bowden's sisters, Mrs. Rauenhorst and Mrs. Blair, contested the will claiming it was procured through undue influence exercised by Mrs. Reddoch and Mrs. Mahan. One year later the other sisters and the half brothers and sister joined in the will contest.

After a 17-day trial during which 52 witnesses were heard, the trial court entered an order on March 26, 1984, finding (1) that Elizabeth Bowden possessed the mental capacity to make a will; (2) that her capacity was diminished making her susceptible to the undue influence of others; (3) that Mrs. Reddoch and Mrs. Mahan had the opportunity to, and did unduly influence the decedent; (4) that as a result the will contained provisions which favored them to the exclusion of other members of the family; (5) the will was an expression of the desires of Helen Reddoch and/or Rose Mahan; (6) the dispositive provisions were the result of undue influence; and (7) the revocation clause was valid, which creates an intestacy and requires that the estate be shared equally by the decedent's surviving sisters or their heirs.

It is from the trial court's order that these appeals are brought. The appellants contend that the court erred in holding the dispositive provisions of the will invalid because of undue influence. We agree.

Probate and chancery cases are tried de novo on appeal. This court does not reverse unless the findings of the probate judge are clearly erroneous, giving due deference to the superior position of the judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Rose* v. *Dunn,* 284 Ark. 42, 679 S.W.2d 180 (1984); *Terrell Faith Prophet Ministries* v. *Estate of Varnum,* 284 Ark. 108, 681 S.W.2d 310 (1984); *Edwards* v. *Vaught,* 284 Ark. 262, 681 S.W.2d 322 (1984). In this instance, the probate judge's finding that undue influence on the part of Mrs. Reddoch and Mrs. Mahan avoids the dispositive aspects of the will was clearly erroneous.

We have held many times that the party challenging the will is required to prove undue influence at the time the will was executed by a preponderance of the evidence. *Rose,* supra. Much of the testimony touched on the relationship of the parties over the years, and previous wills written by Mrs. Bowden, but did not focus on the execution of the will in question. The facts surrounding the execution of the will were as follows.

Mitchell Moore, the attorney who prepared the will, testified that he had known Elizabeth Bowden since about 1967. An accountant had informed Moore that Mrs. Bowden would be contacting him about some legal work and Rose Mahan had also contacted Moore with the same information. Neither the accountant nor Rose Mahan told Moore the nature of the work Mrs. Bowden would require. Moore stated that he first met with Mrs. Bowden at her house on September 22, 1981. He visited with her, Ms. Mahan and Mrs. Reddoch for a few minutes and then Mrs. Bowden asked the other two women to excuse themselves so they could talk. Moore testified that he was at the Bowden residence for about three and one-half hours and that he and Mrs. Bowden discussed a prior will that Susan Callison, a Memphis attorney, had made for her in 1980. Mrs. Bowden was concerned that under the 1980 will her taxes were too high and she had a bank trustee she did not want. She selected a new trustee and told Moore that she had already given two of her other sisters property. She also informed him of how long Mrs. Reddoch had lived with her and discussed some of her grandchildren. Moore indicated that Mrs. Bowden liked the Callison will but had had a change of heart about some of its provisions. Specifically, in the Callison will, Rose Mahan and Carlos Reddoch, Helen Reddoch's son, were not left any property and Mrs. Bowden now wanted to treat Mrs. Reddoch's three children equally, by leaving them each one-third of the estate. Moore stated that she initially wanted to leave everything to Mrs. Reddoch, but that he advised her that because of the tax consequences she should give Mrs. Reddoch the tax exemption equivalent. At no time, according to the attorney, did Mrs. Bowden consult Rose Mahan, or her three sisters who lived in the area: Mrs. Blair, Mrs. Reddoch or Mrs. Banks. Instead, he said she was insistent on keeping their discussions private.

After the September 22 meeting, Moore said he conferred with Mrs. Bowden by phone and was at her house one or two times. In each of these discussions, Moore stated that although Mrs. Bowden would forget some things she never forgot the property she owned and how she wanted it disposed of.

On December 7, 1981, Mrs. Reddoch took Mrs. Bowden to Moore's office to execute the will. Rose Mahan was in Memphis at the time. Mrs. Reddoch stated that Mrs. Bowden, who suffered from severe asthma, cerebral arteriosclerosis, dementia, and chronic obstructive pulmonary disease, was in good condition that day. When they arrived, Mrs. Reddoch stated that they visited with Moore about some property located in Mississippi. She then left Mrs. Bowden and Moore alone in the library to discuss the will. She went in the room a few times to check on Mrs. Bowden but stated that she did not remember any discussion about the will. Mrs. Reddoch returned to the library when the will was signed, but the will was not read during that time. Moore then drove Mrs. Bowden and Mrs. Reddoch home.

Moore's testimony supported Mrs. Reddoch's version of the events surrounding the execution. Moore further stated that he asked Mrs. Bowden questions in front of the witnesses to the will, Dr. Eldon Fairley and James Morgan, which required answers detailing the extent and nature of her property. He also asked her what she wanted to do with her property and she replied that she wanted Helen to have the property for life and then have it go to Helen's children. During their private conference, Moore said he read the entire will with Mrs. Bowden and satisfied himself that this was her will and was what she wanted to do with her property. He further stated that neither Mrs. Reddoch nor Rose Mahan had any knowledge concerning the dispositive provisions of the will.

Vickey Hobbs, an employee of Moore's law firm, testified that Mrs. Bowden appeared to understand what she was doing and seemed to be acting of her own free will.

James Morgan, one of the witnesses, stated that in his opinion Mrs. Bowden understood what she was doing in Moore's office. He said she answered questions in a correct, proper manner and appeared to know and understand what she owned and who her closest relatives were. He testified he saw nothing to indicate she was acting under any duress.

Dr. Fairley, another witness who was also Mrs. Bowden's personal physician, stated that people in Mrs. Bowden's condition can be influenced by whoever is with them. He stated, however, that on the day the will was executed she answered questions about her property correctly and indicated she understood her will and knew who she wanted to leave her property to. Dr. Fairley stated that although Mrs. Bowden still had medical problems they did not seem to be bothering her as much that day and she seemed pretty clear. He testified that he thought Mrs. Bowden knew what she was doing when she signed the will and that he would not have witnessed the will if he did not think she was aware of her actions.

Other evidence was offered at the trial that Mrs. Bowden had executed wills in 1976, 1980 and 1981. There was also evidence of a 1956 will. Each of the wills, including the 1956 will, evinced a consistent pattern of making Helen Reddoch and her descendants Mrs. Bowden's primary beneficiaries. Except for the earliest will, written some 25 years before her death, the other sisters and half-relations were mostly excluded. Furthermore, Helen was the only sister with whom Mrs. Bowden had consistently close contact since the two lived together for 40 years.

We said in *Rose* v. *Dunn,* supra, that:

> Undue influence which avoids a will is not the influence which springs from natural affection or kind offices, but is such as results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and it must be specially directed toward the object of procuring a will in favor of particular parties. . . . The mere fact that a beneficiary is present while a will is made does not give rise to a presumption of undue influence.

We also stated in *Rose* that a rebuttable presumption of undue influence arises in the case of a beneficiary who procures the making of a will. We found no procurement in that case where the beneficiary merely drove the testator to the attorney's office and participated in the initial dis-

cussions. Here there is no evidence that either Rose Mahan or Helen Reddoch procured the will and therefore the presumption did not arise.

In determining the question of undue influence "[i]t is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relation with them at the time of its execution." *Greenwood, Guardian* v. *Wilson,* 267 Ark. 68, 588 S.W.2d 701 (1979). In *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S.W.2d 665 (1963), we explained:

> Testators are not required by law to mete out equal and exact justice to all expectant relations in the dispositions of their estates by will, and the motives of partiality, affection, or resentment, by which they naturally may be influenced, are not subject to examination and review by the courts.

In *Abel* v. *Dickinson,* 250 Ark. 648, 467 S.W.2d 154 (1971), we explained that a will is usually considered "unjust and unnatural" when a testator leaves his estate to strangers to the exclusion of the natural objects of his bounty without any apparent reason. We said, however:

> A will cannot be said to be unnatural because a testator preferred one for whom she had developed a close and affectionate relationship . . . or when the natural objects of the testator's bounty are in no need of funds, aid or assistance.

Here, the proof indicated that not only was the decedent in a close relationship with Helen Reddoch, but she had made gifts to some of her other sisters and, on the whole, considered that they were not in need of financial help from her. The fact that their relationship made Mrs. Reddoch and Rose Mahan natural objects of Mrs. Bowden's bounty, coupled with the strong pattern she had shown over the years of favoring Mrs. Reddoch and her children, support the validity of the will. We find, therefore, that the trial judge clearly erred when he held the will invalid.

Accordingly we reverse and remand with instructions that the 1981 will be admitted to probate. Our holding makes it unnecessary to reach the other issues raised in this appeal or the issues raised in the companion case.

Reversed and remanded.

W. E. TUCKER OIL COMPANY, INC., et al.
*v.* PORTLAND BANK

84-247 688 S.W.2d 293

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*R. J. Brown* and *Lisa A. Kelly,* for appellant.

*Arnold, Hamilton & Streetman,* by: *Herman L. Hamilton, Jr.,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee bank brought this suit to foreclose mortgages securing notes executed after the effective date of Amendment 60 to the Constitution of 1874. The notes bore interest at thirteen percent per annum, which was a permissible rate under Amendment 60 when the notes were given. The appellants, the debtors, defended the suit on the ground that Amendment 60 is unconstitutional, so that the original ten percent limitation is still in effect, and the notes are usurious and void. The chancellor upheld Amendment 60 and entered a decree for the bank. The appeal comes to this court for a construction of our Constitution. Rule 29(1)(a).

The case presents questions of law, on undisputed facts. The Constitution originally had an inflexible ten percent limitation on interest rates. Amendment 60 changed that by declaring that the maximum rate shall not exceed five percent above the Federal Reserve Discount Rate at the time of the contract. The essential issue before us is whether the people of Arkansas had the power to adopt by constitutional amendment a variable maximum interest rate to be fixed from time to time by an agency of the United States government, without state action.

Needless to say, the members of this court would not assume responsibility for striking down a constitutional amendment, after its adoption by the people, without being certain of our position. In this case, however, the question is so simple, because it is so fundamental, that we have not the slightest uncertainty about the validity of Amendment 60. That being true, a long and detailed discussion of the matter is not required.

It is first argued that Amendment 60 unlawfully delegates authority to an agency of the federal government. Such a delegation of power is said to violate the Tenth Amendment to the United States Constitution, which

reserves to the states all powers not delegated to the United States, and to violate the provisions of the Arkansas Constitution dividing the powers of the state government into three departments, the legislative, the executive, and the judicial. Article 4, §§ 1 and 2; Amendment 7.

This argument misconceives the basic principles of our system of self-government. The people of Arkansas adopted their own Constitution and expressly reserved the power to change its provisions by amendments approved by popular vote. Cases cited by counsel hold that the General Assembly cannot delegate legislative authority to another branch of the state government or to an agency of the United States. That is true, but under the state Constitution the people themselves are subject to no similar incapability. What they have done they can undo. They were free to anchor their interest rate to the federal discount rate unless there is some prohibition in the United States Constitution against that action.

The only such prohibition in that Constitution must be found in "some invisible radiation from the general terms of the Tenth Amendment," to quote Justice Holmes's words. *Missouri* v. *Holland,* 252 U.S. 416 (1920). That Amendment was drafted to limit the powers of the federal government, not those of the states. It neither commands the states to exercise their reserved powers to the fullest possible extent nor forbids them from sharing their reserved authority with the United States. If that were not so, every effort by the federal and state governments to join forces in some endeavor falling within the reserved power of the states would be subject to question. Our history of countless such cooperative and successful endeavors is itself a practical answer to the argument now being made.

Second, it is argued that Amendment 60 runs counter to the clause in the national Constitution that directs the United States to guarantee to every state "a republican form of government." Art. 4, § 4. This argument is without weight. A republic is a political state in which the supreme power rests in the citizens entitled to vote and is exercised by them either directly or through their elected representatives.

We are not persuaded that the people of Arkansas abandoned their republican form of government by approving Amendment 60. Quite the contrary. The people evidently believed, after almost a century of experience with a rigid interest limitation, that it should be replaced by a flexible limitation taking into account interest rates elsewhere. The people might have tried to create some system of their own for determining how the rate should be set, but the choice of the federal rate as a base figure had the advantages of simplicity and of uniformity with rates prevailing in neighboring states. At any rate, the choice was made by the voters themselves, by democratic means, and does not seem to us to present even a remote threat to the republican form of government in Arkansas.

Affirmed.

Jerry BROYLES *v.* STATE of Arkansas

CR 85-36 688 S.W.2d 290

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*Jeff Duty,* for appellant.

*Steve Clark,* Att'y Gen., by: *Connie Griffin,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. Tried without a jury, Broyles was convicted of DWI and other offenses. Aside from the punishment imposed, the court assessed costs of $302.25, which apparently included the "additional" costs of $250 mandated by Act 918 of 1983. Ark. Stat. Ann. § 75-2531 (Supp. 1983). The appeal comes to this court under Rule 29(1)(c).

The first of two arguments for reversal is that the State failed to prove beyond a reasonable doubt that Broyles was intoxicated within the statutory definition. § 75-2502 (a) (Supp. 1983). In a criminal case the standard for review is not whether the evidence eliminates a reasonable doubt but simply whether the finding of fact is supported by substantial evidence. *Gardner* v. *State,* 263 Ark. 739, 746, 569 S.W.2d 74 (1978), *cert. denied* 440 U.S. 911 (1979).

Officer McCain, who first stopped Broyles, testified that Broyles had weaved into the oncoming traffic lane several times and smelled of liquor when stopped. Broyles successfully fled in his car for a few minutes, but the officer who quickly found and arrested Broyles testified that he was stumbling and staggering, he smelled strongly of intoxicants, his eyes were bloodshot, and he had trouble walking. Broyles refused to take a breathalyzer test, though he did remark at the time: "Drunker than hell." He testified that he is an alcoholic but had not had even beer that day. He said that for a severe migraine headache he had taken medicine that was labeled 43% alcohol and also contained codeine. Even though he admitted having drunk the whole bottle instead of taking it by the tablespoonful, he said that would

have nothing to do with his driving. Upon the conflicting proof there was obviously substantial evidence to support the trial court's finding that Broyles was driving while intoxicated.

Second, it is argued that the statutory imposition of $250 in additional costs, especially the $75 of that amount that goes to the city or county, is not directly related to the cost of prosecution and must be regarded as a mandatory imposition of punishment rather than as an assessment of costs.

The statute provides that a person convicted of DWI shall pay, "as an additional cost," the sum of $250. § 75-2531. Of that amount $75 goes to the city or county of the court levying the additional cost. Half the remainder goes to support the Highway Safety Program. That program was established by the Omnibus DWI Act and has five enumerated objectives, every one of which relates to drunken driving. § 75-2514 (Supp. 1983). The other half of the remainder goes to the Alcohol and Drug Safety Fund and is to be used to support detoxification services and alcohol and drug abuse rehabilitation and treatment services. § 75-2531.

The decisions elsewhere are not unanimous in deciding to what extent the costs in a criminal case must be directly related to that particular prosecution. An Oklahoma court required a direct relationship between the expense of prosecution and the fixing of costs. *Ex Parte Coffelt,* 93 Okl. Cr. 343, 228 P.2d 199 (1951). Other courts take a less restrictive approach. In Virginia the court sustained the levy of a fixed amount after every conviction for a traffic offense, to help support the Division of Motor Vehicles in its central record-keeping and reporting. *Carter* v. *City of Norfolk,* 206 Va. 872, 147 S.E.2d 139 (1966). It was said: "The costs collected under Code § 14.1-200.1 therefore reimburse the State for expenses incurred by it as a result of prosecutions for traffic offenses." Quite similar to the case at bar was a Florida decision upholding a statute levying a fixed amount as costs in every case not of a civil nature, to be used for the support of the bureau of law enforcement. *State* v. *Young,* 238 So.2d 589 (Fla. 1970). The court reasoned:

> It is not unreasonable that one who stands convicted of such an offense should be made to share in the improvement of the agencies that society has had to employ in defense against the very acts for which he has been convicted. We perceive here a direct relationship. . . .

Our own cases uphold the imposition of costs imposed without a precise relationship to the actual cost of the particular prosecution. In sustaining the assessment of a uniform fee for the prosecuting attorney in all cases we said: "These charges are not part of the punishment of the accused. Costs are awarded in order that the State may prosecute the guilty at their own expense." *Wellington* v. *State,* 52 Ark. 447, 12 S.W. 562 (1889). In a civil case we rejected a contention that the unused portion of advance costs had to be returned to the litigant rather than going into the general revenue to help defray the expenses of the courts. *Marshall* v. *Holland,* 168 Ark. 449, 270 S.W. 609 (1925). Again, in *McArthur* v. *Smallwood,* 225 Ark. 328, 281 S.W.2d 428 (1955), the court upheld a statute levying a fixed amount as costs in all cases, civil and criminal, to secure bonds issued for the constrution of a building to house the Supreme Court, its clerk, its library, and the attorney general. From the opinion:

> The mere fact that there are no appeals to the Supreme Court in a substantial number of cases filed in the circuit, chancery and probate courts . . . is immaterial. The right of appeal is a valuable asset to any litigant and is available to all litigants. The mere fact that these rights may not be utilized in every case does not detract from their importance and there is no constitutional objection to levying costs to contribute to the expense of the maintenance of those rights.

Inasmuch as the State may prosecute guilty persons at their own expense, we perceive no good reason why the legislature may not also require drunken drivers to share in the cost of maintaining agencies that society has had to create to make its highways safe from the risks those drivers impose upon the innocent, and to attempt to rehabilitate

and treat those drivers. There is no specific contention by the appellant that the amount of costs allocated to those purposes exceeds the expenses incurred by the State to achieve the purposes. Even if such a contention were made there is nothing in the record to indicate that the amounts allocated are excessive. Statutes are presumed to be valid; so the party who alleges the invalidity of a statute has the burden of proving that claim. *Handy Dan Imp. Center* v. *Adams,* 276 Ark. 268, 633 S.W.2d 699 (1982). Where, as here, proof is required to demonstrate the validity of a statute, the absence of evidence to overcome the presumption of validity requires us to sustain the statute. *Holman* v. *City of Dierks,* 217 Ark. 677, 233 S.W.2d 392 (1950). Here the appellant offered no proof on the issue.

The appellant does argue that the "additional costs" of $75 earmarked for the city or county are paid into general revenue funds instead of being allocated to a particular purpose. Even so, there is no proof either of the amount of costs already being assessed or of the essential fact that the total of pre-existing costs and additional costs exceeds the expenses incurred by the cities and counties. Without such evidence we are not in a position to say that the legislature has attempted to resort to mandatory punishment in the guise of costs. This opinion of course does not bar a future challenge to the statute, supported by the necessary proof. *See Ark. Motor Vehicle Comm'n* v. *Cliff Peck Chevrolet,* 277 Ark. 185, 640 S.W.2d 453 (1982).

Affirmed.

Patricia HENDRICKSON *v.* STATE of Arkansas

CR 84-164 688 S.W.2d 295

Supreme Court of Arkansas
Opinion delivered April 29, 1985

[redacted]

*Mathis & Childers,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y. Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant, Patricia Hendrickson, stands convicted of capital felony murder. The State contends that appellant conspired with Norma Foster, a college dormitory housemother at Ouachita Baptist University, and Mark Yarbrough, a student, to hire Howard Vagi, another student, to kill her husband for $16,000.00. Vagi did in fact murder appellant's husband and, upon a plea agreement, received a life sentence. Yarbrough was granted immunity from prosecution in return for his testimony. Norma Foster was convicted of first degree murder and was sentenced to life. Her conviction has recently been reversed. *Foster* v. *State,* 285 Ark. 363, 687 S.W.2d 829 (1985). We also reverse this case and remand for a new trial. Jurisdiction of this death penalty case is in this Court. Rule 29(1)(b).

Appellant's first assignment of error is that the trial judge erred in denying her motion to suppress her inculpatory statement. The contention is meritorious. Prior to her being charged in this case, appellant's personal attorney was W. H. "Dub" Arnold. In addition, he also represented her in her capacities as personal representative of her deceased husband's estate and guardian of her son's estate. She testified that she frequently consulted with Arnold as her attorney in one capacity or another. Arnold also serves as Prosecuting Attorney of the district having venue in this case. Immediately before appellant was interrogated, Arnold told the police that he did not want to see appellant, and that

he could no longer personally represent her. While the officers were reading appellant's *Miranda* rights to her, she stated that she wanted "to talk to Dub." The interrogating officers knew the response meant that appellant wanted to speak to her attorney but they had been told by Arnold that he could not represent her. Instead of terminating the questioning at that point, the officers told her that Arnold was not there and he could not represent her. She subsequently executed a waiver of her *Miranda* rights and gave the inculpatory statement.

In *Smith* v. *Illinois,* 105 S.Ct. 490 (1984), the Supreme Court clearly set forth the twofold test we are to apply in the situation before us:

> An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him," unless he validly waives his earlier request for the assistance of counsel. *Edwards* v. *Arizona,* 451 U.S., at 484-485, 101 S.Ct., at 1885. This "rigid" prophylactic rule, *Fare* v. *Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, *e.g., Edwards* v. *Arizona, supra,* 451 U.S., at 484-485, 101 S.Ct., at 1884-1885 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); *Miranda* v. *Arizona,* 384 U.S., at 444-445, 86 S.Ct., at 1612 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards* v. *Arizona, supra,* 451 U.S., at 485, 486, n. 9, 101 S.Ct., at 1885, n. 9.

The threshold inquiry is whether appellant invoked her right to counsel in the first instance. Some courts have

held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See, *e.g., Ochoa* v. *State,* 573 S.W.2d 796, 800-801 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, *e.g., People* v. *Krueger,* 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel"), *cert. den.,* 451 U.S. 1019, 1981. Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel. See, *e.g., Thompson* v. *Wainwright,* 601 F.2d 768, 771-772 (5th Cir. 1979); *State* v. *Moulds,* 105 Idaho 880, 888, 673 P.2d 1074, 1082 (App. 1983). The Supreme Court has not ruled on the matter.

We need not choose between these standards in the instant case because appellant's statement was neither vague not indecisive. She unequivocally asked to speak to "Dub", who was her attorney.

Invocation of the right of counsel and waiver are entirely distinct inquiries. Once the right is invoked, a valid waiver cannot be established by showing only that the accused responded to further police-initiated custodial interrogation. *Edwards* v. *Arizona,* 451 U.S. 477, at 484 (1981). Therefore, the trial court erred in not suppressing the statement.

Because we reverse and remand for a new trial, we answer those assignments of error which are likely to arise again upon retrial.

Prior to trial, appellant filed a motion asking that the state be prohibited from "death qualifying" the jury and from challenging for cause those jurors who expressed

conscientious opposition to capital punishment. The trial court, relying upon our decision in *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983), correctly refused to grant the motion and, upon retrial, should again refuse to grant the motion. The appellant urges us to abandon our position taken in *Rector, supra,* and adopt the position taken later by the Eighth Circuit Court of Appeals in *Grigsby* v. *Mabry,* 758 F.2d 226 (1985). While we have great respect for the opinions of the Eighth Circuit, we decline to change our position. Other Circuit Courts of Appeal which have considered the issue have ruled the same as we have. See *Keeton* v. *Garrison,* 742 F.2d 129 (4th Cir. 1984); *Smith* v. *Balkcom,* 660 F.2d 573 (5th Cir. 1981). The Supreme Court of the United States has not yet ruled on the issue, but may soon grant certiorari to resolve the dispute between circuits since it is a matter of significant public interest.

Next, upon remand, the trial court should again allow Mark Yarbrough to testify about statements by Norma Foster in furtherance of the conspiracy. The case of *Spears, Cassell & Bumgarner* v. *State,* 280 Ark. 577, 660 S.W.2d 913 (1983) is dispositive of this issue. Rule 801(d)(2)(v) of the Ark. Unif. Rules of Evid., Ark. Stat. Ann. § 28-1001 (Repl. 1979) provides that testimony about an out-of-court statement by a co-conspirator during the course and in furtherance of a conspiracy is not hearsay. *Id.* at 584. Thus, Yarbrough's testimony about statements by Norma Foster was properly admissible.

Also, the trial court should again exclude from the penalty phase of the trial the results of a polygraph examination given to appellant. The rules of evidence are not applicable to the penalty phase of the trial. See Ark. Stat. Ann. § 41-1301(4) (Repl. 1977) and *Hobbs* v. *State,* 273 Ark. 125, 617 S.W.2d 347 (1981). However, the evidence offered must be probative of some issue to be properly considered in the penalty phase. The proffered test results were not probative of any issue in the penalty phase.

If the appellant, upon retrial, is again sentenced to death the trial court should again reject appellant's

argument that the death sentence is disproportionate in this case. It is true that the one who pulled the trigger is serving only a life sentence, but he was a young college student, while the appellant was a mature adult and, under the proof, the procuring cause of the murder. There was evidence that appellant entered into the contract to have her husband killed for a financial gain of over $600,000.00. The death sentence is not disproportionate under the circumstances of the case. In addition, there is sufficient evidence of aggravating circumstances.

Appellant argues other points but they are not likely to arise again, and therefore, we do not address them.

Reversed and remanded.

HOLT, C.J., HICKMAN and PURTLE, JJ., concur.

HAYS, J., dissents.

DARRELL HICKMAN, Justice, concurring. The majority opinion states that the interrogating officers "knew" the appellant wanted to speak to her lawyer, as counsel, thus invoking her rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966). That is not entirely correct. They did concede, and it is not disputed, that she asked to see "Dub". However, the question is whether she meant she wanted to talk to her lawyer, get his advice, and have him present, or to merely discuss her charges with the prosecuting attorney. Did she want to apologize for any embarrassment it might cause the prosecutor since he had acted as her attorney and knew her and her husband socially? There was considerable testimony regarding these questions. In my judgment the totality of the circumstances leads me to conclude that she was invoking her right to counsel. Considering the circumstances, her statement undoubtedly could have been interpreted by the officers as an invocation of her right to counsel. The officers did not, however, admit that they understood it that way. On its face, the statement "I want to talk to Dub" would not, as a matter of law, be a clear and unequivocal assertion of her right to counsel. However, "I want to talk to Dub, my lawyer, before answering your question" would be such an assertion.

When the burden of the state and the totality of the circumstances are considered, the police should not have proceeded further without inquiring if indeed she wanted a lawyer, or merely "to talk to Dub." Clearly, there is a difference.

HOLT, C.J., joins in the concurrence.

JOHN I. PURTLE, Justice, concurring. I concur with the result but would also instruct the trial court on the matter of selecting a "death qualified" trial jury and on matters relating to the sentencing phase at the next trial.

First, it is, in my opinion, a stubborn, useless and expensive act to stand on the majority opinion as written in *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983). The Eighth Circuit Court of Appeals has soundly pointed out the infirmities of our *Rector* opinion in *Grigsby* v. *Mabry,* 758 F.2d 226 (1985). Although there is a possibility the United States Supreme Court will reverse *Grigsby,* there is the possibility it will affirm. In the meantime we should follow *Grigsby* not only because it is the law, but also because it is fair and just. I feel there is very little difference in this court's real standing on "death qualified" juries and the criteria established in *Grigsby.*

Both *Rector* and *Grigsby* have common language in part and both rely on some of the same authorities. For example both quote from *Needham* v. *State,* 215 Ark. 935, 224 S.W.2d 785 (1949). *Grigsby* cited with approval the concurring opinion in *Rector* where it was stated:

> The majority correctly states that persons who are unalterably opposed to the imposition of the death penalty should be excluded and I agree. I think *Witherspoon* is in accord with this view. The mistake made in some trial courts is in excluding persons who have moral or religious scruples against the death penalty but who would agree to impose it if the law and the circumstances warrant it in the case being tried. *Witherspoon* never intended to exclude this type juror. Neither did it indicate that only those who favored the

> death penalty should comprise trial juries. I think the correct procedure on this controversial issue lies somewhere between excluding prospective jurors who have scruples against the death sentence and including only those who have no scruples against imposing such a penalty.
>
> I have never thought that all or even most people who favor the death penalty are barbarians in modern society. However, I do feel that a jury composed of only such persons is not representative of any community. Neither would a jury composed only of those having scruples against the death penalty represent the community. The selection of jurors should not favor the accused nor should it favor the state. A properly selected jury enters upon its duties slanted toward neither side. Thus selected, it would not be proper to refer to the jury as a death qualified one.

I fully believe the results of the polygraph test of the appellant should be allowed in the penalty phase of the trial. There can be no doubt that the present law allows the use of such evidence at the sentencing stage of the trial. Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977) reads in part:

> Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trial of criminal matters. . . .

We held, in reversing the conviction in *Hobbs* v. *State,* 273 Ark. 125, 617 S.W.2d 347 (1981), that in the sentencing phase, evidence of mitigating circumstances should be admitted if it is made under oath and the state has an opportunity to cross examine the witness. Both requirements are met in the case here under review. We stated in *Ford* v. *State,* 276 Ark. 98, 633 S.W.2d 3 (1982): "If there is any evidence of aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury."

Laura M. JOHNSON and Charles E. JOHNSON
*v.* The TRUCK INSURANCE EXCHANGE

84-230 688 S.W.2d 728

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*Michael Everett,* for appellants.

*Reid, Burge, Prevallet & Coleman,* for appellee.

STEELE HAYS, Justice. Appellants Charles Johnson and his mother, Laura Johnson, brought suit under their homeowners policy to recover the stated value of a dwelling totally destroyed by fire on May 8, 1982. Appellee insurer defended on grounds of misrepresentation, fraud and arson. The jury returned a verdict of $55,910.64, notwithstanding an instruction that told them if they found for the plaintiffs their verdict for the loss of the dwelling should be the insured value of the dwelling — $95,000. Both sides moved for judgment notwithstanding the verdict and the trial court

set the verdict aside and ordered a new trial. On appeal and cross-appeal, we affirm.

ARCP Rule 59(a) lists the grounds on which a new trial "on all or part of the issues" may be granted, including any irregularity in the proceedings preventing a fair trial. The trial court's power under the rule is necessarily broad and will not be disturbed in the absence of abuse. *Johnson* v. *Bowlin,* 251 Ark. 950, 475 S.W.2d 885 (1972); *House* v. *Finney,* 252 Ark. 66, 477 S.W.2d 482 (1972).

We find no abuse of discretion. The verdict and the instruction cannot be reconciled. The court instructed the jury in effect that it must either find for the defendant or return a verdict for the plaintiffs of at least $95,000. In clear disregard of that instruction the jury by a vote of 9 to 3 returned a verdict of $55,910.64, which cannot be rationally explained.

Appellants also urge it was error for the trial court not to order a partial trial limited to the amount of the damages. That decision is discretionary with the trial court and where the verdict is wholly incongruent, in the face of the instruction given, a new trial on all the issues will not be easily reversed. We have said as a matter of law the verdict must be treated as an entity. *McVay* v. *Cowger,* 276 Ark. 385, 635 S.W.2d 249 (1982). That has been our rule for decades, (see cases cited in *McVay* v. *Cowger*), but we should not overlook the plain wording of Rule 59(a), contemplating new trials on only *part* of the issues. The rule permits partial trials in those cases where one or more of the issues has been clearly resolved by the verdict. That cannot be said of the verdict in this instance and the trial court was right.

The other arguments are moot but will be discussed for the guidance of the trial court on retrial.

Appellants ask us to reverse an evidentiary ruling with respect to other fires. The trial court permitted the introduction of proof that Charles Johnson had had three fires prior to the one in question: the 1977 burning of a building in which he operated a grocery business, the 1977 burning of

a dwelling where the Johnsons had lived and where Johnson's wife was then operating a beauty shop, and the 1981 burning of a late model automobile. Appellants' brief denies they benefited by these fires and whether Johnson was actually paid for the losses is not brought out. It is clear from his testimony, however, that there was insurance coverage on the buildings destroyed by these fires[1].

Appellants rely on *Houston General Insurance Co.* v. *Arkansas Louisiana Gas Company,* 267 Ark. 544, 592 S.W.2d 445 (1980), but that case offers little guidance here. The issue involved a claim of negligence where proof of similar occurrences requires evidence of the same or substantially similar conditions. [See *Houston General, supra; Arkansas Power and Light Co.* v. *Johnson,* 260 Ark. 237, 538 S.W.2d 541 (1976)]. Reversing on other grounds, we noted that no evidence was offered of circumstances and conditions surrounding the other explosions similar to the one in question.

A different situation is presented here. Charles Johnson was shown to have experienced four fires of a major sort within a span of five years, at least three of which were insured against loss by fire. Unif. R. Evid. 401 defines relevant evidence as evidence having any tendency to make a fact more or less probable. Where the issue is whether a fire was set *deliberately* to claim insurance, the existence of other fires, if not too remote in time or dissimilar in circumstances, may be admissible without showing the same or substantially similar circumstances. Such evidence has relevance to show motive, intent, absence of mistake, or accident. See Unif. R. of Evid. 404(b). Unif. R. Evid. 403 requires the trial court to decide whether that relevant evidence is such that its probative value outweighs the harm which its introduction might cause. There were other circumstances this jury could have found probative of a deliberate setting of the 1982 fire, as well as proof that Charles Johnson may have knowingly given a false answer when asked if similar insurance had ever been cancelled or

[1]T. 237-238. (The record is silent concerning coverage on the automobile.)

declined; that he first insured the dwelling only in his mother's name, later adding his own; that he may have given false answers concerning her occupancy of the dwelling as well as occupancy by his former wife; that a few months prior to the fire he attempted to increase coverage from $60,000 to $105,000, and did secure an increase to $95,000; and that Charles and Laura Johnson were $12,500 behind in payments to the Federal Land Bank. It must be said the appellants answered with proof of their own and, as we have said, it is impossible to determine which evidence the jury found preponderant.

The case of *Hammann* v. *Hartford Accident and Indemnity Co.*, 620 F.2d 588 (6th Cir. 1980) is instructive. Hammann brought suit to recover under a fire insurance policy for damage to a barn. The insurer presented expert testimony to show the fire was intentionally started and that Hammann had had six fires over the years, four of which resulted in insurance recoveries. The trial judge excluded evidence of fires which did not result in recoveries and permitted evidence of the circumstances surrounding the four fires yielding insurance recoveries. Hartford argued the evidence was properly admitted under Unif. R. Evid. 404. The Court of Appeals found the probative value outweighed the prejudice and that no abuse of discretion occurred:

> Here the evidence of prior fires was properly admitted for a number of reasons: Defendant attacked Hammann's credibility by establishing that he had willfully concealed several occurrences of fires from the defendant. Second, the trial court properly instructed the jury that the fires were to be considered as bearing only on Hammann's motive. See *Terpstra* v. *Niagara Fire Insurance Co.*, 26 N.Y.2d 70, 308 N.Y.S.2d 378, 256 N.E.2d 536 (1970). Lastly, Hartford asserted the defense of incendiarism which included evidence of Hammann's intent or knowledge of the occurrence. See, e.g., *Trice* v. *Commercial Union Assurance Company*, 397 F.2d 889 (6th Cir. 1968), cert. denied, 393 U.S. 1018, 89 S.Ct. 623, 21 L.Ed.2d 563 (1969).

In *Raphtis* v. *St. Paul Fire & Marine Insurance*

*Company,* 198 N.W.2d 505 (1972) the Supreme Court of South Dakota upheld the admission of evidence of other fires in a similar suit, with this comment:

> General rules of admissibility of other crimes are stated in 29 Am.Jur.2d, Evidence, § 298 through § 333, most of which deals with evidence in criminal actions. See also Arson and Related Offenses, 5 Am. Jur. 2d § 58. Evidence is admissible if it tends to show intent, motive, scheme or plan. 29 Am. Jur. 2d, Evidence, §§ 324, 325 and 326. Three fires in nine months was held admissible to show motive. Generally in a fire insurance case, where circumstantial evidence is resorted to, the objections to testimony as irrelevant are not favored, and the evidence must necessarily take a broad range. Such evidence is to be received with caution, yet in this civil action we conclude no error occurred under this record.

Two Arkansas criminal cases bear comparison. In *Casteel* v. *State,* 205 Ark. 82, 167 S.W.2d 634 (1943), we held where the defendant was charged with arson in the burning of an automobile to recover insurance, proof he had burned other cars for a similar reason was admissible. In *Satterfield* v. *State,* 245 Ark. 337, 632 S.W.2d 472 (1968), for the guidance of the trial court on remand, we said evidence of other incidents of arson would not ordinarily be admissible. However, it should be noted, the proof was "very meager, and the single witness who mentioned [another fire] never described it, never located it and certainly did not connect the defendant with it." Thus, the proof failed for lack of a connection to the defendant.

Given the overall proof of the first trial, we cannot say discretion was abused by the reception of the evidence of other fires. Assuming the proof on retrial is at least the equivalent, we are not willing to say the proof of the other fires is so lacking in relevance as to be inadmissible per se, or that relevance is plainly outweighed by prejudice. We have recognized that the acceptance or rejection of evidence on grounds of relevance is necessarily a matter of discretion. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W.2d 589 (1980);

*Kellensworth* v. *State,* 278 Ark. 261, 644 S.W.2d 933 (1983).

Two additional arguments are made on direct appeal; the trial court erred in denying a motion for a directed verdict in favor of Laura Johnson and in instructing the jury that Laura Johnson was bound by the conduct, acts and representations of Charles Johnson.

The argument that Laura Johnson was entitled to a directed verdict is predicated on an absence of proof she was guilty of wrongdoing. Appellants cite *Mechanics Insurance Co.* v. *Intersouthern Life Ins. Co.,* 184 Ark. 625, 43 S.W.2d 81 (1931) and urge that arson by one co-insured is no defense to a claim by the other, if the latter is innocent of such wrong. *Richardson* v. *Hanover Insurance Co.,* 299 S.E. 2561 (Ga. 1983); *Fuston* v. *National Mutual Insurance Co.,* 440 N.E.2d 751 (Ind. App. 1982); *St. Paul Fire & Marine Insurance Co.* v. *Molloy,* 291 Md. 139, 433 A.2d 1135 (1981); *American Economy Insurance Co.* v. *Liggett,* 426 N.E.2d 136 (Ind. App. 1981); "Insurance Law: Innocent Spouse's Right to Recover in Arson Cases," 17 Wake Forest L. Rev. 1022 (1981).

We will not attempt to settle that issue here. For one thing, apart from the separate consideration of her innocence with respect to arson, the jury could have concluded this policy would not have been issued in the first instance if Charles Johnson, acting for himself and Laura Johnson, had given truthful answers concerning the cancellation of similar insurance. For another, this record does not reflect that appellants presented an instruction to the trial judge which preserved this issue on appeal. ARCP Rule 51. We are unable to say, therefore, the proof was such that the trial court was obliged to direct a verdict for Laura Johnson. *Farm Bureau Mutual Insurance Co.* v. *Henley,* 275 Ark. 122, 628 S.W.2d 301 (1982).

Nor do we think the trial court erred in instructing the jury as it did. Charles Johnson testified that he handled all the affairs affecting insurance with the approval of Laura Johnson, that she left these matters entirely in his hands. She did not know with whom the coverage was placed, the

amount of coverage, the amount of premium (which Charles paid), or anything else concerning coverage. Her testimony nowhere refutes the testimony of Charles Johnson on this issue. In short, we cannot say the trial court should not have given the instruction on the basis of the testimony.

By cross-appeal appellee asserts there was no substantial evidence to support any verdict in favor of appellants. The argument generally is that Charles Johnson willfully concealed material facts concerning the application for insurance. We concede there are discrepancies in some of his answers, but we are not prepared to substitute our view for that of the trial judge on the basis of a printed record of a trial lasting three days. The trial judge hears the witnesses and we recognize his advantage in passing on the weight of the evidence. *Garrett* v. *Puckett,* 252 Ark. 233, 478 S.W.2d 48 (1972).

The order appealed from is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent from that part of the majority opinion which discusses the evidence relating to other fire losses experienced by Charles E. Johnson. He was not charged with the responsibility of causing the other fires which destroyed property in which he held an interest. We held in *Houston General Ins. Co.* v. *Arkla Gas Co.,* 267 Ark. 544, 592 S.W.2d 445 (1980) that evidence of similar occurrences is admissible only when it is demonstrated that the events arose out of the same or substantially similar circumstances. In *Houston* we also held that the burden rests on the party offering such evidence to prove that the necessary similarity of conditions exists. There was no attempt to comply with this holding in the case here under consideration. If the insurance carrier has evidence that Charles E. Johnson was the author of the previous fire losses, it should be allowed to introduce that evidence at the next trial. However, the fact that fire losses occurred on property in which Johnson had an interest is, in and of itself, not proper evidence. It will be necessary to show that Charles E. Johnson set the fires or caused them to be set

before the exclusion in the policy is applicable. *Farmers Ins. Exchange* v. *Staples,* 8 Ark. App. 224, 650 S.W.2d 244 (1983). Certainly such losses would not be relevant unless it were shown that Johnson received pecuniary gain from them. There is no such evidence in the present record.

The majority state: "Where the issue is whether a fire was set *deliberately* to claim insurance, the existence of other fires, if not too remote in time or dissimilar in circumstances, may be admissible without showing the same or substantially similar circumstances." This statement is not supported by any type of authority and I am of the opinion that it is simply pulled out of the air.

Even if it were proven that Charles E. Johnson deliberately set fire to this property, the insurance company would still be obligated to pay Laura M. Johnson the face amount of the policy. No one disputes that she had an insurable interest. The fact that she asked her son to obtain the insurance in no manner reflects any intention on her part to cause the property to be destroyed by fire.

In *Satterfield* v. *State,* 245 Ark. 337, 432 S.W.2d 472, (1968), where a person was charged with arson, we stated: "Evidence of other incidents of arson would not be admissible unless that evidence can be shown to meet the test announced in many decisions." The court then cited *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954) and approved language from C.J.S. as follows: "[E]vidence which shows or tends to show that accused has committed another crime wholly independent of, and unconnected with, that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible."

I believe the valued policy law is applicable to the facts of this case.

Tommy MASON *v.* STATE of Arkansas

CR 84-217 688 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*Paul Johnson,* for appellant.

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Tommy Mason contends on appeal that his conviction of first degree murder with a sentence of life imprisonment must be reversed because of insufficient evidence. We disagree.

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. Substantial evidence must be forceful enough to compel a conclusion one way or another beyond suspicion and conjecture, *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982), and circumstantial evidence can present a question for the jury and provide the basis to support a conviction. *Yandell* v. *State,* 262 Ark. 195, 555 S.W.2d 561 (1977).

Some four months before the dismembered remains of Elbert Jones were found, Jones was last seen getting into Mason's car. By Mason's account, the two men argued over Elaine Grandy, Jones's girlfriend, Mason's former girlfriend. As they fought in the front seat of the car Mason reached under the seat for a pistol and in the struggle the pistol went off, striking Jones in the left temple. Afraid to report the incident, Mason cut off Jones's head, arms and legs and deposited the parts in different places. He later retrieved the head and smashed it into pieces small enough to be disposed of indiscriminately.

Mason submits there was no proof the shooting was deliberate. There was proof that on the day Jones disappeared Mason was looking for him, and had asked several people where Jones might be. When Jones was told Mason was looking for him he said he would meet Mason to show him he was not afraid of him.

Elaine Grandy testified that she had gone with Mason for about two years. She described him as jealous. She said he would choke her when he was angry and had told her if she ever broke up with him he would do something to her and no one would ever find her again. She tried to end the relationship because Mason was seeing another woman and she started going with Elbert Jones. She said Mason tried to continue the relationship but she refused.

We find the evidence enough to support the conviction. The jury could have inferred the shooting was deliberate. Mason wanted Elaine Grandy to be his girlfriend again; he sought Jones out, concealing a loaded pistol under the driver's seat. Even by Mason's version the jury could have concluded from the case as a whole that Mason drew the pistol, not to defend himself, but to kill Jones. Other circumstances point to that conclusion. After his arrest, Mason escaped but was recaptured. We have consistently held that flight to avoid arrest or trial is admissible as a circumstance in corroboration of evidence tending to establish guilt. *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980); *Smith* v. *State,* 218 Ark. 725, 238 S.W.2d 649 (1951); *Stevens* v. *State,* 143 Ark. 618, 221 S.W. 186 (1920).

Too, Mason denied having seen Jones on the day Jones disappeared, both to the police and to Jones's relatives. Though Mason claimed Jones came looking for him, there was proof it was Mason who sought out Jones, whom he did not know. Even the macabre method of disposing of Jones's body suggests more than the mere fear of discovery, particularly in light of the comment to Elaine Grandy that if she ever tried to break up with Mason no one would ever find her again. When the evidence is viewed most favorably to the state, the proof creates a permissible inference that Jones's death was the result of a deliberate act.

> Premeditation and deliberation and intent may all be inferred from the circumstances, such as the character of the weapon used, the manner in which it was used, the nature, extent and location of the wounds inflicted, the conduct of the accused and the like. *McLemore* v. *State,* 274 Ark. 527, 626 S.W.2d 364 (1982).

We have examined all other objections made during the trial 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,* 272 Ark. 5, 612 S.W.2d 98 (1981).

The judgment is affirmed.

Ronald McDONALD *v.* STATE of Arkansas

CR 85-75 688 S.W.2d 302

Supreme Court of Arkansas
Opinion delivered April 29, 1985

Pro Se Petition for Writ of Certiorari; denied.

Appellant, *pro se.*

*Steve Clark,* Att'y Gen., by: *Theodore Holder,* Asst. Att'y Gen., for appellee.

PER CURIAM. Petitioner Ronald McDonald pleaded guilty on February 18, 1982, to aggravated robbery. On March 6, 1985, he filed a petition for writ of error coram nobis which the trial court denied. Petitioner filed a timely notice of appeal; but upon being advised by an attorney that a petition for writ of certiorari was the proper means to challenge the denial of a petition for writ of error coram nobis, he also filed the petition now before us.

Petitioner's so-called petition for writ of error coram nobis raised grounds to vacate his guilty plea which are covered by A.R.Cr.P. Rule 37. Petitioner states in the error coram nobis petition that it was filed instead of a Rule 37 petition because Rule 37 was no longer available to him, apparently because more than three years had passed since his guilty plea was entered. Rule 37.2(c).

Obviously a petition for writ of error coram nobis cannot be used as a substitute for a Rule 37 petition. Since no grounds were alleged which would entitle petitioner to any relief under a petition for writ of error coram nobis, the petition for writ of certiorari is denied.

Petition denied.

Russell McKINNON *v.* STATE of Arkansas

687 S.W.2d 849

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*Patricia Tucker,* for appellant.

No response.

PER CURIAM. Appellant, Russell McKinnon, by his attorney, has filed for a rule on the clerk.

His attorney, Patricia Tucker, admits that the record was tendered late due to a mistake on her part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases.

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

Walter MASON *v.* STATE of Arkansas

CR 85-64 687 S.W.2d 849

Supreme Court of Arkansas
Opinion delivered April 29, 1985

*Robert S. Blatt,* for appellant.

No response.

PER CURIAM. Petitioner Walter Mason was found guilty by a jury of first degree murder and sentenced to a term of twenty years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Mason* v. *State,* CA CR 84-160 (March 20, 1985). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37. He has also filed a motion seeking to remain free on his appeal bond pending disposition of the Rule 37 petition.

Rule 37.1 provides that relief under the rule is available only to prisoners in custody. *See Burkhart* v. *State,* 271 Ark.

859, 611 S.W.2d 500 (1981). An appellant whose conviction is affirmed on appeal is not entitled to remain free merely because he files a petition to proceed under Rule 37. Our postconviction rule was patterned after federal habeas corpus procedure for prisoners in federal custody to provide a procedure whereby state prisoners could raise claims in state courts of violation of constitutional rights, jurisdictional questions, claims of excessive sentence and other claims which subject a judgment or sentence to collateral attack. It was not intended as a continuation of the direct appeal.

Since petitioner here is not a prisoner in custody, the petition must be dismissed even though we find grounds for an evidentiary hearing on some allegations contained in it. The petition is dismissed without prejudice to filing with this Court a properly verified petition for postconviction relief when petitioner is taken into custody. *See Knappenberger* v. *State,* 278 Ark. 382, 647 S.W.2d 417 (1983). The motion to remain free on bond is denied.

Petition dismissed without prejudice.

HAYS, J., concurs; PURTLE, J., dissents.

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